

New York

Third Edition

Volume

1B

PJI 2:149 to PJI 2:325.1

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Pattern Jury Instructions

CIVIL

*Prepared by
Committee on Pattern Jury Instructions
Association of Justices of the
Supreme Court of the State of New York*

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Hon. Jack M. Battaglia, Vice Chair

Hon. Helen E. Freedman, Vice Chair

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Hon. John M. Curran

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Hon. Bernice Siegal

Reporters

Hon. Jeffrey W. Gasbarro

Robert A. Markoff, Esq.

Charles P. Cercone, Esq.



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2023

New York Pattern Jury Instructions—Civil

2023 EDITION
VOLUME 1B
THIRD EDITION

Prepared by Committee on Pattern Jury Instructions Association of
Justices of the Supreme Court of the State of New York

Hon. David Demarest, Chair
Justice of the Supreme Court, Ret.

Hon. Jack M. Battaglia
Vice Chair
Justice of the Supreme Court, Ret.

Hon. Helen E. Freedman
Vice Chair
*Associate Justice, Appellate Division,
First Dept., Ret.*

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*Associate Justice, Appellate Division,
Second Dept., Ret.*

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First Dept.*

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Fourth Dept.*

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Justice of the Supreme Court, Ret.

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Second Dept.*

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*Associate Justice, Appellate Division,
Fourth Dept.*

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*Associate Justice, Appellate Division,
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Justice of the Supreme Court, Ret.

Hon. John R. Higgitt
*Associate Justice, Appellate Division,
First Dept.*

Hon. Phillip R. Rumsey
*Associate Justice, Appellate Division,
Third Dept., Ret.*

Hon. Deborah H. Karalunas
Justice of the Supreme Court

Hon. Bernice Siegal
Justice of the Supreme Court

Reporters

Hon. Jeffrey W. Gasbarro
Town Justice, Town of Ossining, NY

Robert A. Markoff, Esq.
Principal Law Clerk, Second Dept.

Charles P. Cercone, Esq.
*Principal Appellate Court Attorney,
Fourth Dept.*



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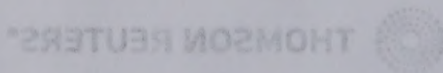
Cite charges by PJI number: e.g.

PJI 2:83

Cite text other than charges by volume, charge, page,
and date: e.g.

1A NY PJI3d 1:76, at 121 (2023)

Citations of NY PJI are noted in Shepard's
New York Statutes Citations



**PUBLISHER'S INTRODUCTION
TO THE 2023 EDITION OF
NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL**

New York Pattern Jury Instructions—Civil is used by judges throughout New York State to instruct juries in all kinds of civil cases. Practicing lawyers use it to develop strategies at all stages of a case, from discovery to settlement negotiations through jury trial. Its model charges and detailed commentaries set forth not only how juries are instructed, but the basis for each instruction in New York statutory and case law.

The Pattern Jury Instructions Committee of the Association of Justices of the Supreme Court of New York State welcomes input from the bench and bar, and encourages lawyers and judges to comment on these volumes. Suggestions may be sent directly to the New York Pattern Jury Instructions editor at Thomson Reuters at NY-PJI-Feedback@thomsonreuters.com and they will be shared with the committee for its consideration.

Changes and updates appearing in the 2023 Edition of New York Pattern Jury Instructions—Civil include:

- A new charge with commentary has been added to cover Substitution of Additional/Alternate Juror for Deliberating Juror and revisions to existing charge covering Alternate/Additional Jurors. See PJI 1:31 & 1:32
- Revised charge covering Damages—Personal Injury—Collateral Sources—Itemized Verdict. See PJI 2:301.
- Revised charges and commentary on “substantial factor” in Liability/Fault. These charges cover Comparative Fault, Possessor’s Liability for Condition or Use of Premises—Standard of Care, Liability for Condition or Use of Land—Possessor’s Liability—Unsafe Condition—Foreign Substances—Slip and Fall Cases, Comparative Fault—Apportionment of Fault Between Defendants, Products Liability—Negligent Design, Liability for the Conduct of Another—Owner of Vehicle, for Acts of Operator—Contributory Fault Not Imputed, Liability for the Conduct of Another—Owner of Stolen Vehicle—Keys Left in Ignition, and charges within Liability for Condition or Use of Land—To Persons Outside the Land—Possessor’s Liability to Persons on Sidewalk—Snow and Ice. See PJIs 2:36, 2:90, 2:91, 2:111A.1, 2:111A.3, 2:126, 2:250, 2:251, and 2:275.
- Revised charge and commentary on Proximate Cause—In General, See PJI 2:70.
- Revised charges and commentary within Strict Products Liability. See PJI 2:120, 2:120.1, and 2:120.2.
- New charge and commentary within Malpractice—Physician, See PJI 2:150 & 2:150.1.

- Substantially revised charge and commentary covering Employment Discrimination—Hostile Work Environment—Claims Under the New York State Human Rights Law and Employment Discrimination—Quid Pro Quo—Claims Under the New York State Human Rights Law. See PJI 9:5, 9:5.2, 9:6, and 9:6.2.
- Many other updates to charges, commentary, special verdict forms, and additions of new case cites throughout the publication.

THE PUBLISHER
December 2022

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December 2022

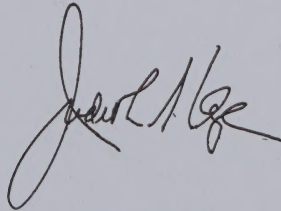
FOREWORD TO THIRD EDITION

The jury is an ancient institution that, across the nation, is today the focus of attention. All aspects of the jury system are being scrutinized, from summoning methods to selection procedures to—the subject at hand—instructions. The goal in each instance is to make jury service meaningful for individual jurors and to ensure that the jury system continues to render substantial justice for the community. This third Edition of Volume One of the New York Pattern Jury Instructions—Civil well serves these vital goals.

The value of this volume to the bench, bar and public cannot be overstated. With more than two thousand pages of carefully researched charges and commentary, the Third Edition provides a comprehensive yet comprehensible guide to the general principles governing civil trials and the law in negligence actions. Readers comparing the Third Edition and the Second will note how extensive its revisions are: many charges have been modified; some deleted; some (such as the municipal liability section) have been completely rewritten; some (such as the continuous treatment section) are totally new.

We are grateful to the hardworking committee of judges which has labored over the past six years to produce this important work: David O. Boehm, Lawrence J. Bracken, M. Dolores Denman, Martin Evans, Helen E. Freedman, Ira Gammernan, Harold J. Hughes, Bentley Kasal, Howard A. Levine, Thomas E. Mercure, Martin B. Stecher and Joseph P. Sullivan, and to the especially dedicated chair, Leon D. Lazer. Each page of this volume is testament to their commitment to scholarship, public service and the law.

Finally, for the committee and for all of us who reap the benefit of their effort, heartfelt thanks to Reporters Patrick M. Connors (Volume One Reporter) and Eileen R. Kaufman (Volume Two Reporter).

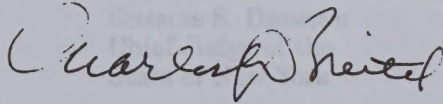
A handwritten signature in black ink, appearing to read "Judith S. Kaye", with a large, stylized initial "J" and a long, sweeping underline.

JUDITH S. KAYE
Chief Judge of the
State of New York

FOREWORD TO SECOND EDITION

Since initial publication eight years ago, and the supplements published since 1966, volume one of the New York Pattern Jury Instructions—Civil has provided immeasurable benefit to both court and counsel in framing clear and precise instructions necessary to guide trial judges in instructing juries so that the applicable rules are intelligible to them. This revision of that volume, reflecting recent developments as well as other changes making for even clearer and more precise instructions, demonstrates anew the thorough research and careful draftsmanship which hallmarked the original volume.

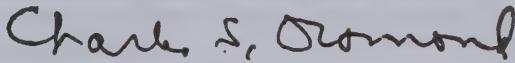
The committee, under the excellent leadership of former Justice Bernard Meyer, has performed its task pre-eminently. Judges Meyer, Feiden, Hawkins, Henry, Leff, Martuscello, Terry and Witmer, and Dean Thornton and Professor Farrell, have provided both bench and bar an invaluable tool with which to perform an integral part of their function. The revised volume is a professional work of high craftsmanship. For this, and its inestimable value to the People of the State, the Judicial Conference, the Administrative Board, and the judges of the State express their appreciation and gratitude.



CHARLES D. BREITEL
Chief Judge of the
State of New York

FOREWORD TO FIRST EDITION

The preparation of these materials and the making of this useful book is another illustration of the paradoxical truth: to get an unpaid public benefit job done well and quickly, pick a man already busy with other tasks. Chairman Justice Meyer and his four committee members were and are, in their regular judicial work, among the most active and productive of that heavily burdened body of men: the Supreme Court of the State of New York. Yet, like Browning's busy man who longs for leisure but once at leisure "straightway he wants to be busy," each of them took on this extra task enthusiastically and intensively. The careful and tireless efficiency and thoroughness with which they accomplished it is proven by every line of the Instructions. Into it they put their learning, their experience, their devotion and their meagre and valuable leisure time. Let us all be thankful that we can call to special service such people as Justices Meyer, Henry, Lawless, Martuscello and Witmer and their able and learned Reporter, Professor Peter W. Thornton.



CHARLES S. DESMOND
Chief Judge of the
State of New York

PREFACE TO THIRD EDITION

This Third Edition of Volume 1 of New York Pattern Jury Instructions—Civil represents the culmination of six years of work by the Pattern Jury Instructions Committee of the Association of Justices of the Supreme Court of New York State.

In preparing the Third Edition, the Committee has examined each charge and comment in the Second Edition and has made significant additions, deletions, revisions and other changes. The Committee has also made a serious effort to make the charges more comprehensible to jurors without affecting the correctness of the legal principles involved in the charges. The new edition is gender neutral.

At the outset of the Third Edition project, the Committee decided that as its work went forward the revisions and changes made would be inserted into the annual supplements each year until completion of the project. Consequently, the number of pages in the Volume 1 supplement ultimately exceeded the number of pages in the hardbound volume published as the Second Edition. Publication of The Third Edition now eliminates the user's problem of coordinating the hardbound Volume 1 with the annual supplement.

The enormity of the changes in statutory and case law since publication of the Second Edition of Volume 1 in 1974 has created the need to expand what was once a single Volume 1 into two volumes designated Volumes 1A and 1B. There was considerable reluctance on the part of the Committee to expand Volume 1 into two volumes, but there was no practical and convenient method of publishing the approximately 1650 pages of the Third Edition within a single cover. However, the policy of issuing a separate supplement each year to be used with the original volume will now be terminated with the Third Edition.

The format and section numbers contained in the Second Edition have been retained in the Third Edition because references to charges by PJI section number, both in the courtroom and in law offices, are now part of the legal culture of the State and changes in those numbers undoubtedly would cause confusion. Nevertheless, changes in case and statutory law and the need for special verdicts have mandated the addition of new charges, some new charge numbers, and extensive revision of some of the charges bearing the old numbers.

Creation of the new edition was accomplished by assigning to each member of the Committee a number of charges and comments to be revised. Thus, the original draft of each charge and comment was the product of the work of a member of the Committee. The original draft was then put to at least two—and often more than two—readings before the entire Committee. The end product is the work of the judges on the Committee, with significant assistance from the Reporters.

During the six years of work on the Third Edition, the Committee also issued annual Supplements to Volumes 1 and 2. To accomplish this,

the Committee conducted two day meetings for most of the months of each year and a full week meeting during the summer of each year. Two summer meetings were held at the offices of the Appellate Division, Third Department in Albany, one at Justice Denman's chambers in Buffalo, one at the offices of the Fourth Department in Rochester and two at the Touro Law Center in Huntington, New York. The Committee appreciates the assistance of the Appellate Divisions and Touro Law Center in providing their facilities.

The Committee members who took part in this project were Justices David O. Boehm, Lawrence J. Bracken, M. Dolores Denman, Martin Evans, Helen E. Freedman, Ira Gammernan, Harold J. Hughes, Bentley Kassal, Howard Levine, Thomas E. Mercure, Martin B. Stecher, Joseph P. Sullivan, and the chair, Leon D. Lazer.

The Committee is highly indebted to its reporters: Professors Patrick M. Connors and Eileen Kaufman. Professor Connors was the overall manager of the project and provided invaluable substantive and editorial assistance. Professor Kaufman, the Reporter for Volume 2, also provided important substantive and editorial assistance in the project. Reporter Emeritus, Professor Alan D. Scheinkman, continued working with the Committee and provided original draft sections as well as important advisory assistance.

A word is necessary concerning the personnel of the Committee, which has undergone significant changes since the publication of the Second Edition. In 1978, Justice Leon D. Lazer, subsequently appointed Associate Justice of the Appellate Division, Second Department, and Justice Frederick B. Bryant, joined the Committee. The following year, Justice Bernard S. Meyer, Chair of the Committee since its inception, resigned from the Committee incident to his appointment to the Court of Appeals. Justice Lazer was appointed as Chair and four new members were added to the Committee: Justices Lawrence J. Bracken, Harold J. Hughes, Bentley Kassal, and Richard D. Simons. In 1980, Justice Murray T. Feiden, a member of the Committee since 1970, retired from the Committee. In January, 1983, Justice Simons resigned from the Committee incident to his appointment to the Court of Appeals and Justice David O. Boehm was appointed in his place. In 1986, Justice Martin Evans was appointed to the Committee. In 1987, Justice James T. Leff, a member of the Committee since 1971, retired from the Committee. In 1988, Justice Bryant and Justice G. Robert Witmer, the last active founding member, retired from the Committee. That year, three new members were appointed: Justices Howard A. Levine, Thomas J. Lowery, Jr., and Martin B. Stecher. Following the untimely death of Justice Lowery in 1991, Justice M. Dolores Denman, Presiding Justice of the Appellate Division, Fourth Department, became a member of the Committee. In 1992, Justices Thomas E. Mercure and Ira Gammernan were appointed to the Committee. In 1993, Justice Levine resigned from the Committee incident to his appointment to the New York Court of Appeals. In 1994, Justice Kassal retired from the Committee and Justice Helen E. Freedman was appointed. In 1995, Justice Joseph P. Sullivan was appointed to the Committee. In 1997, Justice Stecher retired from the Committee and Justices Stephen G. Crane and Jerome C. Gorski

were appointed. Upon Justice Crane's resignation from the Committee in 1999, Justice Robert G. Hurlbutt was appointed to the Committee. Following the untimely death of Justice Denman in 2000, Justice Elizabeth W. Pine was appointed to the Committee. In 2001, Justices Robert J. Lunn and Alan D. Oshrin were appointed to the Committee. In 2003, Justice Oshrin died after a short illness and Justice Hughes retired after 24 years of service to the Committee. Justice David Demarest was appointed the same year. In 2004, Justice Boehm retired after 20 years of service to the Committee and Justices Patrick H. NeMoyer and Leonard B. Austin were appointed. In 2006, Justice Lunn retired after 5 years of service and later that year Justice Mercure retired after 15 years of service. Justices Angela M. Mazzarelli and Emily Pines were then appointed. In 2008, Justice Jerome C. Gorski retired after 11 years of service to the Committee and Justices Phillip R. Rumsey and Alan D. Scheinkman were appointed. In 2009, Justice Sheila Abdus-Salaam was appointed. Justice Lawrence J. Bracken retired in 2011 after 33 years of service to the Committee, and Justice Jack M. Battaglia was appointed the same year. Justice Martin Evans died in 2011 after a short illness. In 2013, Justice Abdus-Salaam retired from the Committee after having been appointed to the Court of Appeals. In the same year, Justice Elizabeth W. Pine retired after 13 years of service. Justices John M. Curran, L. Priscilla Hall and Shirley Werner Kornreich were appointed to the Committee. Significant personnel changes occurred in 2017. Justices Angela M. Mazzarelli, Robert G. Hurlbutt, Joseph P. Sullivan and Ira Gammerman all retired from the Committee after a total of 74 years of combined service. New members appointed that year were Justices Judith J. Gische, Jeffrey K. Oing and Deborah H. Karalunas. Justice Bernice Siegal was appointed to the Committee in 2018. In 2019, Justice L. Priscilla Hall retired from the Committee and was replaced by Justice William G. Ford. In 2020, Justice Oing retired from the Committee and was replaced with Justice Tanya R. Kennedy. Justice Scheinkman left the Committee in 2021 and was replaced by Justice John R. Higgitt.

In December, 2014, having led the Committee for 37 years, Justice Leon D. Lazer decided to retire as Chair. He continued, however, to lend his enormous intellect and legal acumen as a member. The Committee acknowledges his invaluable contributions through his insistence on excellence, his example of thorough preparation and his meticulous legal analysis, all of which have made PJI - Civil indispensable to the Bench and Bar. His name will forever be linked with these volumes, which are his legacy.

In January, 2015, the Committee selected Justice David Demarest as its next Chair.

The 2019 Edition of these volumes were designated the Hon. Leon D. Lazer Memorial Edition as we lost our longtime Chair in January of 2018. Justice Lazer remained a member of the Committee right up until his death in his 96th year. Having joined the Committee in 1978, he became its Chair the following year and continued in that position until he decided to step down in 2014. PJI was Justice Lazer's passion—he fathered its development over the years as it grew into the premier treatise that it is today. His contributions cannot be fully expressed here, but suffice it to say that he lives on in these pages and his work will continue to guide the Bench and Bar of New York State for

generations.

Professor Richard T. Farrell of Brooklyn Law School served as Reporter to the Committee from 1974 to 1983 and remained an active advisor to the Committee for several years. Professor Alan D. Scheinkman of Pace University School of Law served as Reporter to the Committee from 1984 to 1997. In 1988, Professor Eileen R. Kaufman of Touro College, Jacob D. Fuchsberg Law Center, was appointed as Volume 2 Reporter. Professor Patrick M. Connors of Albany School of Law was then appointed as Volume 1 Reporter and became manager of the Third Edition project. In 2001, John R. Higgitt, Esq., Appellate Court Attorney, Appellate Division, Second Department, was appointed Associate Reporter for Volume 1.

In 2003, Professor Patrick M. Connors retired after 15 years of service to the Committee. The Committee extends its gratitude to Professor Connors for his distinguished work that has so profoundly affected the quality of these volumes. Professor Connors was replaced by Lisabeth Harrison, former law clerk to Hon. Vito J. Titone and Hon. Domenick L. Gabrielli of the Court of Appeals and currently affiliated with Mintz & Gold LLP. After 18 years of service, Professor Eileen R. Kaufman retired. Volume 2 of this work is to a great degree the product of her dedication and scholarship, for which the Committee extends its gratitude. Professor Kaufman was replaced by Professor Rodger D. Citron of Touro College, Jacob D. Fuchsberg Law Center. Professor Citron retired after four years of distinguished service. In 2011, John R. Higgitt, Esq., Principal Court Attorney, Supreme Court, Bronx County (Civil Division), returned to serve the Committee as the Report for Volume 1, and Gennaro Savastano, Esq., Senior Appellate Court Attorney, Appellate Division, First Department, was appointed as Associate Reporter. Gennaro Savastano retired in 2012 after a year of distinguished service. He was replaced by David Paul Horowitz, Esq., Adjunct Professor of Law at Brooklyn Law School and affiliated with Ressler & Ressler in New York City. Mr. Horowitz retired in 2015 after three years of distinguished service. In 2017, Melissa B. Ringel, Esq., Director and Special Master of the Pre-argument Mediation Program at the Appellate Division, First Dept. was appointed as an additional Reporter.

In November, 2017, Reporter Lisabeth (Libby) Harrison tragically died, much too young. Libby's passing leaves a tremendous void, for in the 14 years that Libby served the Committee she proved to be an exceptional legal scholar and writer. She was responsible over the years for many new and revised charges and commentary and her mark will be forever on the books. Libby was more than a colleague, she was a friend to everyone, a mentor and a constant advocate for perfection in our work. With her vast knowledge and appreciation of the law, she challenged the judges to be better scholars. With her good humor, humility and humanity, she challenged each committee member to be a better person. The Bench and Bar owe Libby a debt of gratitude for her enduring contributions to these volumes.

Jeffrey A. Helevitz, Esq., Special Referee, Civil Part, First Judicial District and Jeffrey W. Gasbarro, Principal Law Clerk to the Hon. Francesca E. Connolly, Associate Justice, Second Department, were ap-

pointed Reporters in 2018. That year Reporter John R. Higgitt was appointed by the Governor to be a Judge of the New York Court of Claims. In 2019, Charles P. Cercone, Principal Appellate Court Attorney for the Fourth Department, was appointed to a reporter position. In 2021, Robert A. Markoff, Principal Law Clerk to the Hon. Betsy Barros, Associate Justice, Second Department, was appointed to a reporter position.

This Volume also reflects efforts in past years of Professor Aaron D. Twersky, the late Professor David H. Schwartz and, more recently, Lee S. Kreindler, Esq. with reference to the Warsaw Convention. In more recent times, the Committee is appreciative of the work of Presiding Justice M. Dolores Denman and her staff for revising the Comment to section 2:217 to incorporate the substantial body of recent case law on Labor Law § 240. The Committee would like to acknowledge the work of Barry L. Porsch, Esq. for assembling the initial cases under Labor Law § 241(6) that are the subject of the listing in the Comment to 2:216A.

The Committee extends its gratitude to the Judges and Administrators of the Unified Court System for their continued support and cooperation.

December, 2022

THE PATTERN JURY INSTRUCTIONS
COMMITTEE

David Demarest, Chair
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Helen M. Freedman, Vice Chair
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John M. Curran
William G. Ford
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Tanya R. Kennedy
Shirley Werner Kornreich
Patrick H. NeMoyer
Emily Pines
Phillip R. Rumsey
Bernice Siegal

PREFACE TO SECOND EDITION

At the suggestion of Chief Judge Desmond, the Committee on Pattern Jury Instructions of the Association of Supreme Court Justices was established in November 1962. Mr. Justice Samuel W. Eager, then President of the Association, appointed a Committee consisting of Mr. Justice Bernard S. Meyer as Chairman, and Justices Aron Steuer, William B. Lawless, M. Henry Martuscello and G. Robert Witmer. Through the cooperation of the Judicial Conference, Professor Peter W. Thornton joined the Committee as its Reporter. In February 1963, Mr. Justice Steuer felt compelled by the pressure of court work to withdraw from the Committee, but agreed to remain as Advisor and has submitted valuable comments on the Committee's work, of all of which he received copies. In Mr. Justice Steuer's place, Mr. Justice Frederic T. Henry became a member of the Committee.

The Committee remained intact as a working unit from 1962-1971 and published the original two volumes. Their work together transformed acquaintanceships of the members with one another into warm and lasting friendships, and the preparation of those volumes was a source of great satisfaction to all.

Changes in the composition of the Committee were inevitable. Justice William B. Lawless, having retired from the bench and assumed the role of Dean of Notre Dame Law School, then returned to private practice. Because of the press of other duties he resigned from the Committee in January, 1971. At about the same time, Justice Joseph F. Hawkins became an active member and Justice James J. Leff joined several months later in March, 1971. The next addition was Justice Murray T. Feiden in December, 1972 followed by Justices Walter L. Terry and William R. Roy in January, 1973. Professor Richard T. Farrell became the Committee's Supplement Reporter in March, 1972.

The first meeting of the Committee was held on December 17, 1962 and before completion of this first volume, an additional twenty-two meetings, some of them four days in length, took place. The tentative table of contents adopted at the first meeting has been revised many, many times as the work progressed. To each member of the Committee were assigned specific charges for preparation. As each charge was prepared, it was circulated by its author to the other members of the Committee and placed on the agenda of the next meeting for discussion. Inevitably discussion resulted in changes and corrections, sometimes in wholesale revision. No charge was adopted in exactly the form originally prepared; in some cases the charge went through five, six or more versions before it received tentative final approval by the Committee.

Upon tentative final approval, the charge was circulated to three separate Coordinating Committees, one of United States District Judges, one of County Court Judges and one of New York City Civil Court Judges, for comment and criticism. It was also forwarded to

James M. Flavin, State Reporter, whose staff checked citations for accuracy and form, and also offered constructive criticism. Corrections or suggestions substantial in nature were referred back to the Committee for review before the charge was regarded as finally approved.

The Committee of District Judges appointed by Chief Judge Lumbard consisted of Judges John R. Bartels, Chairman, Dudley B. Bonsal and Wilfred Feinberg. To them goes credit not only for the Federal Annotations that appear at the end of some charges, but for the initial work on the charges dealing with the Federal Employers' Liability Act and the Federal Safety Appliance Acts. The Committee of County Judges consisted of Judges John R. Schwartz, Liston F. Coon, Louis M. Greenblott, Ellsworth M. Lawrence and George B. Parsons.

The Committee of Civil Court Judges appointed by Mr. Justice William Groat, Administrative Judge of the Civil Court, consisted of Judges Sidney Asch, Vincent Damiani, Daniel Fitzpatrick and Maurice Wahl, and Chief Law Assistant Aaron Weiss. In addition to their review work, the Civil Court Committee was responsible for the initial preparation of the Landlord and Tenant Charges.

A fourth Coordinating Committee, that of Surrogates, consisting of Judges Joseph A. Cox, Surrogate of New York County, John D. Bennett, Surrogate of Nassau County, Christopher C. McGrath, Surrogate of Bronx County, Pierson R. Hildreth, Surrogate of Suffolk County, Edward S. Silver, Surrogate of Kings County, and Gerald Saperstein, Surrogate of Cayuga County, reviewed and approved the Will Contest charges which appear in Volume 2, the initial drafts having been prepared by Professor Patrick J. Rohan of St. John's University School of Law.

The final responsibility for all of the material appearing in this work is that of the Committee. Its members nevertheless acknowledge their dependence upon a great many others, in addition to those referred to above, for assistance in many different ways. Initial preparation of the material on Public Authorities appearing in the Introductory Statement to the Municipal Liability section was by Mr. Justice Charles Lambiase, for many years prior to his election to the Supreme Court a Judge of the Court of Claims. The charge on malpractice by architects was reviewed by Judge Bernard Tomson of Nassau County District Court, an author of note in that field. For help in compiling material on work expectancy, the Committee expresses appreciation to Jack Karger, Senior Economist for the New York State Department of Labor. For assistance in unraveling the mysteries of present value in relation to damages, the Committee is indebted to Woodward & Fondiller, Inc., 420 Madison Avenue, New York, N.Y., Consulting Actuaries, and to its president, A. William Larson, Esq. The publisher's staff added unofficial citations, assisted with references to encyclopedias and texts and prepared the index and tables of cases and of statutes.

Research assistance to members of the Committee was sought through local bar associations and law schools. The Committee acknowledges its gratitude in this connection to Thomas Burke of the Georgetown University Law Center, Mrs. Elizabeth R. Clark, Esq., of Brooklyn, James J. Delaney, Esq., of Jackson Heights, John L. Doran,

PREFACE TO SECOND EDITION

Esq., of Baldwin, Ronald L. Fancher, Esq., of Buffalo, John M. Farrell, Jr., Esq., of Manhasset, David E. Flierl, Esq., of Buffalo, Victor T. Fuzak, Esq., of Buffalo, Abram R. Harpending, Esq., of Rochester, Eugene M. Harrington, Esq., of Long Beach, Salvatore Martorella, Esq., of Huntington, John B. McCrory, Esq., of Rochester, Stephen Seidner, Esq., of Brooklyn, Andrew J. Simons, Esq., of Brooklyn, Girard M. Ursitti, Esq., of Bualo, and Mitchell T. Williams, Esq., of Rochester.

Preparation of a work such as this involves a great deal of planning and organizing. The assistance of Thomas F. McCoy, State Administrator in the planning, and of Alfred A. Delaney, Administrative Officer of the Judicial Conference in the detail of preparing for the Committee's meetings is gratefully acknowledged. The laborious work of putting the tentatively approved material into mimeographed form for circulation fell to the Chairman's secretary, Mrs. Caroline Gunning, and Personal Officer, Leonard Bivona. Their contribution to keeping the work of the Committee progressing smoothly cannot be overemphasized.

The augmented Committee and reporters accepted appointments to assist in the continuing work of keeping the two volumes of PJI—Civil up to date through pocket parts, and to add new charges which were not originally contemplated. Four supplements were produced. As the Supplement to Volume 1 increased in size, and the original edition was almost exhausted, it was decided to revise Volume 1 so that the additions, corrections, and updatings could be integrated, and so that major changes in approach and format could be made in certain areas.

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HOW TO USE THESE VOLUMES

New York Pattern Jury Instructions Civil, the “PJI,” is designed to assist judges in preparing their jury charges and counsel in preparing their requests to charge. Over time, it has also proved to be a valuable research resource for both bench and bar. The PJI is the product of the Pattern Jury Instructions Committee of the Association of Justices of the Supreme Court of the State of New York. The charges and comments are not the official expression of the Unified Court System. They are intended as guides. While these volumes have been described as an “authoritative” work, *Celle v Filipino Reporter Enterprises Inc.*, 209 F3d 163 (2d Cir 2000), see *Wild v Catholic Health System*, 21 NY3d 951, 969 NYS2d 846, 991 NE2d 704 (2013), trial judges are not required to use the charges. Trial judges are free to adopt, modify, or reject the charges, so long as they adequately convey the sum and substance of the applicable law, *Jackson v Sullivan*, 232 AD2d 954, 648 NYS2d 808 (3d Dept 1996); *Phillips v United Artists Communications, Inc.*, 201 AD2d 634, 607 NYS2d 976 (2d Dept 1994), see *Vivyan v Ilion Central School Dist.*, 94 AD3d 1432, 942 NYS2d 298 (4th Dept 2012). While the charges are the result of careful study and analysis by the Committee, their use by a trial judge remains subject to objection by trial counsel or reversal on appeal, as is true of any other determination made by the court during trial.

Most of the pattern charges state general principles, some of which may be irrelevant to the facts of a particular case and which, in some cases, should not be stated to the jury, see *Spadaccini v Dolan*, 63 AD2d 110, 407 NYS2d 840 (1st Dept 1978). Each case has unique facts, and the interrelationship of the law and the evidence admitted at trial will determine whether and, if so, to what extent, a charge should be modified, or even rejected, see *Spensieri v Lasky*, 94 NY2d 231, 701 NYS2d 689, 723 NE2d 544 (1999). The charge must be carefully crafted and tailored to the claims, defenses, and evidence in each case, see *Altamirano v Door Automation Corp.*, 76 AD3d 401, 907 NYS2d 164 (1st Dept 2010). “The trial court’s instructions ‘should state the law as applicable to the particular facts in issue in the case at bar, which the evidence in the case tends to prove; mere abstract propositions of law applicable to any case, or mere statements of law in general terms, even though correct, should not be given unless they are made applicable to the issues in the case at bar,’” *Green v Downs*, 27 NY2d 205, 316 NYS2d 221, 265 NE2d 68 (1970). The pattern charges are not intended for use as a rote mechanism for stating abstract legal principles to jurors. The Committee does not make or set the law. Its role is to report the controlling law and craft pattern charges based upon that law. Thus, the Committee does not predict how the Court of Appeals will resolve unsettled issues, or purport to resolve splits among the Departments of the Appellate Division.

The charge will be more comprehensible to the jury, and the jury’s use of the charge is facilitated, when the pattern charge is adapted to

the facts of the particular case by counsel in stating requests, and by the trial judge in preparing the charge. This task is the obligation of both judge and counsel, see *Green v Downs*, 27 NY2d 205, 316 NYS2d 221, 265 NE2d 68 (1970).

The Committee is mindful of the need to craft charges in a manner that is comprehensible to jurors, and strives to use language that jurors will understand, see Tiersma, *Communicating with Juries: How to Draft More Understandable Jury Instructions* (National Center for State Courts 2007) (originally published in 10 *Scribes J. Legal Writing* 1 [2005–2006]); O'Connor, *Juries: They May Be Broken but We Can Fix Them*, 44 *Fed. Law.* 20, 24 (June 1997); Elwork, Sales & Alumni, *Making Jury Instructions Understandable* (Michie 1982). This presents a continuing challenge. The Committee attempts, where possible, to provide direct and unambiguous statements in everyday language. Notwithstanding this goal, it is the legal correctness of the charge that is paramount. The Committee is loathe to deviate from the specific language expressed in the statute or by the court upon which the charge is based. There are instances when such language has not been modified in pursuit of comprehensibility to remain true to the principles expressed by the statute or court.

Use of the pattern charges, and their modification, where required, is facilitated by understanding the organization of the PJI, including its arrangement, format, and content. It is customary for trial counsel to use the section numbers in the PJI and title that identify each charge when making requests to charge to the court, for example “PJI 3:9. Intentional Torts—Interference With Person Or Property—Trespass To Chattels,” and trial judges use the same shorthand.

The PJI begins with a discussion of General Principles, followed by ten divisions:

1. General Charges;
2. Negligence Actions;
3. Torts Other than Negligence;
4. Contracts;
5. Divorce;
6. Landlord and Tenant;
7. Will Contests;
8. Mental Hygiene Law;
9. Employment Discrimination; and
10. Navigation Law.

Each section is formatted with the pattern charge, in boldface, followed by a Comment, in regular type. Frequently the black letter portion states a general principle. However, because jurors are more likely to grasp the meaning of a charge incorporating the facts they have heard in evidence, as opposed to a charge merely reciting abstract concepts, pattern charges suggesting illustrative facts are sometimes provided. It is important to remember that this second type of pattern charge only illustrates just one factual variation for the legal principle set forth in the charge.

Matter in the charge which is designed to be tailored to a particular case is set forth in the pattern charge in parentheses. Parentheses are used in two ways. First, parentheses, and, where necessary, double parentheses, may be used to highlight applicable alternatives to alert the judge that one or more, but not necessarily all, of the alternatives may be appropriate for inclusion in the charge, and the judge must determine what part of the matter in parentheses to use, see e.g. PJI 2:217. Second, parentheses may be used in charges to highlight illustrative factual material, see e.g. PJI 2:113. Brackets are used to highlight directions to the judge and are not part of the charge. Directions are printed in italicized, regular typeface, to alert the court that they are not to be read to the jury, see e.g. PJI 1:55.

Statutes are quoted in some of the charges. Where certain factual alternatives are excluded from a charge based upon the evidence in a particular case, care must be taken to exclude the corresponding portion of the statute.

Because change is a constant in the law, the PJI is revised and reissued annually. Nonetheless, when referencing statutes, cases, and other authorities included in the PJI, it is always important to ascertain whether the statute has been amended or repealed, or a case holding overruled or modified.

From time to time new or amended charges are posted on the OCA website at <http://www.nycourts.gov/judges/cpi/index.shtml> in advance of their publication in the print volumes or on Westlaw.

In some instances where the charge deals with a single fact pattern, other fact patterns commonly encountered are dealt with in the Comment, which may include alternative or additional charge material. When this occurs, the alternative or additional charge material is printed in boldface so that it will be readily apparent to the user, see e.g. PJI 2:90.

The Comments that follow the pattern charges serve several functions:

- (1) Presenting the authority on which the charge is based, together with secondary authorities providing a broader view of the subject;
- (2) Orienting the user to the relationship between the pattern charge and the general legal topic it relates to and to other related charges which may be used in the same case;
- (3) Advising the user of any assumptions made preparing the charge;
- (4) Highlighting when an issue is for the court and when it is for the jury;
- (5) Setting forth commonly encountered factual variations and advising how a particular factual variation requires a modification in the pattern charge; and
- (6) Noting important procedural considerations relating to, among others, statutes of limitations, pleadings, and motion practice.

Wherever possible, matter not necessary for the jury to consider has been omitted from the pattern charges. This furthers the goal of providing a comprehensible instruction that states the essentials with as little embellishment as possible.

On occasion charges are followed by one or more Caveats. Caveats are intended to caution the user and convey important information concerning the use or limitation of a particular charge, see e.g. PJI:1:3. Other uses include alerting the court to any differences between Departments of the Appellate Division, see e.g. PJI 2:85A, or factual variations impacting whether or not a particular charge is to be given, see e.g. PJI 2:82A, caveat 2.

After selection of the jurors (see VOIR DIRE-SELECTING THE JURY, Methods of Selection), the judge will typically give the jury a preliminary charge instructing the jurors about general principles of law, and the rules governing their conduct, interaction with each other, contact with non-jurors during the trial, and prohibit the use of independent research and outside sources, including social media.

At the conclusion of the testimony, and prior to summations, the court should conduct a charge conference concerning the proposed verdict sheets and the written requests from counsel for the court to instruct the jury on the law, see CPLR 4110-b. The court will then inform counsel of its intended charge and verdict sheet, and provide them with an opportunity to object to both. Preserving this process on the record for appellate review is important, and may include marking the requests to charge and proposed verdict sheets as court exhibits. For additional information on requests to charge, see GENERAL PRINCIPLES, Introductory Statement, Requests to Charge. All questions from the jurors, including those related to the charge, interactions with the jury during deliberations, and the verdict sheet as completed by the jury should also be marked as court exhibits, see GENERAL PRINCIPLES, Introductory Statement, Inquiry by Jury.

Following summations, the judge will instruct the jury on general provisions of law and specific factual and legal issues in the case, see e.g. PJI 1:20 *et seq.* For example, in a negligence case there are elements of negligent conduct, causation, and damages that are involved, in addition to many additional principles and facts that often must be charged. As an illustration, if an infant plaintiff contends that defendant automobile driver struck the infant while the defendant was passing another car on the right, and the defendant contends that the infant was riding a bicycle on the wrong side of the road and that the bicycle struck a parked car, causing the plaintiff to veer into the path of the defendant's automobile, the court's charge to the jury may include the following:

- (1) The charge prior to trial, see PJI 1:1 through 1:14;
- (2) Provisions of general application, see PJI 1:20 through PJI 1:29;
- (3) Burden of Proof, see PJI 1:23 and PJI 1:60;
- (4) Expert and interested witnesses, see PJI 1:25C and 1:90 through 1:94;

HOW TO USE THESE VOLUMES

- (5) Use of pre-trial deposition, see PJI 1:94;
- (6) Common law standard of care, see PJI 2:10 and 2:12;
- (7) The driver's duty to maintain a lookout, see PJI 2:77 and 2:77.1;
- (8) The effect of violation of Vehicle and Traffic Law § 1123(b) governing passing on the right, see PJI 2:26;
- (9) The parties' relative duty in an emergency, see PJI 2:14;
- (10) Proximate cause as it relates to the defendant's negligence, see PJI 2:70;
- (11) The effect of the comparative negligence of an infant generally, see PJI 2:36, 2:48;
- (12) Violation of a statute by persons under disability, in this case infancy, see PJI 2:49;
- (13) Proximate cause in relation to the infant plaintiff's comparative negligence, see PJI 2:70;
- (14) Damages generally, see PJI 2:277 and PJI 2:280;
- (15) The damages of the infant's parents on their derivative cause of action, see PJI 2:317 and PJI 2:318;
- (16) An itemized verdict sheet, see PJI 2:301; and
- (17) An explanation of the verdict, see PJI 1:26.

The table of contents can provide a useful template and organizational structure for crafting the charge. However, there is no set order in which the component portions of the charge must be given. It may be appropriate to use a pattern charge more than once, as might be the case in the example given. In other situations, to avoid repetition, the trial judge may elect to omit portions of a pattern charge that are covered adequately elsewhere in the charge. It is not required, or expected, that the charges will be used verbatim. They must be modified to the particular case and molded together with transitional sentences to create a coherent, intelligible instruction for the jury.

In almost all cases, it will be necessary to submit written questions to the jury in a special verdict form, commonly referred to as a verdict sheet, PJI 1:26. The verdict sheet is to be reviewed with and read to the jury or otherwise incorporated by the court into the charge before the jury begins deliberations. Many charges are followed by sample verdict forms which are labeled with the number of the charge and the letters "SV." See e.g. PJI 2:91 SV-1. The verdict sheet should be given to counsel prior to summation so that they may use them as appropriate. The verdict sheet should be marked as a court exhibit.

The Committee strives to craft neutral charges that do not favor one side over the other, avoiding, wherever possible, the use of words with qualitative implications or connotations. When a charge includes a statement of possible findings or verdicts, the possibilities for both sides are stated. With a few exceptions, the charges are stated affirmatively. There is seldom reason to advise a jury what it may not do. Generally, it will suffice to instruct the jury as to what must be found to warrant arriving at a decision on each issue.

Unless a particular fact situation requires otherwise, charges are stated in terms of one plaintiff and one defendant. Gender neutral

language is used wherever possible. Where names of parties would be appropriate in the charge, the letters AB generally have been used for the first party referred to, CD for the second party referred to, and so forth.

The Committee is receptive to suggestions and comments from the bench and bar. Suggestions are welcomed, and should be addressed to Pattern Jury Instructions Committee, c/o Hon. David Demarest, Chair, NY-PJI-Feedback@thomsonreuters.com.

DIVISION 2. NEGLIGENCE ACTIONS

G. SPECIFIC NEGLIGENCE ACTIONS

4. PROFESSIONAL MALPRACTICE

Introductory Statement

Professional Malpractice Statutes of Limitations

The following discussion addresses various rules for accrual and interposition of a malpractice claim within the statute of limitations. The four major areas of professional malpractice litigation are discussed herein: medical malpractice, attorneys' malpractice, architects' malpractice, and accountants' malpractice.

Malpractice is the negligence of a professional toward a person for whom a service is rendered, *Santiago v 1370 Broadway Associates, L.P.*, 264 AD2d 624, 695 NYS2d 326 (1st Dept 1999), mod on other grounds, 96 NY2d 765, 725 NYS2d 599, 749 NE2d 168 (2001). The qualities shared by such professional groups as architects, engineers, lawyers and accountants guide courts in defining the term "professional" for purposes of CPLR 214(6), which prescribes a three-year statute of limitations in actions to recover damages in nonmedical malpractice actions, *Chase Scientific Research, Inc. v NIA Group, Inc.*, 96 NY2d 20, 725 NYS2d 592, 749 NE2d 161 (2001). In particular, those qualities include extensive formal learning and training, licensure and regulation indicating a qualification to practice, a code of conduct imposing standards beyond those accepted in the marketplace and a system of discipline for violation of those standards, *id.* Additionally, a professional relationship is one of trust and confidence, carrying with it a duty to counsel and advise clients, *id.*

The alleged misfeasance of insurance agents and brokers toward their clients is not "malpractice" under CPLR 214(6), *Chase Scientific Research, Inc. v NIA Group, Inc.*, 96 NY2d 20, 725 NYS2d 592, 749 NE2d 161 (2001). Actions against insurance agents and brokers are governed by the limitations periods applicable to negligence actions, three years, CPLR 214(4), and breach of contract actions, six years, CPLR 213(2), *Chase Scientific Research Inc. v NIA Group, Inc.*, *supra.* A cause of action in educational malpractice does not exist in New York, *Torres v Little Flower Children's Services*, 64 NY2d 119, 485 NYS2d 15, 474 NE2d 223 (1984); *Hoffman v Board of Ed. of City of New York*, 49 NY2d 121, 424 NYS2d 376, 400 NE2d 317 (1979); *Cantone by Cantone v Rosenblum*, 186 AD2d 167, 587 NYS2d 743 (2d Dept 1992). The Third Department has refused to recognize the tort of professional malprac-

tice in the field of computer consulting, independent from breach of contract, *Atkins Nutritionals, Inc. v Ernst & Young, LLP.*, 301 AD2d 547, 754 NYS2d 320 (2d Dept 2003); *RKB Enterprises Inc. v Ernst & Young*, 182 AD2d 971, 582 NYS2d 814 (3d Dept 1992); see *Chatlos Systems, Inc. v National Cash Register Corp.*, 635 F2d 1081 (3d Cir 1980). The Fourth Department has refused to recognize the tort of “clergy malpractice based upon sexual abuse,” *Joshua S. by Paula S. v Casey*, 206 AD2d 839, 615 NYS2d 200 (4th Dept 1994). In the context of a claim based on a pastor’s participation in a consensual sexual relationship with a woman while providing marital counseling to her and her husband, the Court of Appeals determined that the claim was actually one for clergy malpractice rather than breach of fiduciary duty and that permitting such a claim would improperly require courts to examine ecclesiastical doctrine in an effort to determine the appropriate standard of care, *Wende C. v United Methodist Church*, 4 NY3d 293, 794 NYS2d 282, 827 NE2d 265 (2005); see *Langford v Roman Catholic Diocese of Brooklyn*, 271 AD2d 494, 705 NYS2d 661 (2d Dept 2000) (any attempt to define duty of care owed by clergy to parishioners in counseling relationship fosters excessive entanglement with religion). In *Wende C.* the Court left open the question whether a claim against a cleric by a parishioner for breach of fiduciary duty could be maintained under very different circumstances, see *Langford v Roman Catholic Diocese of Brooklyn*, *supra* (dismissing claims based on, inter alia, negligent counseling, breach of fiduciary duty and negligent infliction of emotional distress); see also *Lightman v Flaum*, 97 NY2d 128, 736 NYS2d 300, 761 NE2d 1027 (2001) (rabbi’s disclosure of confidences does not give rise to breach-of-fiduciary-duty cause of action under CPLR 4505). For a discussion of causes of action for breach of fiduciary duty, see Comment to PJI 3:59. Where a plaintiff’s claims are based upon intentional acts of sexual abuse that do not bear a substantial relationship to the rendition of medical care, plaintiff has not set forth a viable cause of action to recover damages for medical malpractice, *Karczewski v Sharpe*, 248 AD2d 679, 670 NYS2d 318 (2d Dept 1998).

For statute of limitations purposes, the time within which a plaintiff must commence an action shall be computed from the time the cause of action accrued to the time the claim is interposed, CPLR 203(a); *McCoy v Feinman*, 99 NY2d 295, 755 NYS2d 693, 785 NE2d 714 (2002). While courts have discretion to waive other time limits for good cause, see CPLR 2004, the legislature has specifically enjoined that “no court shall extend the time limited by law for the commencement of an action,” CPLR 201.

I. Medical Malpractice

A. General Rule

In a medical malpractice action, the cause of action generally accrues on the date when the alleged original negligent act or omission occurred, CPLR 214-a; *Young v New York City Health & Hospitals Corp.*, 91 NY2d 291, 670 NYS2d 169, 693 NE2d 196 (1998); *Rockefeller v*

Moront, 81 NY2d 560, 601 NYS2d 86, 618 NE2d 119 (1993); *Massie v Crawford*, 78 NY2d 516, 577 NYS2d 223, 583 NE2d 935 (1991); *McDermott v Torre*, 56 NY2d 399, 452 NYS2d 351, 437 NE2d 1108 (1982); see *Conklin v Draper*, 229 App Div 227, 241 NYS 529 (1st Dept 1930), *aff'd*, 254 NY 620, 173 NE 892 (1930) (overruled in part, *Flanagan v Mount Eden General Hospital*, 24 NY2d 427, 301 NYS2d 23, 248 NE2d 871 (1969)); Annot: 80 ALR2d 368; 3 ALR4th 318. However, a parent's cause of action under *Becker v Schwartz*, 46 NY2d 401, 413 NYS2d 895, 386 NE2d 807 (1978), to recover the extraordinary expenses incurred to care for a disabled child who, but for a medical professional's negligent failure to detect or advise on the risks of impairment, would not have been born, accrues on the date of the child's birth, not the date of the alleged negligence, *B.F. v Reproductive Medicine Associates of New York, LLP*, 30 NY3d 608, 69 NYS3d 543, 92 NE3d 766 (2017); see *Pahlad ex rel. Berger v Brustman*, 33 AD3d 518, 823 NYS2d 61 (1st Dept 2006), *aff'd*, 8 NY3d 901, 834 NYS2d 74, 865 NE2d 1240 (2007); see also *LaBello v Albany Medical Center Hosp.*, 85 NY2d 701, 628 NYS2d 40, 651 NE2d 908 (1995) (infant's medical malpractice action premised on alleged acts or omissions occurring before birth accrues on infant's date of birth).

In January 2018, the statute was amended by the passing of Lavern's Law (S6800/A8516, effective as of January 31, 2018) which changed the statute of limitation to commence an action involving a failure to diagnose cancer or a malignant tumor to two years and six months from the later of either (i) when the patient discovers the misdiagnosis or reasonably should have known, or (ii) the date of the last treatment where there is continuous treatment, CPLR 214-a; *Ford v Lee*, 203 AD3d 456, 164 NYS3d 592 (1st Dept 2022); see CPLR 203(g). The law limits the time to commence such an action to seven years after the date of the alleged malpractice, CPLR 214-a. The law applies to medical, dental and podiatric malpractice actions in which the failure to diagnose cancer of a malignant tumor is alleged. In addition to medical malpractice claims, the two-year and six-month period of limitation provided by CPLR 214-a applies to dental and podiatric malpractice claims. The statute's reach is not limited to the enumerated professionals and may extend to other somatic health care professionals, *Bleiler v Bodnar*, 65 NY2d 65, 489 NYS2d 885, 479 NE2d 230 (1985); see *Karasek v LaJoie*, 92 NY2d 171, 677 NYS2d 265, 699 NE2d 889 (1998); *Perez v Fitzgerald*, 115 AD3d 177, 981 NYS2d 5 (1st Dept 2014). As to special accrual rules for actions involving "foreign objects," and actions involving failure to diagnose cancer and malignant tumors, see this comment, *infra*.

The applicable period of limitations may turn on whether plaintiff's claim sounds in ordinary negligence rather than in professional malpractice. While the statute of limitations applicable to medical, dental and podiatric malpractice is two years and six months, CPLR 214-a, the statutory period governing negligence claims is three years, CPLR 214(4), (5). Whether the claim is one for medical malpractice or ordinary negligence can also affect the schedule that is used for calculating the successful plaintiff's attorney's fee, *Spiegel v Goldfarb*, 66 AD3d

873, 889 NYS2d 45 (2d Dept 2009) (citing Judiciary Law § 474-a; 22 NYCRR 691.20(e)).

A complaint against a non-physician may sound in medical malpractice governed by a two and one-half year statute of limitations, rather than ordinary negligence governed by a three-year statute of limitations, where the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician to a particular patient, *Bleiler v Bodnar*, 65 NY2d 65, 489 NYS2d 885, 479 NE2d 230 (1985); *Wesolowski v St. Francis Hospital*, 175 AD3d 1461, 108 NYS3d 180 (2d Dept 2019); *Perez v Fitzgerald*, 115 AD3d 177, 981 NYS2d 5 (1st Dept 2014); *Pacio v Franklin Hosp.*, 63 AD3d 1130, 882 NYS2d 247 (2d Dept 2009); *Cullinan v Pignataro*, 266 AD2d 807, 698 NYS2d 381 (4th Dept 1999); see *Dupree v Giugliano*, 20 NY3d 921, 958 NYS2d 312, 982 NE2d 74 (2012). When the duty arises from the physician-patient relationship or is substantially related to medical treatment, the breach gives rise to an action sounding in medical malpractice, not simple negligence, *Wesolowski v St. Francis Hospital*, *supra*. The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts, *Wesolowski v St. Francis Hospital*, *supra*; *Holland v Cayuga Medical Center at Ithaca, Inc.*, 195 AD3d 1292 (3d Dept 2021); *Miller by Miller v Albany Medical Center Hosp.*, 95 AD2d 977, 464 NYS2d 297 (3d Dept 1983); *Twitchell v MacKay*, 78 AD2d 125, 434 NYS2d 516 (4th Dept 1980) (citing PJI). In *Karasek v LaJoie*, 92 NY2d 171, 677 NYS2d 265, 699 NE2d 889 (1998), the Court of Appeals rejected the Education Law § 6521 definition of the “practice of medicine” as a basis for deciding whether CPLR 214-a is applicable to services provided by non-physicians. The approach taken by the Court of Appeals in *Karasek* has been characterized as “restrictive,” *Perez v Fitzgerald*, *supra*.

An action alleging malpractice in the provision of mental health services by a psychologist, although stating a valid claim, is not subject to the statute of limitations for medical malpractice, *Karasek v LaJoie*, 92 NY2d 171, 677 NYS2d 265, 699 NE2d 889 (1998). The practice of optometry is not the practice of medicine, and the claims of alleged malpractice by optometrists are governed by the three-year statute of limitations, *Boothe v Weiss*, 107 AD2d 730, 484 NYS2d 598 (2d Dept 1985). In contrast, laboratory services that were performed at the direction of a physician and were a “crucial element of diagnosis and treatment” constituted an “integral part” of rendering medical treatment and were, thus, covered by CPLR 214-a, *Spiegel v Goldfarb*, 66 AD3d 873, 889 NYS2d 45 (2d Dept 2009), as was the application of a heating pad by a physical therapist working in defendant-physicians’ office, *Ryan v Korn*, 57 AD3d 507, 868 NYS2d 735 (2d Dept 2008); see *Meiselman v Fogel*, 50 AD3d 979, 858 NYS2d 200 (2d Dept 2008) (physical therapists, who are professionals licensed under Education Law article 136, covered by

CPLR 214-a for acts bearing substantial relationship to rendition of medical treatment by licensed physician); *Pattavina v DiLorenzo*, 26 AD3d 167, 807 NYS2d 564 (1st Dept 2006) (physical therapy bearing substantial relationship to medical treatment); *Levinson v Health South Manhattan*, 17 AD3d 247, 793 NYS2d 401 (1st Dept 2005) (same); *Wahler v Lockport Physical Therapy*, 275 AD2d 906, 713 NYS2d 405 (4th Dept 2000) (physical therapist's allegedly negligent placement of chair related to use of wall-mounted pulley device); see also *Morales v Carcione*, 48 AD3d 648, 852 NYS2d 343 (2d Dept 2008). Similarly, CPLR 214-a applied to allegedly negligent implementation of a protocol to prevent pressure ulcers that was executed by licensed practical nurses, nursing assistants, patient care assistants, home health aides and nutritionists employed by defendant hospital, where the protocol bore a substantial relationship to the rendition of medical treatment, *Pacio v Franklin Hosp.*, 63 AD3d 1130, 882 NYS2d 247 (2d Dept 2009). In *Foote v Picinich*, 118 AD2d 156, 503 NYS2d 926 (3d Dept 1986), the court held, based on the parties' conflicting submissions, that the question whether a chiropractor's services constituted medical treatment within CPLR 214-a was a question of fact for the jury; but see *Faden v Robbins*, 88 AD2d 631, 450 NYS2d 238 (2d Dept 1982) (pre-Bleiler case holding that chiropractic malpractice not medical malpractice); *Vidra v Shoman*, 59 AD2d 714, 398 NYS2d 377 (2d Dept 1977) (pre-Bleiler case holding that chiropractors do not practice medicine). However, in *Perez v Fitzgerald*, 115 AD3d 177, 981 NYS2d 5 (1st Dept 2014), the court held that "medical malpractice" does not include chiropractic treatment that was not provided at the direction or request of a physician providing medical treatment and that was separate and apart from any medical treatment administered by a physician.

Medical "treatment" includes an independent medical examination performed by a licensed physician at an adverse party's request pursuant to CPLR 3121, *Bazakos v Lewis*, 12 NY3d 631, 883 NYS2d 785, 911 NE2d 847 (2009). In *Bazakos*, the Court held that the CPLR 214-a two-and-a-half-year statute of limitations applies to actions for injuries resulting from a physician's allegedly negligent manipulation of the examinee's body part even though the examinee was not the physician's patient and the relationship did not require the physician to treat the examinee for any medical condition. Medical and dental malpractice actions are not affected by changes in the statute of limitations applicable to exposure to toxic and other substances, see CPLR 214-c(5); Introductory Statement preceding PJI 2:120.

Not every act of misconduct with respect to a patient constitutes medical malpractice, *Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 650 NYS2d 629, 673 NE2d 914 (1996). A claim sounds in medical malpractice when the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician to a particular patient, *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 26 NYS3d 231, 46 NE3d 614 (2015); *Dupree v Giugliano*, 20 NY3d 921, 958 NYS2d 312, 982 NE2d 74 (2012); *Weiner v Lenox Hill Hosp.*, *supra*; *B.F. v Reproductive Medicine Associ-*

ates of New York, LLP, 136 AD3d 73, 22 NYS3d 190 (1st Dept 2015), aff'd, 30 NY3d 608, 69 NYS3d 543, 92 NE3d 766 (2017) (screening of egg donor bears substantial relationship to rendition of medical treatment); *Holland v Cayuga Medical Center at Ithaca, Inc.*, 195 AD3d 1292 (3d Dept 2021) (where nurse erroneously programmed pump that supplied plaintiff's medication, claim sounded in medical malpractice); *Wesolowski v St. Francis Hospital*, 175 AD3d 1461, 108 NYS3d 180 (2d Dept 2019); *Bell ex rel. Todzia v WSNCHS North, Inc.*, 153 AD3d 498, 59 NYS3d 475 (2d Dept 2017) (physician's assessment of patient's supervisory and treatment needs sounds in medical malpractice); *Koster v Davenport*, 142 AD3d 966, 37 NYS3d 323 (2d Dept 2016) (plastic surgeon's use of allegedly wrong suture material in suturing surgical wound sounds in malpractice); *Glasgow v Chou*, 33 AD3d 959, 826 NYS2d 303 (2d Dept 2006) (allowing allograft to become contaminated with bacteria during operative procedure sounds in malpractice); *Levinson v Health South Manhattan*, 17 AD3d 247, 793 NYS2d 401 (1st Dept 2005) (physical therapist's use of electrical stimulation constituted integral part of professional medical treatment); *Toepp v Myers Community Hosp.*, 280 AD2d 921, 721 NYS2d 177 (4th Dept 2001) (doctor's inadvertent use of bandage containing surgical or hypodermic needle while applying cast to plaintiff's foot constituted integral part of medical treatment and, therefore, must be characterized as malpractice); *Payette v Rockefeller University*, 220 AD2d 69, 643 NYS2d 79 (1st Dept 1996); *Rice v Vandenebossche*, 185 AD2d 336, 586 NYS2d 303 (2d Dept 1992) (where plaintiff was burned on forehead by physician's lamp during treatment for forehead laceration, physician's conduct related to medical treatment and constituted medical malpractice). The issue of whether a claim sounds in negligence or medical malpractice reduces to whether medical judgment is required; where the conduct involves a standard established by means of the exercise of medical judgment, the claim is for malpractice, *Martuscello v Jensen*, 134 AD3d 4, 18 NYS3d 463 (3d Dept 2015). When the allegations of the complaint do not focus on negligence in furnishing medical treatment to a patient, but on the hospital's failure in fulfilling a different duty, the claim sounds in negligence, *Weiner v Lenox Hill Hosp.*, *supra*. In a case where the plaintiff alleged that the defendant hospital failed to train its employees to safely restrain patients, the defendant failed to establish that the action sounded in malpractice, where it did not submit evidence that a doctor ordered the decedent to be restrained, *Wesolowski v St. Francis Hospital*, *supra*.

Where a plaintiff's claims are based upon intentional acts of sexual abuse that do not bear a substantial relationship to the rendition of medical care, plaintiff has not set forth a viable cause of action to recover damages for medical malpractice, *Karczewski v Sharpe*, 248 AD2d 679, 670 NYS2d 318 (2d Dept 1998). Such claims are governed by a one year statute of limitations applicable to intentional torts, *id*. However, where defendant-physician prescribed a course of treatment for plaintiff's mental health problems, including medication and counseling, a jury could reasonably conclude that the sexual relationship that developed between plaintiff and defendant was substantially related to

the treatment so as to constitute medical malpractice, *Dupree v Giugliano*, 20 NY3d 921, 958 NYS2d 312, 982 NE2d 74 (2012).

The failure to take proper medical histories constitutes medical malpractice, but the failure to provide competent personnel or to promulgate appropriate emergency room rules is negligence, not malpractice, *Bleiler v Bodnar*, 65 NY2d 65, 489 NYS2d 885, 479 NE2d 230 (1985); but see *Bruno v Gosy*, 48 AD3d 1147, 852 NYS2d 507 (4th Dept 2008) (hospital's alleged failure to provide plaintiff's neurologist with two nurses who regularly assisted him or with another qualified assistant constitutes medical malpractice rather than ordinary negligence). Where plaintiff's complaint asserted a cause of action based upon the alleged negligent creation and implementation of a diet research program and plaintiff underwent procedures as a volunteer in the diet research program, and not as a patient with a medical condition, plaintiff's claim sounded in negligence, *Payette v Rockefeller University*, 220 AD2d 69, 643 NYS2d 79 (1st Dept 1996). In contrast, the failure to follow hospital protocol for preventing "pressure ulcers" bears a substantial relationship to the rendition of medical treatment and is therefore in the category of medical malpractice, *Pacio v Franklin Hosp.*, 63 AD3d 1130, 882 NYS2d 247 (2d Dept 2009).

Allegations challenging a medical facility's assessment of a patient's need for supervision sound in medical malpractice implicating a 2½-year statute of limitations, while allegations relating to a medical facility's general duty to follow a plan of supervision to safeguard patients sound in ordinary negligence implicating a 3-year statute of limitations. *Bell ex rel. Todzia v WSNCHS North, Inc.*, 153 AD3d 498, 59 NYS3d 475 (2d Dept 2017), *Santana v St. Vincent Catholic Medical Center of New York*, 65 AD3d 1119, 886 NYS2d 57 (2d Dept 2009), *Pacio v Franklin Hosp.*, 63 AD3d 1130, 882 NYS2d 247 (2d Dept 2009), see *Noga v Brothers of Mercy Nursing & Rehabilitation Center*, 198 AD3d 1277, 155 NYS3d 503 (4th Dept 2021) (challenges to assessment of patients need for supervision is medical malpractice, challenges to failure to follow care plan and provide wheelchair with seatbelt is ordinary negligence); *Carthon v Buffalo General Hosp. @ Deaconess Skilled Nursing Facility Div.*, 83 AD3d 1404, 921 NYS2d 746 (4th Dept 2011) (assessment of decedent's need for supervision is medical malpractice, failure to carry out physician's directions is ordinary negligence).

There appears to be a significant distinction between claims based upon negligent hiring of medical personnel and negligent supervision and training of such personnel. Negligent hiring of an employee who subsequently commits acts of malpractice is a violation of a general duty to a patient, rather than an integral part of medical treatment, and is subject to the three year statute, *De Leon by De Leon v Hospital of Albert Einstein College of Medicine*, 164 AD2d 743, 566 NYS2d 213 (1st Dept 1991). On the other hand, the adequacy of the supervision, training and treatment requirements of existing personnel has been held to be an integral part of the process of rendering medical treat-

ment and subject to the two year six months period of limitations, *Perkins v Kearney*, 155 AD2d 191, 553 NYS2d 552 (3d Dept 1990); see *Cullinan v Pignataro*, 266 AD2d 807, 698 NYS2d 381 (4th Dept 1999) (plaintiffs' contention that defendant doctor inadequately supervised or trained office personnel who undertook medical treatment does not change gravamen of complaint for malpractice to negligence). Note, however, that when only a claim for negligence is asserted and not a lack of due care in the performance of a contract, the three year statute of limitations applies, see *Ackerman v Price Waterhouse*, 84 NY2d 535, 620 NYS2d 318, 644 NE2d 1009 (1994).

The need for the use of expert evidence is not necessarily determinative in assessing whether an action sounds in malpractice rather than ordinary negligence, *Bazakos v Lewis*, 56 AD3d 15, 864 NYS2d 505 (2d Dept 2008), rev'd on other grounds, 12 NY3d 631, 883 NYS2d 785, 911 NE2d 847 (2009). However, the need for specialized professional knowledge and expert testimony may be an important consideration in some cases, *Lomonaco v United Health Services Hospitals, Inc.*, 16 AD3d 958, 791 NYS2d 737 (3d Dept 2005); *Borrillo v Beekman Downtown Hosp.*, 146 AD2d 734, 537 NYS2d 219 (2d Dept 1989) (failure of hospital to prevent one patient from assaulting another constitutes negligence, not medical malpractice); see *Martuscello v Jensen*, 134 AD3d 4, 18 NYS3d 463 (3d Dept 2015); *Rice v Vandenebossche*, 185 AD2d 336, 586 NYS2d 303 (2d Dept 1992).

Where plaintiff's complaint against a hospital alleged that the hospital failed to adopt and prescribe proper procedures and regulations for the collection of blood to prevent HIV contamination, and the challenged conduct was not linked to the medical treatment of a particular patient, the claim sounded in negligence for statute of limitations purposes, *Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 650 NYS2d 629, 673 NE2d 914 (1996); see *Rodriguez v Saal*, 43 AD3d 272, 841 NYS2d 232 (1st Dept 2007) (claim based on testing and screening procedures for harvesting and providing organs for transplants sounds in negligence not malpractice).

Generally, the negligence of a physician in not ordering that side rails be used on patient's bed is malpractice, not ordinary negligence, *Lenny v Loehmann*, 78 AD2d 813, 433 NYS2d 135 (1st Dept 1980); see also *Bleiler v Bodnar*, 65 NY2d 65, 489 NYS2d 885, 479 NE2d 230 (1985); *Huntley v State*, 62 NY2d 134, 476 NYS2d 99, 464 NE2d 467 (1984); *Miller by Miller v Albany Medical Center Hosp.*, 95 AD2d 977, 464 NYS2d 297 (3d Dept 1983). A claim that a medical provider was negligent, given the nature of the patient's condition, in not preventing the patient from falling off the examining table was clearly related to the treatment provided and, therefore, constituted malpractice, rather than negligence, *Martuscello v Jensen*, 134 AD3d 4, 18 NYS3d 463 (3d Dept 2015); *Chaff v Parkway Hosp.*, 205 AD2d 571, 613 NYS2d 237 (2d Dept 1994); *Stanley v Lebetkin*, 123 AD2d 854, 507 NYS2d 468 (2d Dept 1986). Where an intoxicated patient was placed in a hospital bed with the side rails up and, while left unattended, climbed out and fell,

the patient's action challenged defendants' assessment of the patient's "supervisory and treatment needs," involved an "integral part of the process of rendering medical treatment," and therefore sounded in medical malpractice, rather than negligence, *Scott v Uljanov*, 74 NY2d 673, 543 NYS2d 369, 541 NE2d 398 (1989); see *Boothe by Boothe v Lawrence Hosp.*, 188 AD2d 435, 591 NYS2d 412 (1st Dept 1992) (burns allegedly sustained by hypothermic infant plaintiff after defendant hospital's treatment by nurses' placement of hot water bottles constituted "integral part" of medical treatment); but see *Wesolowski v St. Francis Hospital*, 175 AD3d 1461, 108 NYS3d 180 (2d Dept 2019) (defendant failed to establish action sounded in medical malpractice, where hospital failed to establish that any doctor ordered decedent to be restrained). Similarly, where a defendant's expert testified that the level of supervision and restraint of a psychiatric patient are medical decisions, defendant established prima facie that the action was one for medical malpractice rather than negligence, *Lomonaco v United Health Services Hospitals, Inc.*, 16 AD3d 958, 791 NYS2d 737 (3d Dept 2005).

A claim will not necessarily sound in medical malpractice merely because expert testimony of a medical nature is required to assist the jury in understanding the particulars of a procedure, *Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 650 NYS2d 629, 673 NE2d 914 (1996); *Rodriguez v Saal*, 43 AD3d 272, 841 NYS2d 232 (1st Dept 2007); *Payette v Rockefeller University*, 220 AD2d 69, 643 NYS2d 79 (1st Dept 1996). Thus, where the need for expert testimony arose only because of the technical and scientific nature of the blood collection process, which is beyond the ken of the average juror, the claim did not sound in medical malpractice, *Weiner v Lenox Hill Hosp.*, *supra*. Likewise, where a surgical patient falls after being left alone in a bathroom, the hospital's failure to provide an attendant is negligence, not malpractice. The standard of due care is a matter the jury can determine by applying its common knowledge to the applicable legal principles, *Coursen v New York Hospital-Cornell Medical Center*, 114 AD2d 254, 499 NYS2d 52 (1st Dept 1986); see also *Papa v Brunswick General Hosp.*, 132 AD2d 601, 517 NYS2d 762 (2d Dept 1987); *Zellar v Tompkins Community Hosp., Inc.*, 124 AD2d 287, 508 NYS2d 84 (3d Dept 1986). However, whether the doctor's instruction that the patient should get out of bed and walk around the same day as his surgery is a departure from sound medical practice requires expert testimony to establish a prima facie case and is, therefore, governed by the malpractice period of limitations, *Coursen v New York Hospital-Cornell Medical Center*, *supra*.

B. Tolls And Special Accrual Rules

1. Infancy

The statute is tolled until the infant reaches eighteen or sooner dies, but in no event for more than ten years from the date of accrual, CPLR 208 (which applies to malpractice claims against doctors, dentists, and podiatrists). The 10-year limitation on the infancy toll begins to run at the time of the original negligent act or omission and may not be

tacked to the end of a period of continuous treatment, *Daniel J. by Ann Mary J. v New York City Health and Hospitals Corp.*, 77 NY2d 630, 569 NYS2d 396, 571 NE2d 704 (1991); *Sarjoo v New York City Health and Hospitals Corp.*, 252 AD2d 449, 675 NYS2d 595 (1st Dept 1998); *Ramirez v St. Luke's Hosp. Center*, 188 AD2d 419, 591 NYS2d 836 (1st Dept 1992). Similarly, the CPLR 204(a) toll, which tolls the statute of limitations where the commencement of an action has been stayed by a court or by statutory prohibition, must run concurrently, not consecutively, with the CPLR 208 toll, *Barlow v Harlem Hosp. Center*, 253 AD2d 355, 676 NYS2d 169 (1st Dept 1998). Plaintiff may nevertheless be able to establish that, completely separate and apart from the CPLR 208 toll, an action was timely brought within the statutory period following the completion of a course of continuous treatment, *Sarjoo v New York City Health and Hospitals Corp.*, *supra*. Where plaintiff's medical malpractice cause of action is premised on alleged injurious acts or omissions occurring prior to birth, such cause of action accrues on the date of birth and the ten-year limitation on the infancy toll begins to run at that time, *LaBello v Albany Medical Center Hosp.*, 85 NY2d 701, 628 NYS2d 40, 651 NE2d 908 (1995).

CPLR 208 tolls the statute of limitations for the period of infancy and the toll is not terminated by the acts of a guardian or legal representative in taking steps to pursue the infant's claim, *Henry ex rel. Henry v New York*, 94 NY2d 275, 702 NYS2d 580, 724 NE2d 372 (1999). Therefore, an infant's disability under CPLR 208 does not cease, and the CPLR 208 toll is not terminated, when a parent, through counsel, files timely notices of claim pursuant to General Municipal Law § 50-e on the infant's behalf, *id.* The rationale in *Henry* also applies to a plaintiff under the disability of insanity, *Costello v North Shore University Hosp. Center for Extended Care and Rehabilitation*, 273 AD2d 190, 709 NYS2d 108 (2d Dept 2000).

2. *Insanity*

CPLR 208 also provides that where a person entitled to commence an action is under a disability because of insanity at the time the cause of action accrues, the time for the commencement of the action shall be extended by the period of such disability. The toll afforded by CPLR 208 is available only to those individuals who are unable to protect their legal rights because of an over-all inability to function in society, *McCarthy v Volkswagen of America, Inc.*, 55 NY2d 543, 450 NYS2d 457, 435 NE2d 1072 (1982); *Costello v North Shore University Hosp. Center for Extended Care and Rehabilitation*, 273 AD2d 190, 709 NYS2d 108 (2d Dept 2000); *Smith v Kelley*, 228 AD2d 831, 643 NYS2d 764 (3d Dept 1996). While the disability does not have to be adjudicated prior to the accrual of the cause of action, the toll must be interpreted narrowly, *McCarthy v Volkswagen of America, Inc.*, *supra*; *Lynch v Carlozzi*, 284 AD2d 865, 727 NYS2d 504 (3d Dept 2001). The statute does not provide a toll to an individual claiming a mere post-traumatic neurosis, *McCarthy v Volkswagen of America*, *supra*; see *Karczewicz v New York City Transit Authority*, 244 AD2d 285, 664 NYS2d 300 (1st Dept 1997) (post-traumatic stress disorder). In addition, the toll provided by CPLR

208 should not be read to include the temporary effects of medications administered in the treatment of physical injuries, *Eisenbach v Metropolitan Transp. Authority*, 62 NY2d 973, 479 NYS2d 338, 468 NE2d 293 (1984). CPLR 208 does apply to a plaintiff who was rendered comatose and is confined to a nursing home, *Sanchez v Wolkoff*, 247 AD2d 529, 669 NYS2d 337 (2d Dept 1998) (abrogated on other grounds by, *Costello v North Shore University Hosp. Center for Extended Care and Rehabilitation*, 273 AD2d 190, 709 NYS2d 108 (2d Dept 2000)).

Where an insanity disability exists under CPLR 208, the toll applies until their exists a representative entitled to commence an action on behalf of the disabled person, *Smith v Kelley*, 228 AD2d 831, 643 NYS2d 764 (3d Dept 1996); see *Hernandez v New York City Health and Hospitals Corp.*, 78 NY2d 687, 578 NYS2d 510, 585 NE2d 822 (1991). As with the infancy toll, in a medical, dental or podiatric malpractice case, the statute will not be tolled for more than ten years from the date of accrual of the cause of action, CPLR 208.

Lynch v Carlozzi, 284 AD2d 865, 727 NYS2d 504 (3d Dept 2001), holds that the determination of whether a person is entitled to the CPLR 208 toll for insanity is for the court. The Lynch court determined that plaintiff was entitled to a toll, but then ordered a hearing to determine if he was under the disability of insanity as of the accrual of his cause of action, see also *Smith v Kelley*, 228 AD2d 831, 643 NYS2d 764 (3d Dept 1996); but see Siegel's Practice Review No. 126 (August 2002) (discussing right to jury trial in analogous circumstances).

3. *Continuous Treatment*

When the claim arises out of an act of malpractice committed during a course of continuous treatment which is related to the original condition or complaint, the statute of limitations is tolled until the end of the course of continuous treatment of the patient by the defendant, CPLR 214-a; *Young v New York City Health & Hospitals Corp.*, 91 NY2d 291, 670 NYS2d 169, 693 NE2d 196 (1998); *Allende v New York City Health and Hospitals Corp.*, 90 NY2d 333, 660 NYS2d 695, 683 NE2d 317 (1997); *Massie v Crawford*, 78 NY2d 516, 577 NYS2d 223, 583 NE2d 935 (1991); *McDermott v Torre*, 56 NY2d 399, 452 NYS2d 351, 437 NE2d 1108 (1982); see *Lohnas v Luzi*, 30 NY3d 752, 71 NYS3d 404, 94 NE3d 892 (2018); *Cox v Kingsboro Medical Group*, 88 NY2d 904, 646 NYS2d 659, 669 NE2d 817 (1996); *Ganess by Ganess v New York*, 85 NY2d 733, 628 NYS2d 242, 651 NE2d 1261 (1995); *Cooper v Kaplan*, 78 NY2d 1103, 578 NYS2d 124, 585 NE2d 373 (1991); *Nykor-chuck v Henriques*, 78 NY2d 255, 573 NYS2d 434, 577 NE2d 1026 (1991); *Richardson v Orentreich*, 64 NY2d 896, 487 NYS2d 731, 477 NE2d 210 (1985); see also *Jorge v New York City Health and Hospitals Corp.*, 79 NY2d 905, 581 NYS2d 654, 590 NE2d 239 (1992). Under the continuous treatment doctrine, the limitations period does not begin to run until the end of the course of treatment if three conditions are met: (1) the patient continued to seek, and in fact obtained, an actual course of treatment from the defendant physician during the relevant period;

(2) the course of treatment was for the same conditions or complaints underlying the plaintiff's medical malpractice claim; and (3) the treatment is continuous, *Chvetsova v Family Smile Dental*, 202 AD3d 657, 163 NYS3d 98 (2d Dept 2022); *Wright v Southampton Hospital*, 187 AD3d 1242, 131 NYS3d 216 (2d Dept 2020); *Gomez v Katz*, 61 AD3d 108, 874 NYS2d 161 (2d Dept 2009).

The continuous treatment doctrine rests on the premise that it is in the patient's best interest that an ongoing course of treatment be continued, rather than interrupted by a lawsuit, because "the doctor not only is in a position to identify and correct his or her malpractice, but is best placed to do so," *McDermott v Torre*, 56 NY2d 399, 452 NYS2d 351, 437 NE2d 1108 (1982); see *Young v New York City Health & Hospitals Corp.*, 91 NY2d 291, 670 NYS2d 169, 693 NE2d 196 (1998); *Nykorchuck v Henriques*, 78 NY2d 255, 573 NYS2d 434, 577 NE2d 1026 (1991). Then too, courts recognize that the doctor-patient relationship is marked by continuing trust and confidence and that the patient should not be put to the disadvantage of questioning the doctor's skill in the midst of treatment, since the commencement of litigation during ongoing treatment necessarily interrupts the course of treatment itself, *Chvetsova v Family Smile Dental*, 202 AD3d 657, 163 NYS3d 98 (2d Dept 2022); *Wright v Southampton Hospital*, 187 AD3d 1242, 131 NYS3d 216 (2d Dept 2020); *Gomez v Katz*, 61 AD3d 108, 874 NYS2d 161 (2d Dept 2009). For the application of the continuous treatment doctrine to a legal malpractice action, see *Shumsky v Eisenstein*, 96 NY2d 164, 726 NYS2d 365, 750 NE2d 67 (2001); *Greene v Greene*, 56 NY2d 86, 451 NYS2d 46, 436 NE2d 496 (1982); *Borgia v New York*, 12 NY2d 151, 237 NYS2d 319, 187 NE2d 777 (1962), *aff'd*, 15 NY2d 665, 255 NYS2d 878, 204 NE2d 207 (1964); PJI 2:152. Plaintiff has the burden of demonstrating that the continuous treatment doctrine applies to toll the statute of limitations against a particular defendant, *Siegel v Wank*, 183 AD2d 158, 589 NYS2d 934 (3d Dept 1992); *Pierre-Louis v Hwa*, 182 AD2d 55, 587 NYS2d 17 (2d Dept 1992); *Blythe by Blythe v New York*, 119 AD2d 615, 501 NYS2d 69 (2d Dept 1986).

There is a division in authority as to whether the continuous treatment toll applies to a derivative claim, such as a parent's claim for the loss of services of a child. The First Department has held that the continuous treatment toll is personal to the patient and does not extend the time within which to bring a derivative claim, *Richardson v New York City Health and Hospitals Corp.*, 191 AD2d 376, 595 NYS2d 419 (1st Dept 1993). On the other hand, the Third Department has held that the same policy considerations that underlie the continuous treatment doctrine (avoiding the premature termination of the doctor-patient relationship by the initiation of a lawsuit) require the application of the doctrine to derivative claims, *Miller v Rivard*, 180 AD2d 331, 585 NYS2d 523 (3d Dept 1992). While the Second Department originally held that the continuous treatment doctrine did not apply to derivative claims, it has since changed its position and followed the approach taken by the Third Department in *Miller v Rivard*, *supra*; see *Collum v New York City Health & Hospitals Corp.*, 244 AD2d 380, 664 NYS2d 96 (2d Dept

1997); *Parker v Jankunas*, 227 AD2d 537, 642 NYS2d 959 (2d Dept 1996); *Cappelluti v Skolnick*, 207 AD2d 763, 616 NYS2d 398 (2d Dept 1994), declining to follow *Allison v Booth Memorial Medical Center*, 155 AD2d 497, 547 NYS2d 359 (2d Dept 1989) and *Dunaway v Staten Island Hosp.*, 122 AD2d 775, 505 NYS2d 661 (2d Dept 1986).

CPLR 214-a refines the continuous treatment toll by providing that “the term ‘continuous treatment’ shall not include examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient’s condition,” see *Charalambakis v New York*, 46 NY2d 785, 413 NYS2d 912, 386 NE2d 823 (1978); *Cassara v Larchmont-Mamaroneck Eye Care Group*, 194 AD2d 708, 600 NYS2d 107 (2d Dept 1993); *Swartz v Karlan*, 107 AD2d 801, 484 NYS2d 635 (2d Dept 1985). The term does include “a timely return visit instigated by the patient to complain about and seek treatment for a matter related to the initial treatment,” *McDermott v Torre*, 56 NY2d 399, 452 NYS2d 351, 437 NE2d 1108 (1982); see *Bellamy v Baron*, 191 AD3d 1447, 141 NYS3d 818 (4th Dept 2021); *Melup v Morrissey*, 3 AD3d 391, 771 NYS2d 8 (1st Dept 2004); *Stahl v Smud*, 210 AD2d 770, 620 NYS2d 534 (3d Dept 1994). The fact that defendant doctor did not actually treat plaintiff during surgical follow up visits is not dispositive if the doctor was monitoring the progress of plaintiff’s post surgical healing, *Ramirez v Friedman*, 287 AD2d 376, 731 NYS2d 445 (1st Dept 2001). Fact questions often arise as to whether the physician patient contacts were inter-related or were “discrete and complete,” *Davis v New York*, 38 NY2d 257, 260, 379 NYS2d 721, 342 NE2d 516 (1975); *Edmonds v Getchonis*, 150 AD2d 879, 541 NYS2d 250 (3d Dept 1989); *De Peralta v Presbyterian Hosp.*, 121 AD2d 346, 503 NYS2d 788 (1st Dept 1986). The plaintiff bears the burden of establishing a nexus between the subsequent events and the prior treatment, *Grellet v New York*, 118 AD2d 141, 504 NYS2d 671 (2d Dept 1986); *Weinblatt v Lydia Hall Hosp.*, 105 AD2d 781, 481 NYS2d 727 (2d Dept 1984); *Connell v Hayden*, 83 AD2d 30, 443 NYS2d 383 (2d Dept 1981); see *Borgia v New York*, 12 NY2d 151, 237 NYS2d 319, 187 NE2d 777 (1962), *aff’d*, 15 NY2d 665, 255 NYS2d 878, 204 NE2d 207 (1964).

Richardson v Orentreich, 64 NY2d 896, 487 NYS2d 731, 477 NE2d 210 (1985), held that the course of “continuous treatment” extended to the date of the patient’s last scheduled appointment with the defendant doctor, even though the patient did not keep that appointment. The Court of Appeals explained that “a patient remains under the ‘continuous treatment or care’ of a physician between the time of the last visit and the next scheduled one where the latter’s purpose is to administer ongoing corrective efforts for the same or a related condition,” *id.* It further explained that “[r]egardless of the absence of physical or personal contact between them in the interim, where the physician and patient reasonably intend the patient’s uninterrupted reliance upon the physician’s observation, directions, concern, and responsibility for overseeing the patient’s progress, the requirement for continuous care and treatment for the purpose of the Statute of Limitations is certainly satisfied,” *id.*

Where a patient commences treatment with a new physician and

cancels a future appointment with the former physician, the course of continuous treatment will end, at the latest, when the patient commences treatment with the new physician, *Allen v Blum*, 196 AD2d 624, 601 NYS2d 350 (2d Dept 1993); see *McInnis v Block*, 268 AD2d 509, 702 NYS2d 358 (2d Dept 2000). The treatment with the new physician, however, must be for the same condition for which defendant was treating plaintiff, *Melup v Morrissey*, 3 AD3d 391, 771 NYS2d 8 (1st Dept 2004); see *Rudolph v Jerry Lynn, D.D.S., P.C.*, 16 AD3d 261, 792 NYS2d 410 (1st Dept 2005). On the other hand, a patient's consultation with another physician for the same condition does not necessarily establish the loss of continuing trust and confidence in defendant physician that would negate application of the continuous treatment doctrine, *Piro v Macura*, 58 AD3d 707, 871 NYS2d 725 (2d Dept 2009); see *Gomez v Katz*, 61 AD3d 108, 874 NYS2d 161 (2d Dept 2009).

A patient's act of consulting with an attorney to explore the patient's legal options does not, in itself, terminate the course of treatment, *Guarino v Sharzer*, 281 AD2d 188, 721 NYS2d 631 (1st Dept 2001). However, the filing of a notice of intention to file a claim clearly severs any continuing relationship of trust and ends any tolling of the statute of limitations under the continuous-treatment doctrine, *O'Connor v State*, 15 AD3d 827, 790 NYS2d 569 (3d Dept 2005); *Toxey v State*, 279 AD2d 927, 719 NYS2d 765 (3d Dept 2001).

Richardson does not apply, and continuous treatment will not be found, where the doctor instructs the patient to return for a follow-up visit but the patient fails to make an appointment, *Bellmund v Beth Israel Hosp.*, 131 AD2d 796, 517 NYS2d 161 (2d Dept 1987). In addition, continuous treatment will not be found where plaintiff failed to show that both the patient and doctor "explicitly anticipated" that the doctor would continue to treat the patient, *Allende v New York City Health and Hospitals Corp.*, 90 NY2d 333, 660 NYS2d 695, 683 NE2d 317 (1997) (while doctors at hospital expected plaintiff to return, there was no evidence that plaintiff intended to return); *Cox v Kingsboro Medical Group*, 88 NY2d 904, 646 NYS2d 659, 669 NE2d 817 (1996); see *Lohnas v Luzi*, 30 NY3d 752, 71 NYS3d 404, 94 NE3d 892 (2018). Continuous treatment may be found where a physician has a continuing relationship with the patient and is prescribing and refilling prescriptions, see *Murray v Charap*, 150 AD3d 752, 54 NYS3d 28 (2d Dept 2017); *Stilloe v Contini*, 190 AD2d 419, 599 NYS2d 194 (3d Dept 1993) (plaintiff had continuing relationship with defendants so that treatment occurred on each date prescription was received); *Siegel v Wank*, 183 AD2d 158, 589 NYS2d 934 (3d Dept 1992). Where a doctor merely evaluates a plaintiff's condition for the purpose of reporting her status to the Workers' Compensation Board, the continuous treatment doctrine does not apply, *Brecka v Dolan*, 191 AD2d 862, 594 NYS2d 467 (3d Dept 1993).

The "continuing trust and confidence" which underlies the "continuous treatment doctrine," *Coyne v Bersani*, 61 NY2d 939, 940, 474 NYS2d 970, 463 NE2d 371 (1984), does not necessarily come to an end upon a

patient's last personal visit with his or her physician, see *McDermott v Torre*, 56 NY2d 399, 452 NYS2d 351, 437 NE2d 1108 (1982). Continuous treatment may exist when further treatment is explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during that last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past, *Cox v Kingsboro Medical Group*, 88 NY2d 904, 646 NYS2d 659, 669 NE2d 817 (1996); *Davis v New York*, 38 NY2d 257, 379 NYS2d 721, 342 NE2d 516 (1975); see *Hillary v Gerstein*, 178 AD3d 674, 114 NYS3d 440 (2d Dept 2019). Thus a patient remains under the "continuous treatment or care" of a physician between the time of the last visit and the next scheduled one where the latter's purpose is to administer ongoing corrective efforts for the same or a related condition. It is not always possible to know at the conclusion of one visit with a physician whether a further visit to the physician may become necessary for the same condition within a reasonable time thereafter, *Lohnas v Luzi*, 140 AD3d 1717, 33 NYS3d 637 (4th Dept 2016) *aff'd*, 30 NY3d 752, 71 NYS3d 404, 94 NE3d 892 (2018); *Gomez v Katz*, 61 AD3d 108, 874 NYS2d 161 (2d Dept 2009). The absence of an agreed-upon scheduled appointment made during the last visit is not fatal to the application of the continuous treatment doctrine, *Lohnas v Luzi*, *supra*; *Gomez v Katz*, *supra*. Regardless of the absence of physical or personal contact between them in the interim, where the physician and patient reasonably intend the patient's uninterrupted reliance upon the physician's observation, directions, concern, and responsibility for overseeing the patient's progress, the requirement for continuous care and treatment for the purpose of the Statute of Limitations is certainly satisfied, see *Lohnas v Luzi*, *supra*. Although "uninterrupted reliance," as discussed in *Lohnas v Luzi*, *supra*, is sufficient to establish the applicability of the continuous treatment toll, it is not necessary for the plaintiff to demonstrate that level of reliance in order for the toll to apply, *Bellamy v Baron*, 191 AD3d 1447, 141 NYS3d 818 (4th Dept 2021). Therefore, the ordering of tests by a physician evidenced an expectation that the doctor patient relationship would encompass a review of the tests and advising plaintiff of the results, *Lawyer v Albany Medical Center Hosp. Inc.*, 246 AD2d 800, 668 NYS2d 244 (3d Dept 1998). On the other hand, where the parties scheduled a further appointment, and the defendant claimed that he later cancelled the appointment but the cancellation did not occur, there was an issue of fact as to the applicability of the continuous treatment doctrine, *Hillary v Gerstein*, *supra*.

Because the purpose of the continuous treatment doctrine is to protect a patient from having to choose between commencing an action and continuing to receive treatment from the physician, the determination as to whether continuous treatment exists must focus on whether there is continuing trust in the physician on the part of the patient, *Young v New York City Health & Hospitals Corp.*, 91 NY2d 291, 670 NYS2d 169, 693 NE2d 196 (1998); *Rizk v Cohen*, 73 NY2d 98, 538 NYS2d 229, 535 NE2d 282 (1989); see *Massie v Crawford*, 78 NY2d 516, 577 NYS2d 223, 583 NE2d 935 (1991); *Gomez v Katz*, 61 AD3d 108, 874

NYS2d 161 (2d Dept 2009); see also *Cooper v Kaplan*, 78 NY2d 1103, 578 NYS2d 124, 585 NE2d 373 (1991); *Branigan by Branigan v DeBrovner*, 197 AD2d 270, 612 NYS2d 119 (1st Dept 1994) (continuous treatment for pre-natal care extends to the time of birth and encompasses the myriad, diverse procedures and tests appropriate to carrying a child to term and delivery); *Miller v Rivard*, 180 AD2d 331, 585 NYS2d 523 (3d Dept 1992) (continuous treatment in connection with vasectomy does not end until completion of postoperative procedures of fertility testing and notification to patient of final test results); *Patterson v Minehan*, 180 AD2d 241, 584 NYS2d 929 (3d Dept 1992). In *Plummer ex rel. Heron v New York City Health and Hospitals Corp.*, 98 NY2d 263, 746 NYS2d 647, 774 NE2d 712 (2002), the Court declined to apply the continuous treatment doctrine because plaintiffs failed to keep numerous scheduled appointments, plaintiffs intended to relocate and both parties objectively manifested an understanding that defendant's treatment of the patient would not continue after the relocation.

The failure to treat a condition may well be negligence, but the continuing failure to make a correct diagnosis, without more, does not constitute a course of treatment for the condition, *Young v New York City Health & Hospitals Corp.*, 91 NY2d 291, 670 NYS2d 169, 693 NE2d 196 (1998); *Nykorchuck v Henriques*, 78 NY2d 255, 573 NYS2d 434, 577 NE2d 1026 (1991); *Marrone v Klein*, 33 AD3d 546, 823 NYS2d 371 (1st Dept 2006); *Shiffman v Harris*, 280 AD2d 752, 720 NYS2d 262 (3d Dept 2001); *Casale v Hena*, 270 AD2d 680, 704 NYS2d 361 (3d Dept 2000); *Iazzetta v Vicenzi*, 200 AD2d 209, 613 NYS2d 750 (3d Dept 1994); but see *Stahl v Smud*, 210 AD2d 770, 620 NYS2d 534 (3d Dept 1994) (continuous treatment tolled plaintiff's claim where plaintiff complained to defendant and sought treatment for problem during several postpartum appointments, but never received treatment for her condition).

The critical inquiry in each case is not whether the defendant failed to make a diagnosis or undertake a course of treatment during the relevant period of limitation, but rather whether the plaintiff continued to seek treatment from the defendant for the same conditions or complaints giving rise to the plaintiff's claim of malpractice, or related conditions or complaints, during the relevant period of limitation, *Couch v Suffolk*, 296 AD2d 194, 746 NYS2d 187 (2d Dept 2002); see *Lohnas v Luzi*, 30 NY3d 752, 71 NYS3d 404, 94 NE3d 892 (2018); *Chestnut v Bobb-McKoy*, 94 AD3d 659, 943 NYS2d 461 (1st Dept 2012); *Melup v Morrissey*, 3 AD3d 391, 771 NYS2d 8 (1st Dept 2004); *Hein v Cornwall Hosp.*, 302 AD2d 170, 753 NYS2d 71 (1st Dept 2003) (continuous treatment tolled plaintiff's claim where plaintiff presented with symptoms of abdominal obstruction and defendant undertook course of treatment specifically directed at symptoms, yet failed to diagnose obstruction); *Marun v Coleburn*, 291 AD2d 340, 739 NYS2d 22 (1st Dept 2002) (continuous treatment tolled plaintiff's claim where plaintiff presented with symptoms of urological ailment and defendant undertook course of treatment specifically directed at symptoms, yet failed to diagnose urethral cancer until three years after plaintiff's initial visit). Thus,

where the physician misdiagnosed plaintiff's condition but there was no contact between physician and patient for more than three years, the fact that the physician later contacted the patient to inquire as to the patient's condition did not support a finding of continuous treatment, *Rizk v Cohen*, 73 NY2d 98, 538 NYS2d 229, 535 NE2d 282 (1989); see *Casale v Hena*, 270 AD2d 680, 704 NYS2d 361 (3d Dept 2000) (fact that doctor suggested plaintiff have mammogram five years in future, standing alone, is insufficient to establish relationship constituting continuous treatment).

The passive failure to disclose the existence of a condition warranting further medical treatment is not a continuing wrong, *Neumann v Nassau County Medical Center*, 210 AD2d 301, 619 NYS2d 721 (2d Dept 1994). Although routine diagnostic examinations, even when conducted repeatedly over a period of time, do not constitute a course of treatment, diagnostic examinations which are specifically prescribed as part of ongoing care for an existing medical condition may be sufficient to invoke the continuous treatment toll, *Goldschmidt v Cortland Regional Medical Center, Inc.*, 190 AD3d 1212, 141 NYS3d 522 (3d Dept 2021); *Mandel v Herrmann*, 271 AD2d 661, 706 NYS2d 195 (2d Dept 2000); *Kurland v McElwain*, 231 AD2d 685, 647 NYS2d 542 (2d Dept 1996); see *Melup v Morrissey*, 3 AD3d 391, 771 NYS2d 8 (1st Dept 2004). Although successive comparisons of scans, standing alone, does not render treatment by a radiologist continuous, where the scans are regularly scheduled as part of ongoing care and relied upon by the patient, the treatment may be found to be continuous, *Goldschmidt v Cortland Regional Medical Center, Inc.*, *supra*. Similarly, repeated administration of medication and testing undertaken to treat and diagnose a symptom is a course of professional activity deserving of the application of the doctrine of continuous treatment, *Hein v Cornwall Hosp.*, 302 AD2d 170, 753 NYS2d 71 (1st Dept 2003). "The fact that the defendants did not initially diagnose plaintiff's [condition] does not detract from the conclusion that defendants treated plaintiff continuously over the relevant period of time for symptoms ultimately traceable to the . . . condition whose alleged misdiagnosis and alleged mistreatment have given rise to this action," *id.*

The continuous treatment doctrine was held inapplicable where a gynecologist inserted an intrauterine birth control device (IUD) in plaintiff and, despite periodic gynecological examination, did not treat plaintiff with respect to the IUD until more than 14 years later, *Massie v Crawford*, 78 NY2d 516, 577 NYS2d 223, 583 NE2d 935 (1991). Although plaintiff had returned to the gynecologist periodically during the intervening years, such visits were for routine examinations, not for therapy to correct a medical condition, and could not serve as basis for applying the continuous treatment doctrine since plaintiff could have interrupted the services and switched physicians at any time without jeopardizing her health, 78 NY2d at 519–520; see *Ganess by Ganess v New York*, 85 NY2d 733, 628 NYS2d 242, 651 NE2d 1261 (1995); *Patten v Hamburg OB/GYN Group, P.C.*, 50 AD3d 1624, 856 NYS2d 748 (4th Dept 2008) (plaintiff suffering from metastatic breast cancer could not

invoke continuous treatment doctrine against physicians who treated her for menopause symptoms even though estrogen cream they prescribed may have been related to cancerous condition); *Konstantikis v Kassapidis*, 196 AD2d 858, 602 NYS2d 67 (2d Dept 1993). However, *Massie* was distinguished in *Wojnarowski v Cherry*, 184 AD2d 353, 584 NYS2d 836 (1st Dept 1992), where plaintiff, in the years following insertion of an IUD, periodically informed defendant of, and sought treatment for, a recurring abnormal discharge, backaches and prolonged menstrual periods and was misinformed on the nature of the IUD. Under these circumstances the court held that there was an issue of fact as to whether visits constituted continuous treatment. The same conclusion was reached where plaintiff, who visited defendant doctor annually or semi-annually for breast examinations, claimed that defendant physician was monitoring a fibrocystic breast condition, as evidenced by relevant notations in the examination reports, and that she was aware of the monitoring, *Prinz-Schwartz v Levitan*, 17 AD3d 175, 796 NYS2d 36 (1st Dept 2005); see *Cherise v Braff*, 50 AD3d 724, 855 NYS2d 233 (2d Dept 2008).

Likewise, the continuous treatment rule was held inapplicable where the physician, after failing during an initial visit to diagnose decedent's lung cancer, treated decedent again 14 months later for a respiratory condition, *Ross v Community General Hosp. of Sullivan County*, 150 AD2d 838, 541 NYS2d 246 (3d Dept 1989). Even if both visits had an underlying relationship to the undiagnosed lung cancer, the two visits were discrete transactions, in which decedent was diagnosed as having a temporary illness of finite existence and was discharged, *id.* Thus, where defendant administered a lengthy and continuous program of post-surgical treatment to plaintiff from the date of the alleged medical malpractice, and defendant denied that the treatment related to the condition, there was a question of fact as to whether the action was timely commenced under the doctrine of continuous treatment, *Patterson v Minehan*, 180 AD2d 241, 584 NYS2d 929 (3d Dept 1992).

Mail and telephone contacts may not extend the period of continuous treatment, *Davis v New York*, 38 NY2d 257, 379 NYS2d 721, 342 NE2d 516 (1975); see *De Peralta v Presbyterian Hosp.*, 121 AD2d 346, 503 NYS2d 788 (1st Dept 1986); *Etra v Matta*, 61 NY2d 455, 474 NYS2d 687, 463 NE2d 3 (1984); but see *Ward v Kaufman*, 120 AD2d 929, 502 NYS2d 883 (4th Dept 1986) (holding that telephone call by doctor to patient to schedule appointment showed continuance of professional relationship and operated to extend the period); nor does the fact that the patient, without doctor's orders, refilled a prescription for years after discontinuing treatment, *Bernardo v Ayerest Laboratories*, 99 AD2d 430, 470 NYS2d 395 (1st Dept 1984). Regardless of any physical or personal contact between a doctor and a patient, where they intend the relationship to continue and the patient continues to rely on the doctor for renewal of prescriptions, the requirement for continuous care and treatment for the purpose of the statute of limitations is satisfied, *Stilloe v Contini*, 190 AD2d 419, 599 NYS2d 194 (3d Dept 1993).

An action for medical malpractice must be commenced within two years and six months of the date of accrual, CPLR 214-a. Where the cause of action is not commenced within this period, the plaintiff has the burden of proving *prima facie* that the continuous treatment doctrine is applicable, *Cox v Kingsboro Medical Group*, 88 NY2d 904, 646 NYS2d 659, 669 NE2d 817 (1996); *Siegel v Wank*, 183 AD2d 158, 589 NYS2d 934 (3d Dept 1992); *Werner v Kwee*, 148 AD2d 701, 539 NYS2d 449 (2d Dept 1989); *Grellet v New York*, 118 AD2d 141, 504 NYS2d 671 (2d Dept 1986). The fact that more than two years and six months have elapsed between visits does not, *per se*, preclude the application of the continuous treatment rule, *Lohnas v Luzi*, 30 NY3d 752, 71 NYS3d 404, 94 NE3d 892 (2018); *Massie v Crawford*, 78 NY2d 516, 577 NYS2d 223, 583 NE2d 935 (1991); see *Rizk v Cohen*, 73 NY2d 98, 538 NYS2d 229, 535 NE2d 282 (1989); *Curcio v Ippolito*, 63 NY2d 967, 483 NYS2d 989, 473 NE2d 239 (1984); *Lohnas v Luzi*, 140 AD3d 1717, 33 NYS3d 637 (4th Dept 2016); *Shumway v DeLaus*, 152 AD2d 951, 543 NYS2d 777 (4th Dept 1989). To the extent certain cases have held otherwise, the Court of Appeals has explicitly stated that they should not be followed, *Lohnas v Luzi*, *supra*.

Intermittent visits, mostly for unrelated conditions and illnesses, do not constitute continuous treatment, *Young v New York City Health & Hospitals Corp.*, 91 NY2d 291, 670 NYS2d 169, 693 NE2d 196 (1998); *Nykorchuck v Henriques*, 78 NY2d 255, 573 NYS2d 434, 577 NE2d 1026 (1991); *Marrone v Klein*, 33 AD3d 546, 823 NYS2d 371 (1st Dept 2006) (continuous treatment doctrine inapplicable where root canal and crown work performed over seven-year period involved isolated and discrete conditions); *Kasten v Blaustein*, 214 AD2d 539, 625 NYS2d 44 (2d Dept 1995); *Roberts v New York*, 188 AD2d 337, 591 NYS2d 16 (1st Dept 1992) (discrete examinations for unrelated illnesses do not establish a continuous course of treatment); *Grellet v New York*, 118 AD2d 141, 504 NYS2d 671 (2d Dept 1986); there must be continuity of treatment and identity of condition treated, *Traphagen v Robert Packer Hosp.*, 270 AD2d 777, 704 NYS2d 374 (3d Dept 2000) (return visits scheduled by clinic's surgeon to monitor plaintiff's breast condition constituted continuing treatment); *Delaney v Muscillo*, 138 AD2d 258, 525 NYS2d 221 (1st Dept 1988); see *Gordon v Magun*, 83 NY2d 881, 612 NYS2d 373, 634 NE2d 974 (1994) (where first consultation was undertaken for a purpose wholly independent of the second and involved neither ongoing provision of services by defendant nor the expectation of future contact between the patient and the physician after discharge, the continuous treatment doctrine was inapplicable); *Angelhow v Chahfe*, 174 AD3d 1285, 104 NYS3d 498 (4th Dept 2019) (continuous treatment not applicable where plaintiff did not treat with defendant following 2005 procedure and presented no evidence of anticipated further treatment at that time; plaintiff did not return to see defendant until 2010 and surgical procedures performed by defendant in 2005 and 2010 were discrete and complete events); *Meier v Huntington Hosp. Ass'n*, 186 AD2d 637, 588 NYS2d 421 (2d Dept 1992) (where prior diagnostic services performed by hospital were discrete and complete, subsequent admission of plaintiff to the hospital, as directed by her at-

tending physician, was a renewal rather than a continuation of the hospital-patient relationship); *Landau v Salzman*, 129 AD2d 774, 514 NYS2d 767 (2d Dept 1987) (routine dental examinations not part of course of continuous dental treatment). Thus, where the physician treated plaintiff for endometriosis over a period of years, during which she received occasional breast examinations, those examinations were “discrete and complete” and were not part of continuous treatment for the unrelated endometriosis condition, *Nykorchuck v Henriques*, 78 NY2d 255, 573 NYS2d 434, 577 NE2d 1026 (1991); see *Salquerro v State*, 212 AD2d 827, 622 NYS2d 147 (3d Dept 1995) (doctor’s failure to prescribe course of physical therapy and discrete examinations of finger not part of continuous treatment). In contrast, a question of fact existed as to the applicability of the continuous-treatment doctrine where there was some evidence that plaintiff was being monitored because of irregularities in her breast and conflicting evidence that her 12 years of visits were nothing more than routine diagnostic examinations, *Prinz-Schwartz v Levitan*, 17 AD3d 175, 796 NYS2d 36 (1st Dept 2005).

The fact that the condition allegedly overlooked in the first examination was the condition ultimately diagnosed in a later, unrelated, examination does not bring the case within the continuing treatment doctrine even if a correct diagnosis would have lead to an ongoing course of treatment, *Gordon v Magun*, 83 NY2d 881, 612 NYS2d 373, 634 NE2d 974 (1994); *Sweet v Austin*, 226 AD2d 942, 641 NYS2d 165 (3d Dept 1996). However, the fact that a doctor did not diagnose a plaintiff’s condition is not a basis to find that the doctor was not treating the patient for that condition if the patient’s symptoms were such as to indicate the condition’s existence and the doctor still failed to properly diagnose the condition, *Lewis v Rutkovsky*, 153 AD3d 450, 58 NYS3d 391 (1st Dept 2017); *Hein v Cornwall Hosp.*, 302 AD2d 170, 753 NYS2d 71 (1st Dept 2003); *Couch v Suffolk*, 296 AD2d 194, 746 NYS2d 187 (2d Dept 2002); *Marun v Coleburn*, 291 AD2d 340, 739 NYS2d 22 (1st Dept 2002); *Bonanza v Raj*, 280 AD2d 948, 721 NYS2d 204 (4th Dept 2001); *Hill v Manhattan West Medical Group—H.I.P., P.C.*, 242 AD2d 255, 661 NYS2d 229 (1st Dept 1997). Additionally, the monitoring of an abnormality to ascertain the presence or onset of a disease or condition may constitute treatment for purposes of tolling the statute of limitations, *Cherise v Braff*, 50 AD3d 724, 855 NYS2d 233 (2d Dept 2008); *Oksman v New York*, 271 AD2d 213, 705 NYS2d 360 (1st Dept 2000).

Where the evidence showed that plaintiff, during her visits to defendant in the years following insertion of a Dalkon shield IUD, had periodically informed defendant of, and sought treatment for, a recurring abnormal vaginal discharge, backaches and prolonged menstrual periods which commenced at the time the IUD was inserted and were allegedly related to the IUD, issues of fact existed as to whether the visits constituted continuous treatment related to maintenance of the IUD, *Wojnarowski v Cherry*, 184 AD2d 353, 584 NYS2d 836 (1st Dept 1992). The court distinguished *Massie v Crawford*, 78 NY2d 516, 577 NYS2d 223, 583 NE2d 935 (1991), on the grounds that the period that

had elapsed between plaintiff's last previous visit and the visit when diagnosis of the condition was made was less than two years and six months and that plaintiff was incorrectly informed, in response to a specific inquiry, that the IUD was not a Dalkon shield, about which she had concerns due to negative publicity. In *Garcia-Alano v Guttman Breast Diagnostic Institute, Inc.*, 188 AD2d 262, 590 NYS2d 453 (1st Dept 1992), the court held that mammographies and breast examinations occurring over approximately nineteen months fell within continuous treatment doctrine as a matter of law where visits and examinations all related to patient's breasts and the growth and discoloration initially discovered, *Oksman v New York*, 271 AD2d 213, 705 NYS2d 360 (1st Dept 2000) (agreement between physician and patient to continue observation of suspicious breast tissue may constitute sufficient monitoring to support finding of continuous treatment). In *Mandel v Herrmann*, 271 AD2d 661, 706 NYS2d 195 (2d Dept 2000), the court held that there was a question of fact as to whether defendant doctor monitored the decedent's lung condition after receiving a tomography report which revealed abnormalities suggestive of a pulmonary malignancy and whether his two year, seven month relationship with the patient amounted to continuous treatment of the same original condition or complaint.

Whether a return visit was timely for purposes of determining the question of continuous treatment may present issues of fact for resolution by the jury, see *Lohnas v Luzi*, 30 NY3d 752, 71 NYS3d 404, 94 NE3d 892 (2018); *Cox v Kingsboro Medical Group*, 88 NY2d 904, 646 NYS2d 659, 669 NE2d 817 (1996) (referral by primary care physician to surgical group insufficient to attribute treatment by primary physician to member of surgical group); *Lohnas v Luzi*, 30 NY3d 752, 71 NYS3d 404, 94 NE3d 892 (2018); *Chvetsova v Family Smile Dental*, 202 AD3d 657, 163 NYS3d 98 (2d Dept 2022) (issue of fact whether plaintiff timely initiated return visit to complain and seek corrective treatment from physician such that physician's purported discharge of patient did not sever course of treatment); *Edmonds v Getchonis*, 150 AD2d 879, 541 NYS2d 250 (3d Dept 1989).

Continuous treatment by one physician will generally not be imputed to another unless there is a principal-agent or employer-employee relationship between the two physicians, see *Allende v New York City Health and Hospitals Corp.*, 90 NY2d 333, 660 NYS2d 695, 683 NE2d 317 (1997); *Meath v Mishrick*, 68 NY2d 992, 510 NYS2d 560, 503 NE2d 115 (1986); *Lawyer v Albany Medical Center Hosp. Inc.*, 246 AD2d 800, 668 NYS2d 244 (3d Dept 1998) (imputation proper where plaintiff was treated by both physicians during course of pregnancy, both physicians shared office space and were both employed by same employer during period in issue); *Sweet v Austin*, 226 AD2d 942, 641 NYS2d 165 (3d Dept 1996); *Pierre-Louis v Hwa*, 182 AD2d 55, 587 NYS2d 17 (2d Dept 1992); *Diller v Munchmeyer*, 130 AD2d 868, 515 NYS2d 642 (3d Dept 1987); *De Peralta v Presbyterian Hosp.*, 121 AD2d 346, 503 NYS2d 788 (1st Dept 1986) (referral to physical therapist by physician does not extend continuous treatment); *Evra v Hillcrest*

General Hosp., 111 AD2d 740, 490 NYS2d 234 (2d Dept 1985). Where the first physician sold his practice to a second physician, the second physician's subsequent treatment of plaintiff for the same medical condition cannot be imputed to the first physician for statute of limitations purposes, *Guida v Trichter*, 188 AD2d 636, 591 NYS2d 520 (2d Dept 1992). Continuous treatment may be found where health care providers consult on a regular basis throughout the course of treatment, *Siegel v Wank*, 183 AD2d 158, 589 NYS2d 934 (3d Dept 1992).

Where a patient treated at a group practice was considered a patient of the group rather than of a particular physician, the continuous treatment doctrine tolled the statute of limitations during the patient's treatment by any physician employed by the group for the patient's original condition or complaint, *Mendrzycki v Cricchio*, 58 AD3d 171, 868 NYS2d 107 (2d Dept 2008). The Second Department has held that where a medical group is involved and plaintiff is a patient of the group, rather than of an individual member, the continuous treatment of the patient for the condition by one group member may extend the statute of limitations as against all physicians who were members of the group at the time of the initial malpractice, even if they have subsequently left the group, *Matthews v Barrau*, 150 AD3d 836, 55 NYS3d 282 (2d Dept 2017); *Watkins v Fromm*, 108 AD2d 233, 488 NYS2d 768 (2d Dept 1985); see *Pollicino v Roemer and Featherstonhaugh P.C.*, 260 AD2d 52, 699 NYS2d 238 (3d Dept 1999); *Polokoff v Palmer*, 190 AD2d 897, 593 NYS2d 129 (3d Dept 1993); *Ryan v Kountz*, 114 AD2d 358, 493 NYS2d 878 (2d Dept 1985). The Fourth Department appears to have taken a contrary view, holding that continuous treatment by a professional medical service corporation did not extend the statute of limitations as to a member who retired during the treatment period, *Bradt v Hamel*, 144 AD2d 921, 534 NYS2d 242 (4th Dept 1988); see *Patten v Hamburg OB/GYN Group, P.C.*, 50 AD3d 1624, 856 NYS2d 748 (4th Dept 2008); *Janisch v Howland*, 163 AD2d 821, 558 NYS2d 355 (4th Dept 1990).

The course of continuous treatment by a physician is not imputed to an independent pathologist or radiologist who had a single contact with plaintiff and had neither a continuing relationship with the patient nor an agency relationship with the treating physician, *Meath v Mishrick*, 120 AD2d 327, 501 NYS2d 350 (1st Dept 1986), *aff'd*, 68 NY2d 992, 510 NYS2d 560, 503 NE2d 115 (1986); *Damsker v Berger*, 123 AD2d 343, 506 NYS2d 354 (2d Dept 1986); *Modzelewski v Kingsbrook Jewish Medical Center*, 120 AD2d 498, 501 NYS2d 699 (2d Dept 1986); see *Meier v Huntington Hosp. Ass'n*, 186 AD2d 637, 588 NYS2d 421 (2d Dept 1992). Where a radiologist whose contract is with the hospital performs successive procedures over a period of time at the request of the patient's private physician, to whom the results are directly communicated, the performance of each test is a separate act and does not constitute continuous treatment by the radiologist, *Noack v Symenow*, 132 AD2d 965, 518 NYS2d 495 (4th Dept 1987); see *Solomonik v Elahi*, 282 AD2d 734, 725 NYS2d 49 (2d Dept 2001). However, where periodic diagnostic examinations that are explicitly anticipated by physi-

cian and patient alike are prescribed as part of an ongoing scheme of care for a plaintiff's existing condition, the continuous treatment toll may apply to a diagnostic laboratory, *Elkin v Goodman*, 285 AD2d 484, 727 NYS2d 158 (2d Dept 2001); see also *Waring v Kingston Diagnostic Radiology Center*, 13 AD3d 1024, 786 NYS2d 832 (3d Dept 2004) (recognizing that continuous treatment doctrine may apply where periodic examinations are prescribed as part of ongoing care for existing condition, but declining to apply doctrine where prescription for such examinations ceased more than 2½ years before action commenced). This principle does not apply where the treating physician made discrete referrals for each diagnostic radiological examination, neither the patient nor the radiological laboratory anticipated that it would provide the patient with ongoing treatment and the patient's physician, after conducting his own analysis, determined the appropriate course of treatment, *Elkin v Goodman*, 24 AD3d 717, 808 NYS2d 405 (2d Dept 2005).

When a doctor refers a patient to a specialist and subsequently reviews and evaluates the specialist's findings, the patient remains under the care and treatment of the doctor until the time that the doctor receives the results of the specialist's examination, *Keith v Schulman*, 265 AD2d 380, 696 NYS2d 514 (2d Dept 1999); see *Venson v Daun*, 277 AD2d 53, 717 NYS2d 6 (1st Dept 2000). The common ownership of two hospitals by the New York City Health and Hospitals Corporation, standing alone, is insufficient to create a relevant relationship between the two entities such that continuous treatment by one hospital will be imputed to the other, *Allende v New York City Health and Hospitals Corp.*, 90 NY2d 333, 660 NYS2d 695, 683 NE2d 317 (1997).

The course of continuous treatment by a surgeon is not extended by the post-operative care provided by the patient's family physician, *Florio v Cook*, 65 AD2d 548, 408 NYS2d 949 (2d Dept 1978), *aff'd* for reasons in AD opinion, 48 NY2d 792, 423 NYS2d 917, 399 NE2d 947 (1979), nor is it extended by the fact that the original tortfeasor-physician has supplied the patient's medical history to the succeeding doctors, *Coyne v Bersani*, 94 AD2d 961, 463 NYS2d 967 (4th Dept 1983), *aff'd*, 61 NY2d 939, 474 NYS2d 970, 463 NE2d 371 (1984), nor is it extended by a conference between defendant and a successor doctor, outside of the patient's presence, with respect to the medical history and background, *Alverio v New York Eye & Ear Infirmary*, 123 AD2d 568, 507 NYS2d 8 (1st Dept 1986), nor does post-hospitalization treatment by a private physician who has a hospital affiliation extend the period of limitations against the hospital at which the plaintiff was treated, *Ruane v Niagara Falls Memorial Medical Center*, 60 NY2d 908, 470 NYS2d 576, 458 NE2d 1253 (1983); *Weinblatt v Lydia Hall Hosp.*, 105 AD2d 781, 481 NYS2d 727 (2d Dept 1984).

Whether "continuous treatment by an institution" can toll the running of the statute of limitations against an individual doctor was addressed in *Pierre-Louis v Hwa*, 182 AD2d 55, 587 NYS2d 17 (2d Dept 1992). In *Pierre-Louis*, the Second Department held that the subsequent treatment of a patient by a physician affiliated with the hospital, but in

a different unit, does not extend the course of continuous treatment by a prior treating physician employee of the same hospital. In *Plummer v New York City Health and Hospitals Corp.*, 285 AD2d 374, 729 NYS2d 70 (1st Dept 2001), rev'd on other grounds, 98 NY2d 263, 746 NYS2d 647, 774 NE2d 712 (2002), the First Department apparently adopted the continuous treatment by an institution theory. The Court of Appeals reversed because the course of the infant's treatment was not truly continuous, but expressly declined to reach the question of whether continuous treatment by an institution is a cognizable theory.

Where the claim is prescribing of improper medication by a specialist and the patient's general physician periodically renews the prescription without consulting the specialist, in the absence of a continued relationship between the physicians, the continued renewals are insufficient to extend the course of continuous treatment as far as the specialist is concerned, *Swartz v Karlan*, 107 AD2d 801, 484 NYS2d 635 (2d Dept 1985).

Generally, a laboratory neither has a continuing relationship with the patient nor, as an independent contractor, does it act as an agent for the doctor. Therefore, the policy underlying the continuous treatment doctrine generally will not apply to an independent laboratory, *McDermott v Torre*, 56 NY2d 399, 452 NYS2d 351, 437 NE2d 1108 (1982); *Yanello v Radiological Health Service, P.C.*, 110 AD2d 834, 488 NYS2d 83 (2d Dept 1985); see *Noack v Symenow*, 132 AD2d 965, 518 NYS2d 495 (4th Dept 1987) (independent radiologist). The continuous treatment of a patient by a surgeon does not generally extend the statute of limitations applicable to a pathologist who was neither an agent nor an employee of the surgeon, *Meath v Mishrick*, 68 NY2d 992, 510 NYS2d 560, 503 NE2d 115 (1986). While *Fonda v Paulsen*, 46 AD2d 540, 363 NYS2d 841 (3d Dept 1975), indicated that the statute could be extended as to a laboratory when it should have reasonably expected that its work would be relied upon by others and the physician committed no subsequent negligence, *Meath* held that *Fonda v Paulsen*, and cases relying on it, should not be followed.

Continuation of care of the patient by a second hospital does not ordinarily extend the period of treatment by the first, *De Sainz v New York*, 101 AD2d 746, 475 NYS2d 67 (1st Dept 1984), unless the relationship between the two hospitals is such that referral of the patient by one to the other was meant by the hospitals to be one unbroken course of treatment, *Cotto v New York*, 99 AD2d 748, 471 NYS2d 865 (2d Dept 1984). Similarly, it has been said that there was "continuous treatment" when the patient received care in several hospitals under the aegis of the New York City Health and Hospitals Corporation, *Marabello v New York*, 99 AD2d 133, 472 NYS2d 933 (2d Dept 1984). Note, however, that the *De Sainz*, *Marabello* and *Cotto* cases refer to the "continuous treatment" rule as postponing the "accrual" of the claim, see *Borgia v New York*, 12 NY2d 151, 237 NYS2d 319, 187 NE2d 777 (1962), aff'd, 15 NY2d 665, 255 NYS2d 878, 204 NE2d 207 (1964). In *McDermott v Torre*, 56 NY2d 399, 452 NYS2d 351, 437 NE2d 1108

(1982), and *Greene v Greene*, 56 NY2d 86, 451 NYS2d 46, 436 NE2d 496 (1982), the Court held that the continuous treatment doctrine does not postpone accrual of the claim but merely postpones the running of the statute of limitations until the end of the relationship between patient and defendant, see *Daniel J. by Ann Mary J. v New York City Health and Hospitals Corp.*, 77 NY2d 630, 569 NYS2d 396, 571 NE2d 704 (1991); *Branigan by Branigan v DeBrovner*, 197 AD2d 270, 612 NYS2d 119 (1st Dept 1994); see also CPLR 214-a; *Richardson v Orentreich*, 64 NY2d 896, 487 NYS2d 731, 477 NE2d 210 (1985); *Farrell*, Civil Practice, 33 Syracuse L Rev 31, 40–42. Therefore, the ten year period provided for in the infancy toll in CPLR 208 runs from the date of malpractice and not from the completion of a course of continuous treatment, *Daniel J. by Ann Mary J. v New York City Health and Hospitals Corp.*, supra; *Sarjoo v New York City Health and Hospitals Corp.*, 252 AD2d 449, 675 NYS2d 595 (1st Dept 1998). Plaintiff may nevertheless be able to establish that, completely separate and apart from the CPLR 208 toll, an action was timely brought within the statutory period following the completion of a course of continuous treatment, *Sarjoo v New York City Health and Hospitals Corp.*, supra.

The continuous treatment doctrine, if otherwise applicable to the facts of a case, applies to the time in which to serve a Notice of Claim under General Municipal Law § 50-e, *Plummer ex rel. Heron v New York City Health and Hospitals Corp.*, 98 NY2d 263, 746 NYS2d 647, 774 NE2d 712 (2002); *Young v New York City Health & Hospitals Corp.*, 91 NY2d 291, 670 NYS2d 169, 693 NE2d 196 (1998); *Allende v New York City Health and Hospitals Corp.*, 90 NY2d 333, 660 NYS2d 695, 683 NE2d 317 (1997); *Collum v New York City Health & Hospitals Corp.*, 244 AD2d 380, 664 NYS2d 96 (2d Dept 1997). Therefore, plaintiff may serve a notice of claim within ninety days of cessation of the treatment that gives rise to the injury, *Sarjoo v New York City Health and Hospitals Corp.*, 252 AD2d 449, 675 NYS2d 595 (1st Dept 1998).

For an excellent discussion of the continuous treatment rule, and its parallel in legal malpractice actions, i.e., the continuous representation doctrine, see *Shumsky v Eisenstein*, 96 NY2d 164, 726 NYS2d 365, 750 NE2d 67 (2001).

Where the nature of plaintiff's continuing visits to defendant raises a question as to whether the continuous treatment doctrine may be applied, see *Bartolo v Monaco*, 202 AD2d 535, 609 NYS2d 275 (2d Dept 1994), PJI 2:149 should be given.

4. *Discovery of Condition—Foreign Objects*

In 1969, the Court of Appeals created a limited exception to the general rule, concluding that where a foreign object has negligently been left in the patient's body, the statute of limitations does not run until the patient could have reasonably discovered the medical malpractice, *Flanagan v Mount Eden General Hospital*, 24 NY2d 427, 301 NYS2d 23, 248 NE2d 871 (1969). The Legislature essentially codified

Flanagan in 1975; CPLR 214-a was enacted, providing, in relevant part, “that where the action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier.”

“[T]he term ‘foreign object’ shall not include a chemical compound, fixation device or prosthetic aid or device,” CPLR 214-a; see *Walton v Strong Memorial Hosp.*, 25 NY3d 554, 14 NYS3d 757, 35 NE3d 827 (2015) (fixation device is one that performs securing or supporting function during or after surgery; fragment of monitoring catheter is foreign object); *Rodriguez v Manhattan Medical Group, P.C.*, 77 NY2d 217, 566 NYS2d 193, 567 NE2d 235 (1990) and *Moschetti v Saxe*, 199 AD2d 79, 605 NYS2d 47 (1st Dept 1993) (intrauterine device [IUD] is fixation device, not foreign object); *Ruane v Niagara Falls Memorial Medical Center*, 91 AD2d 1176, 459 NYS2d 147 (4th Dept 1983), *aff’d*, 60 NY2d 908, 470 NYS2d 576, 458 NE2d 1253 (1983) (burr hole cover not a foreign object); *Gaylord v Gentile*, 187 AD3d 569, 130 NYS3d 677 (1st Dept 2020) (stent placed in plaintiff’s ureter as part of kidney stone removal procedure was fixation device and not foreign object); *Provenzano v Becall*, 138 AD2d 585, 526 NYS2d 167 (2d Dept 1988) (silver point wires intentionally implanted in plaintiff’s mouth are not foreign objects for purpose of dental malpractice statute of limitations); *Szajna v Rand*, 131 AD2d 840, 517 NYS2d 201 (2d Dept 1987) (an intramedullary nail is a fixation device and not a foreign object). A misplaced suture is not a “foreign object” and is more readily characterized as a “fixation device” excluded from the benefit of the discovery rule, *Rockefeller v Moront*, 81 NY2d 560, 601 NYS2d 86, 618 NE2d 119 (1993); *Lombardi v DeLuca*, 130 AD2d 632, 515 NYS2d 811 (2d Dept 1987), *aff’d*, 71 NY2d 838, 527 NYS2d 757, 522 NE2d 1055 (1988); *Mitchell v Abitol*, 130 AD2d 633, 515 NYS2d 810 (2d Dept 1987); but see *Vinciguerra v Jameson*, 153 AD2d 452, 551 NYS2d 691 (3d Dept 1990) (hemoclip or suture permanently placed during surgery on an organ not normally associated with the medical procedure being performed may be considered a foreign object). Thus, the discovery rule is not to be extended and does not apply to an internal injury not readily ascertainable, *Beary v Rye*, 44 NY2d 398, 406 NYS2d 9, 377 NE2d 453 (1978); *Brush v Olivo*, 81 AD2d 852, 438 NYS2d 857 (2d Dept 1981); *McKnight v New York City Health & Hospitals Corp.*, 70 AD2d 587, 416 NYS2d 63 (2d Dept 1979), or if the condition is the result of the introduction of the object by an event unrelated to medical treatment, see *Garrett v Brooklyn Hosp.*, 99 AD2d 541, 471 NYS2d 621 (2d Dept 1984) (fragment of broken glass); *Soto v Greenpoint Hospital*, 76 AD2d 928, 429 NYS2d 723 (2d Dept 1980) (object lodged in patient’s throat); *Famulare v Huntington Hospital*, 78 AD2d 547, 432 NYS2d 33 (2d Dept 1980) (broken tooth).

The discovery rule is inapplicable to misdiagnosis, *Rockefeller v Moront*, 81 NY2d 560, 601 NYS2d 86, 618 NE2d 119 (1993); *Leace v Kohlroser*, 151 AD3d 707, 55 NYS3d 434 (2d Dept 2017); *Schiffman v Hospital for Joint Diseases*, 36 AD2d 31, 319 NYS2d 674 (2d Dept 1971); see *Walton v Strong Memorial Hosp.*, 25 NY3d 554, 14 NYS3d 757, 35 NE3d 827 (2015).

In determining whether an object which remains in the patient constitutes a “foreign object,” a court should consider the nature of the material implanted in a patient, as well as its function, *Walton v Strong Memorial Hosp.*, 25 NY3d 554, 14 NYS3d 757, 35 NE3d 827 (2015); *Rockefeller v Moront*, 81 NY2d 560, 601 NYS2d 86, 618 NE2d 119 (1993). Objects such as surgical clamps, surgical drains, scalpels and sponges are introduced into the patient’s body to serve a temporary medical function for the duration of the surgery and are normally intended to be removed after the procedure’s completion, see *Walton v Strong Memorial Hosp.*, *supra* (fragment of catheter); *Carmona v Lutheran Medical Center*, 238 AD2d 535, 656 NYS2d 693 (2d Dept 1997) (surgical drain). When such “foreign objects” are left behind, no assessment of the medical professional’s expert judgment or discretion in failing to remove them is necessary, *Rockefeller v Moront*, *supra*; see *Walton v Strong Memorial Hosp.*, *supra*. By contrast, items which are placed in the patient with the intention that they will remain to serve some continuing treatment purpose generally constitute “fixation devices,” *Rockefeller v Moront*, *supra*; *LaBarbera v New York Eye and Ear Infirmary*, 91 NY2d 207, 668 NYS2d 546, 691 NE2d 617 (1998). The continued inadvertent presence of a fixation device that was meant to be temporary does not transform it into a foreign object, *Gaylord v Gentile*, 187 AD3d 569, 130 NYS3d 677 (1st Dept 2020) (stent in ureter); *Knox v St. Luke’s Hosp.*, 140 AD3d 501, 32 NYS3d 488 (1st Dept 2016); see *Walton v Strong Memorial Hosp.*, *supra* (every fixation device is intentionally placed for continuing treatment purpose, but not every object that is intentionally placed for continuing treatment purpose is fixation device; key remains nature of materials and their intended function).

Rodriguez v Manhattan Medical Group, P.C., 77 NY2d 217, 566 NYS2d 193, 567 NE2d 235 (1990) held that a fixation device originally implanted in the patient’s body for a specific treatment purpose is not transformed into a “foreign object” when a physician retained to remove the device negligently fails to do so, see *Walton v Strong Memorial Hosp.*, 25 NY3d 554, 14 NYS3d 757, 35 NE3d 827 (2015); *Kornegay v Mt. Sinai Medical Center*, 199 AD2d 69, 604 NYS2d 116 (1st Dept 1993). *Rodriguez* characterizes the nature of such claim as involving misdiagnosis, a category to which the benefits of the foreign object discovery rule have not been extended. *Rodriguez* expressly overrules prior cases which had held that an intrauterine device becomes a foreign object when it ceases to perform and no longer belongs in the body. Analogizing to *Rodriguez*, the Court of Appeals has ruled that a claim based on a medical professional’s deliberate implantation of a “fixation device” in the wrong place does not transform it into a foreign object, *Rockefeller v Moront*, 81 NY2d 560, 601 NYS2d 86, 618 NE2d 119 (1993). Such a claim is more readily characterized as one predicated on negligent medical treatment, which, like misdiagnosis, is a category of malpractice not covered by the “foreign object” rule, *Rockefeller v Moront*, *supra*. Likewise, placement of a plastic stent in the plaintiff’s nose for postsurgery healing purposes is not covered by the “foreign object” rule, *LaBarbera v New York Eye and Ear Infirmary*, 91 NY2d 207, 668 NYS2d 546, 691 NE2d 617 (1998).

A claim against a physician arising out of a malfunctioning prosthetic device accrues upon implantation of the device, not upon injury to the patient, *Goldsmith v Howmedica, Inc.*, 67 NY2d 120, 500 NYS2d 640, 491 NE2d 1097 (1986); *Szakalski v Aubry*, 148 AD2d 972, 539 NYS2d 207 (4th Dept 1989); *Wancewicz v Hickey*, 148 AD2d 773, 538 NYS2d 354 (3d Dept 1989). In a strict products liability action against the manufacturer, the statute of limitations, however, would be measured from the time of injury, *Martin v Edwards Laboratories, Div. of American Hosp. Supply Corp.*, 60 NY2d 417, 469 NYS2d 923, 457 NE2d 1150 (1983); see Introductory Statement preceding PJI 2:120.

In *Walton v Strong Memorial Hosp.*, 25 NY3d 554, 14 NYS3d 757, 35 NE3d 827 (2015), the Court reviewed its significant precedents relating to the foreign object rule, including *LaBarbera v New York Eye and Ear Infirmary*, 91 NY2d 207, 668 NYS2d 546, 691 NE2d 617 (1998); *Rockefeller v Moront*, 81 NY2d 560, 601 NYS2d 86, 618 NE2d 119 (1993); *Rodriguez v Manhattan Medical Group, P.C.*, 77 NY2d 217, 566 NYS2d 193, 567 NE2d 235 (1990); *Beary v Rye*, 44 NY2d 398, 406 NYS2d 9, 377 NE2d 453 (1978); and *Flanagan v Mount Eden General Hospital*, 24 NY2d 427, 301 NYS2d 23, 248 NE2d 871 (1969), and laid out the following general principles applicable to the rule: (1) tangible items (clamps, scalpels, sponges, etc.) introduced into a patient's body solely to carry out or facilitate a surgical procedure are foreign objects if left behind; (2) the alleged failure to timely remove a fixation device does not transform it into a foreign object; (3) a fixation device does not become a foreign object if inserted in the wrong place in the body; (4) the failure to timely remove a fixation device is generally akin to misdiagnosis, and improper placement of a fixation device is most readily characterized as negligent medical treatment; (5) the discovery exception for foreign objects should not be extended beyond the confines of *Flanagan*; and (6) chemical compounds, fixation devices and prosthetic aids or devices are never to be classified as foreign objects.

5. *Failure to Diagnose Cancer or Malignant Tumor*

In January 2018, CPLR 214-a was amended by the passing of Lavern's Law (S6800/A8516, effective January 31, 2018) which changed the accrual date of a cause of action involving a failure to diagnose cancer or a malignant tumor to two years and six months from the later of either (i) when the person knows or reasonably should have known of such alleged negligent act or omission and knows or reasonably should have known that such alleged negligent act or omission has caused injury, subject to an outside limit of seven years, or (ii) the date of the last treatment where there is continuous treatment for such injury, illness or condition, CPLR 214-a; CPLR 203(g). CPLR 214-a also provides for the revival of certain time-barred medical malpractice claims, *Ford v Lee*, 203 AD3d 456, 164 NYS3d 592 (1st Dept 2022); *Mula v Sasson*, 181 AD3d 686, 121 NYS3d 143 (2d Dept 2020). Where the claim, based upon the negligent failure to diagnose cancer or a malignant tumor occurring within 10 months prior to the effective date of CPLR 214-a, became time-barred under any statute of limitations then in effect, such

action or claim may be commenced within six months of the effective date of the act, *Ford v Lee*, supra (revival provision did not avail plaintiff); *Mula v Sasson*, supra (revival provision availed plaintiff).

C. Informed Consent

Under Public Health Law § 2805-d(1), “lack of informed consent” is defined as “the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation.” Public Health Law § 2805-d(2) places causes of action for lack of informed consent within the category of medical, dental or podiatric malpractice claims, see *Karlin v IVF America, Inc.*, 93 NY2d 282, 690 NYS2d 495, 712 NE2d 662 (1999). Consequently, such causes of action are governed by the two-and-a-half-year limitations period in CPLR 214-a, see *Rigie v Goldman*, 148 AD2d 23, 543 NYS2d 983 (2d Dept 1989). To be distinguished are cases in which defendant medical practitioner performed a procedure on plaintiff with no consent at all, *Messina v Matarasso*, 284 AD2d 32, 729 NYS2d 4 (1st Dept 2001); see *McCarthy v Shah*, 162 AD3d 1727, 80 NYS3d 778 (4th Dept 2018); *Wiesenthal v Weinberg*, 17 AD3d 270, 793 NYS2d 422 (1st Dept 2005); *Cerilli v Kezis*, 16 AD3d 363, 790 NYS2d 714 (2d Dept 2005), or the treatment went beyond the scope of the patient’s consent, *Cross v Colen*, 6 AD3d 306, 775 NYS2d 307 (1st Dept 2004). Such situations are properly categorized as batteries and are subject to the one-year statute of limitation, *Young v Sethi*, 188 AD3d 1339, 134 NYS3d 571 (3d Dept 2020); *Messina v Matarasso*, supra; see CPLR 215; see also *McCarthy v Shah*, supra. For a charge on a medical practitioner’s duty adequately to inform the patient, see PJI 2:150A.

D. Circumventing the Statute of Limitations

1. Fraud and Estoppel

Efforts to state a fraud and deceit claim and thus circumvent the malpractice statute of limitations have often met defeat, see *Golia v Health Ins. Plan of Greater New York*, 6 AD2d 884, 177 NYS2d 550 (2d Dept 1958), *aff’d*, 7 NY2d 931, 197 NYS2d 735, 165 NE2d 578 (1960); *Ranalli v Breed*, 277 NY 630, 14 NE2d 195 (1938); *McIvor v Di Benedetto*, 121 AD2d 519, 503 NYS2d 836 (2d Dept 1986); *Kleinman v Lack*, 6 AD2d 1046, 179 NYS2d 194 (2d Dept 1958). However, *Simcusi v Saeli*, 44 NY2d 442, 406 NYS2d 259, 377 NE2d 713 (1978), held that intentional concealment of an act of malpractice by the defendant and misrepresentation as to its cure creates an estoppel preventing the defendant from asserting the statute of limitations, provided that the malpractice action was commenced within a reasonable time after discovery of the malpractice, see *Kremen v Brower*, 16 AD3d 156, 793 NYS2d 3 (1st Dept 2005); *DeMatteo v Sanford A. Ratzan, M.D., P.C.*, 225 AD2d 579, 638 NYS2d 780 (2d Dept 1996); *Harkin v Culleton*, 156

AD2d 19, 554 NYS2d 478 (1st Dept 1990); *Cassidy v Nassau*, 84 AD2d 742, 443 NYS2d 742 (2d Dept 1981) (county estopped from asserting untimeliness of notice of claim because delay was caused by its conduct in withholding data from plaintiff). *Simcusi* has been applied to estop an assertion of the statute of limitations defense where the defendant's insurer's actions, combined with defendant's own failure to properly file a certificate of doing business as required by General Business Law § 130, perpetuated plaintiff's erroneous impression that she had served the proper party and prevented the timely commencement of her action against defendant, *Hart v Marriott Intern., Inc.*, 304 AD2d 1057, 758 NYS2d 435 (3d Dept 2003). The estoppel doctrine is available only where the alleged misrepresentations occurred after the negligent acts or omissions that form the basis of the malpractice claim, *Safer v Long Beach Medical Center*, 39 AD3d 257, 833 NYS2d 68 (1st Dept 2007). Thus, defendant physician's failure to communicate the results of a patient's X-ray cannot be the predicate for both the malpractice claim and the application of the estoppel doctrine, *id.*

Where a physician learns, within the period of limitations, facts which would support a claim of malpractice and fails, though requested, to disclose those facts to the patient, an inference may be drawn that the physician intentionally concealed the facts in order to forestall timely commencement of a malpractice action, giving rise to an estoppel from asserting a statute of limitations defense, *Ross v Community General Hosp. of Sullivan County*, 150 AD2d 838, 541 NYS2d 246 (3d Dept 1989); see *Edmonds v Getchonis*, 150 AD2d 879, 541 NYS2d 250 (3d Dept 1989); see also *Drysdale v New York*, 182 AD2d 566, 582 NYS2d 716 (1st Dept 1992) (intentional concealment of patient's death and failure to inquire as to whereabouts of patient's relatives held to give rise to an estoppel). After discovery of the facts supporting the estoppel, plaintiff must sue at the latest, within the statutory period measured from discovery, *Curcio v Ippolito*, 97 AD2d 497, 467 NYS2d 692 (2d Dept 1983), *aff'd*, 63 NY2d 967, 483 NYS2d 989, 473 NE2d 239 (1984). Further, where the defendant's conduct ceased well before the statute of limitations expired and plaintiff's counsel had access to relevant records and opinions well before the limitations period ran, defendant will not be estopped from pleading a limitations defense, *DeMille v Franklin General Hosp.*, 107 AD2d 656, 484 NYS2d 596 (2d Dept 1985), *aff'd*, 65 NY2d 728, 492 NYS2d 29, 481 NE2d 569 (1985). The doctrine of equitable estoppel will not be applied where, despite defendant's intentional concealment of malpractice, plaintiff had enough information to place him or her under a duty to make inquiry before the applicable statutory period expired, *McIvor v Di Benedetto*, 121 AD2d 519, 503 NYS2d 836 (2d Dept 1986); see *Putter v North Shore University Hosp.*, 7 NY3d 548, 825 NYS2d 435, 858 NE2d 1140 (2006); *Ramsay v Mary Imogene Bassett Hosp.*, 113 AD2d 149, 495 NYS2d 282 (3d Dept 1985).

A plaintiff wishing to take advantage of the estoppel must plead the facts constituting fraud or fraudulent concealment, see CPLR 3016; *Florio v Cook*, 48 NY2d 792, 423 NYS2d 917, 399 NE2d 947 (1979);

Immediate v St. John's Queens Hospital, 48 NY2d 671, 421 NYS2d 875, 397 NE2d 385 (1979); *Kuhlman v Westfield Memorial Hosp., Inc.*, 212 AD2d 1007, 623 NYS2d 682 (4th Dept 1995); compare *Renda v Frazer*, 75 AD2d 490, 496, 429 NYS2d 944, 948 (4th Dept 1980) (“[P]laintiffs proffering this type of claim should plead affirmatively any fraud or misrepresentation on which to base their claim of equitable estoppel . . .”); with *Arbutina v Bahuleyan*, 75 AD2d 84, 428 NYS2d 99 (4th Dept 1980) (whether defendant intended to deceive is immaterial. Estoppel may also be invoked if defendants unreasonably delay in delivering medical records, and the delay prevented timely commencement of the action); see also *Farrell*, *Civil Practice*, 32 *Syracuse L Rev* 75, 97–98. The defendant’s mere silence is insufficient to invoke the equitable estoppel doctrine, *Ross v Louise Wise Services, Inc.*, 8 NY3d 478, 836 NYS2d 509, 868 NE2d 189 (2007); *McDonald v Edelman & Edelman, P.C.*, 118 AD3d 562, 988 NYS2d 591 (1st Dept 2014).

Simcusi v Saeli, 44 NY2d 442, 406 NYS2d 259, 377 NE2d 713 (1978), also holds that the intentional concealment of an act of malpractice by the defendant doctor gives rise to a separate cause of action for fraud, provided the plaintiff can establish the elements of the tort of deceit, see *Howe v Ampil*, 185 AD2d 520, 585 NYS2d 869 (3d Dept 1992); *Coopersmith v Gold*, 172 AD2d 982, 568 NYS2d 250 (3d Dept 1991); PJI 2:151C, *infra*; see also CPLR 203(f), 213(8) (the six year statute of limitations governing fraud actions, which *Simcusi* holds applicable to the post-malpractice claim). Where fraudulent acts by a physician employed by a municipal hospital are separate from, and occur after, the claimed malpractice, plaintiff’s cause of action against the physician based on fraud is not subject to the notice of claim provisions of the General Municipal Law, *Kramer v New York*, 157 AD2d 404, 556 NYS2d 287 (1st Dept 1990).

2. *Contract Theory of Liability*

A contract theory of action will not support a claim for personal injury damages arising out of malpractice, see *Mamunes v Williamsburg General Hosp.*, 23 NY2d 757, 296 NYS2d 954, 244 NE2d 468 (1968); *Calhoun v Gale*, 29 AD2d 766, 287 NYS2d 710 (2d Dept 1968), *aff’d*, 23 NY2d 756, 296 NYS2d 953, 244 NE2d 468 (1968); *Monroe v Long Island College Hospital*, 84 AD2d 576, 443 NYS2d 433 (2d Dept 1981); *Liebler v Our Lady of Victory Hospital*, 43 AD2d 898, 351 NYS2d 480 (4th Dept 1974); see also *Lillich*, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 *Cornell LQ* 339, 352. The availability of the six-year breach-of-contract cause of action in certain limited circumstances distinguishes medical malpractice cases from other cases involving professional malpractice, which are governed by the three-year limitations period in CPLR 214 regardless of whether the claim is cast in tort or breach of contract, see CPLR 214(6). If the action is based upon an express contract to produce a particular result, or follow a particular method, or produce a result within a specified time, the six year contract limitation period also applies, CPLR 213, see *Sears, Roebuck & Co. v Enco Associates, Inc.*, 43 NY2d 389, 401 NYS2d 767, 372 NE2d 555 (1977); PJI 4:35.

A contract action may be maintained against a doctor or hospital only if it is based upon breach of an express special promise to effect a cure or accomplish some specific result, *Robins v Finestone*, 308 NY 543, 127 NE2d 330 (1955); *Scalisi v New York University Medical Center*, 24 AD3d 145, 805 NYS2d 62 (1st Dept 2005); *Nicoleau v Brookhaven Memorial Hosp. Center*, 201 AD2d 544, 607 NYS2d 703 (2d Dept 1994); *Winegrad v Jacobs*, 171 AD2d 525, 567 NYS2d 249 (1st Dept 1991); *Bobrick v Bravstein*, 116 AD2d 682, 497 NYS2d 749 (2d Dept 1986); see *Catapano v Winthrop University Hosp.*, 19 AD3d 355, 796 NYS2d 158 (2d Dept 2005); *Monroe v Long Island College Hospital*, 84 AD2d 576, 443 NYS2d 433 (2d Dept 1981). Thus, a contract claim based on a specific promise to deliver a baby without administration of blood was upheld in *Nicoleau v Brookhaven Memorial Hosp. Center*, 201 AD2d 544, 607 NYS2d 703 (2d Dept 1994); see also *Keating v Perkins*, 250 App Div 9, 293 NYS 197 (1st Dept 1937) (upholding breach-of-contract claim based on dentist's "special contract" to remove every part of patient's extracted teeth). In contrast, an allegation that defendant physician promised to report the results of a colonoscopy was held insufficient to support a breach-of-contract cause of action where the claim was based on the physician's having reported the wrong results, *Varone v Delman*, 272 AD2d 320, 707 NYS2d 879 (2d Dept 2000); see also *Scalisi v New York University Medical Center*, *supra* (plaintiff's claim that defendant hospital orally promised that in vitro fertilization procedure would not result in birth of autistic child dismissed where plaintiff signed written contract agreeing that hospital did not assume responsibility for child's hereditary medical problems). Where a contract claim based on a special promise to accomplish a specific result has been properly alleged, only those damages that are suited to a breach of contract action are available, *Robins v Finestone*, *supra*. Plaintiff may not recover for tort damages such as pain and suffering, *id.* The provisions of the "Patient's Bill of Rights" do not constitute an express promise or special agreement with the patient that would support a breach of contract cause of action, *Catapano v Winthrop University Hosp.*, *supra*.

II. Malpractice by Attorneys, Architects and Other Professionals

The statute of limitations on malpractice claims, other than medical, dental and podiatric malpractice, see discussion *supra*, is three years under CPLR 214(6), *McCoy v Feinman*, 99 NY2d 295, 755 NYS2d 693, 785 NE2d 714 (2002); *Karasek v LaJoie*, 92 NY2d 171, 677 NYS2d 265, 699 NE2d 889 (1998) (psychologist); *Ackerman v Price Waterhouse*, 84 NY2d 535, 620 NYS2d 318, 644 NE2d 1009 (1994). As the Court of Appeals observed in *Matter of R.M. Kliment & Frances Halsband, Architects* (McKinsey & Co., Inc.), 3 NY3d 538, 788 NYS2d 648, 821 NE2d 952 (2004), a 1996 amendment to CPLR 214(6) effectively overrules a substantial body of caselaw holding that a six year statute of limitations governs malpractice actions against professionals such as attorneys, see *Santulli v Englert, Reilly & McHugh, P.C.*, 78 NY2d 700, 579 NYS2d 324, 586 NE2d 1014 (1992), architects, see *Sears, Roebuck*

& Co. v Enco Associates, Inc., 43 NY2d 389, 401 NYS2d 767, 372 NE2d 555 (1977), and accountants, see Nate B. & Frances Spingold Foundation v Wallin, Simon, Black and Co., 184 AD2d 464, 585 NYS2d 416 (1st Dept 1992). As a result of the amendment, CPLR 214(6) now provides that an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, is governed by a three year statute of limitations “regardless of whether the underlying theory is based in contract or tort,” see *Germantown Cent. School Dist. v Clark, Clark, Millis & Gilson*, AIA, 294 AD2d 93, 743 NYS2d 599 (3d Dept 2002), *aff’d* on other grounds, 100 NY2d 202, 761 NYS2d 141, 791 NE2d 398 (2003); *Regency Club at Wallkill, LLC v Appel Design Group, P.A.*, 112 AD3d 603, 976 NYS2d 164 (2d Dept 2013). Where the claim is essentially one for malpractice, the three-year limitations period applies even though the cause of action is premised on an express, rather than an implied, contract provision, *Matter of R.M. Kliment & Frances Halsband, Architects (McKinsey & Co., Inc.)*, *supra*. Thus, an action against an architect premised on a breach of a contractual provision requiring compliance with relevant building codes is governed by the three-year statute of limitations, since such a requirement is not inconsistent with an architect’s ordinary professional obligations, *id.*

The statute applies not only to causes of action accruing after its effective date but also to previously accrued claims not yet interposed by that date, *Brothers v Florence*, 95 NY2d 290, 716 NYS2d 367, 739 NE2d 733 (2000). However, the Court of Appeals has provided a one-year grace period for previously accrued claims which would have been extinguished immediately upon the statute’s effective date, *id.* Therefore, nonmedical malpractice plaintiffs immediately barred as of the September 4, 1996 effective date of the amendment will have the shorter of either the remaining time under the former six-year limitations period or one year from the amendment’s effective date in which to commence their actions, *id.* As a general proposition, it is upon injury, not discovery, that a legal right to relief arises in a malpractice action and the statute of limitations begins to run, *Ackerman v Price Waterhouse*, 84 NY2d 535, 620 NYS2d 318, 644 NE2d 1009 (1994).

A. Attorneys’ Malpractice

Pursuant to an amendment to CPLR 214(6) effective September 4, 1996, an action for legal malpractice is governed by a three year statute of limitations, “regardless of whether the underlying theory is based on contract or tort.” This amendment effectively overrules a substantial body of caselaw holding that a six year statute of limitations governs malpractice actions against attorneys. The statute applies not only to causes of action accruing after its effective date but also to previously accrued claims not yet interposed by that date, *Brothers v Florence*, 95 NY2d 290, 716 NYS2d 367, 739 NE2d 733 (2000). Claims against attorneys based on alleged mishandling of money or property held for the client involve breaches of fiduciary duty rather than malpractice and are therefore governed by the residual six-year statute of limitations, *McDonald v Edelman & Edelman, P.C.*, 118 AD3d 562, 988 NYS2d 591 (1st Dept 2014); see CPLR 213(1).

A legal malpractice claim accrues when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court, *McCoy v Feinman*, 99 NY2d 295, 755 NYS2d 693, 785 NE2d 714 (2002); see *Shumsky v Eisenstein*, 96 NY2d 164, 726 NYS2d 365, 750 NE2d 67 (2001) (action to recover damages for legal malpractice accrues when malpractice is committed). What is important is the date the malpractice was committed, not when the client discovered it, *Shumsky v Eisenstein*, *supra*; *Goodman v Weiss, Zarett, Brofman, Sonnenklar & Levy, P.C.*, 199 AD3d 659, 156 NYS3d 386 (2d Dept 2021); *Lavelle-Tomko v Aswad & Ingraham*, 191 AD3d 1142, 143 NYS3d 109 (3d Dept 2021); *Sommers v Cohen*, 14 AD3d 691, 790 NYS2d 141 (2d Dept 2005); see *McCoy v Feinman*, *supra* (in most cases, accrual of legal malpractice claim is measured from day actionable injury occurs, “even if the aggrieved party is then ignorant of the wrong or injury”). In *McCoy v Feinman*, the attorney was negligent in failing to assert plaintiff’s claim for pre-retirement death benefits in the stipulation settling a divorce action or the divorce judgment entered on the stipulation. The Court held that plaintiff suffered actionable injury on the day the stipulation was entered, or at the latest, on the day the judgment incorporating the stipulation was filed, see also *Zorn v Gilbert*, 27 AD3d 731, 812 NYS2d 136 (2d Dept 2006), *aff’d as modified on other grounds and remanded*, 8 NY3d 933, 834 NYS2d 702, 866 NE2d 1030 (2007). Therefore, the Court concluded that plaintiff’s cause of action for legal malpractice accrued on the day the divorce judgment was filed because plaintiff’s damages were then sufficiently calculable to permit plaintiff to obtain prompt judicial redress of the injury. The Court rejected the application of the continuous representation toll because there was no mutual understanding of the need for further representation on the specific subject matter underlying the alleged malpractice that caused plaintiff’s injury, i.e., defendant’s failures in connection with the stipulation and the divorce judgment. It has been held that if the malpractice relates to preparation of a will, the cause of action accrues when the will is drawn and not upon discovery of the malpractice after decedent’s death, *Goldberg v Bosworth*, 29 Misc2d 1057, 215 NYS2d 849 (Sup 1961).

The continuous treatment rule applied to medical malpractice actions has been extended to claims of attorney malpractice, as well as to actions alleging an attorney’s failure to perform services in breach of contract with the client, *Zorn v Gilbert*, 8 NY3d 933, 834 NYS2d 702, 866 NE2d 1030 (2007); *Shumsky v Eisenstein*, 96 NY2d 164, 726 NYS2d 365, 750 NE2d 67 (2001); *Sommers v Cohen*, 14 AD3d 691, 790 NYS2d 141 (2d Dept 2005); *Goicoechea v Law Offices of Stephen R. Kihl*, 234 AD2d 507, 651 NYS2d 198 (2d Dept 1996); *Bass & Ullman v Chanes*, 185 AD2d 750, 586 NYS2d 610 (1st Dept 1992); *Luk Lamellen U. Kupplungsbau GmbH v Lerner*, 166 AD2d 505, 560 NYS2d 787 (2d Dept 1990); see *Matter of Lawrence*, 24 NY3d 320, 998 NYS2d 698, 23 NE3d 965 (2014); *Williamson ex rel. Lipper Convertibles, L.P. v PricewaterhouseCoopers LLP*, 9 NY3d 1, 840 NYS2d 730, 872 NE2d 842 (2007) (accounting malpractice). The continuous representation doctrine, like the continuous treatment rule, its counterpart with respect to medical

malpractice claims, recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered, *Shumsky v Eisenstein*, supra; *Pollicino v Roemer and Featherstonhaugh P.C.*, 260 AD2d 52, 699 NYS2d 238 (3d Dept 1999); see *Matter of Lawrence*, supra.

The application of the "continuous representation" doctrine is limited to situations in which the attorney who allegedly was responsible for the malpractice continues to represent the client on the matter which is the subject of the malpractice actions, *Glamm v Allen*, 57 NY2d 87, 453 NYS2d 674, 439 NE2d 390 (1982) (death of attorney); *Goodman v Weiss, Zarett, Brofman, Sonnenklar & Levy, P.C.*, 199 AD3d 659, 156 NYS3d 386 (2d Dept 2021); *Sommers v Cohen*, 14 AD3d 691, 790 NYS2d 141 (2d Dept 2005) (relieving of attorney); *Goicoechea v Law Offices of Stephen R. Kihl*, 234 AD2d 507, 651 NYS2d 198 (2d Dept 1996) (disbarment of attorney); see *Tulino v Hiller, P.C.*, 202 AD3d 1132, 164 NYS3d 157 (2d Dept 2022). The doctrine applies where there is continuing trust and confidence in the relationship between the parties and the attorney's continuing representation pertains to the specific matter in which the attorney committed the alleged malpractice, not merely the continuity of a general professional relationship, *Lavelle-Tomko v Aswad & Ingraham*, 191 AD3d 1142, 143 NYS3d 109 (3d Dept 2021); see *Goodman v Weiss, Zarett, Brofman, Sonnenklar & Levy, P.C.*, supra (toll did not apply where attorney's performance of legal services related to different subject matter than alleged transaction which is subject of action). When an attorney engages in a financial transaction with a client by charging a fee or accepting a gift, the attorney is not representing the client in that transaction, *Matter of Lawrence*, 24 NY3d 320, 998 NYS2d 698, 23 NE3d 965 (2014). Thus, the doctrine has no application to a financial dispute between an attorney and the client, *id.* The continuous representation toll does not apply to an attorney's representation of the same client on another related matter years after the alleged malpractice occurred, when the two matters involved different lawsuits and separate retainer agreements which limited the scope of representation, *Etzion v Blank Rome, LLP*, 174 AD3d 421, 104 NYS3d 629 (1st Dept 2019).

It should be noted that the running of the statute of limitations against a law firm is tolled as long as the attorney handling the case continues to represent the client on the same matter even though that attorney has taken the matter to another firm, *Waggoner v Caruso*, 68 AD3d 1, 886 NYS2d 368 (1st Dept 2009), *aff'd*, 14 NY3d 874, 903 NYS2d 333, 929 NE2d 396 (2010); *HNH Intern., Ltd. v Pryor Cashman Sherman & Flynn LLP*, 63 AD3d 534, 881 NYS2d 86 (1st Dept 2009).

The statute of limitations on a claim for malpractice in the conduct of litigation begins to run when the attorney-client relationship concerning the same or a related problem terminates, *Greene v Greene*, 56 NY2d 86, 451 NYS2d 46, 436 NE2d 496 (1982); see *Grace v Law*, 24

NY3d 203, 997 NYS2d 334, 21 NE3d 995 (2014); *Santulli v Englert, Reilly & McHugh, P.C.*, 78 NY2d 700, 579 NYS2d 324, 586 NE2d 1014 (1992); *Glamm v Allen*, 57 NY2d 87, 453 NYS2d 674, 439 NE2d 390 (1982); *Burrowes v Caruso, Spillane, Contrastano & Ulaner*, 203 AD2d 228, 609 NYS2d 660 (2d Dept 1994); *Johnston v Raskin*, 193 AD2d 786, 598 NYS2d 272 (2d Dept 1993); *Kramer v Belfi*, 106 AD2d 615, 482 NYS2d 898 (2d Dept 1984). Whether the termination of the attorney-client relationship should be measured by the issuance of a court order granting the attorney's motion to withdraw depends on the particular facts and circumstances. Thus, in *Aaron v Roemer, Wallens & Mineaux, LLP*, 272 AD2d 752, 707 NYS2d 711 (3d Dept 2000), the court held that the attorney-client relationship ended before the formal issuance of the withdrawal order and that, accordingly, the continuous representation doctrine was not available. In *Aaron*, the client did not timely oppose the withdrawal motion and the client ultimately consented to the withdrawal noting the "irretrievable breakdown" of the relationship. In contrast, in *Deep v Boies*, 53 AD3d 948, 863 NYS2d 269 (3d Dept 2008), the attorney-client relationship was deemed to have continued until a formal withdrawal order was issued, since the court had compelled the attorney to continue until an unfinished aspect of the litigation was finalized, see also *Tulino v Hiller, P.C.*, 202 AD3d 1132, 164 NYS3d 157 (2d Dept 2022) (question of fact whether continuous representation doctrine tolled statute of limitations during time attorney's motion to withdraw was reargued).

Where an attorney serves as trial counsel, his responsibilities continue until the action terminates in a final judgment and the period of limitations did not commence until then, *Cherry v Mallery*, 280 AD2d 860, 721 NYS2d 144 (3d Dept 2001) (representation in surrogate's court proceeding in which attorney represented public administrator continued at least until issuance of decree); *LaRosa v Grossman, Liepziger, Daniels & Freund*, 105 AD2d 730, 481 NYS2d 165 (2d Dept 1984). Likewise, where an attorney represented the client in a dispute that eventually resulted in litigation and then arranged to have the client represented by an associate of his firm, the statute of limitations was tolled until judgment was entered against the client in the litigation, *Stampfel v Eckhardt*, 143 AD2d 184, 531 NYS2d 814 (2d Dept 1988). Where, however, another law firm represents a plaintiff in an action arising out of a prior attorney's malpractice, consultation with the new law firm does not constitute continuous representation by the prior attorney. Thus, in such an instance, the statute of limitations for legal malpractice against the prior attorney accrues when the malpractice is committed and not when the damages are adjudicated, *Tal-Spons Corp. v Nurnberg*, 213 AD2d 395, 623 NYS2d 604 (2d Dept 1995). A law firm's continuous representation of a client will be imputed to a former associate for the purpose of tolling the statute of limitations against the associate in a legal malpractice action commenced by the client, *Pollicino v Roemer and Featherstonhaugh P.C.*, 260 AD2d 52, 699 NYS2d 238 (3d Dept 1999).

The "continuous representation" doctrine will not apply where it is

based on the defendant attorney's alleged failure to commence an action for loss of services on behalf of client's wife, *Baker v Levitin*, 211 AD2d 507, 622 NYS2d 8 (1st Dept 1995). Even when further representation concerning a specific matter in which the attorney allegedly committed the malpractice is needed and contemplated by the client, the continuous representation toll will nonetheless end once the client is informed or otherwise put on notice of the attorney's withdrawal from representation, *Shumsky v Eisenstein*, 96 NY2d 164, 726 NYS2d 365, 750 NE2d 67 (2001); *McDonald v Edelman & Edelman, P.C.*, 118 AD3d 562, 988 NYS2d 591 (1st Dept 2014) (continuous representation doctrine not applicable where defendant sent plaintiff-client letter enclosing unfavorable Appellate Division decision and formally closing representation and plaintiff did not object to letter). In *Shumsky*, the Court held that the earliest plaintiffs may have received reasonable notice of defendants' withdrawal from representation occurred upon defendant lawyer's interminable failure to respond to their telephone inquiries, *id.* However, there was an issue of fact as to the applicability of the continuous representation doctrine where, after the plaintiff cancelled the retainer agreement and the defendant returned the balance of the retainer, the defendant took several actions on the plaintiff's behalf and was counsel of record for her in a subsequent related matter, *Lavelle-Tomko v Aswad & Ingraham*, 191 AD3d 1142, 143 NYS3d 109 (3d Dept 2021).

Application of the continuous representation doctrine is generally limited to the course of representation concerning a specific legal matter and does not extend to a client's continuing general relationship with a lawyer involving only routine contact for miscellaneous legal representation, *Shumsky v Eisenstein*, 96 NY2d 164, 726 NYS2d 365, 750 NE2d 67 (2001); see *Matter of Lawrence*, 24 NY3d 320, 998 NYS2d 698, 23 NE3d 965 (2014); *Zorn v Gilbert*, 8 NY3d 933, 834 NYS2d 702, 866 NE2d 1030 (2007); *McCoy v Feinman*, 99 NY2d 295, 755 NYS2d 693, 785 NE2d 714 (2002); see *Goodman v Weiss, Zarett, Brofman, Sonnenklar & Levy, P.C.*, 199 AD3d 659, 156 NYS3d 386 (2d Dept 2021) (toll did not apply where attorney's performance of legal services related to different subject matter than alleged transaction which is subject of action). As in the application of the continuous treatment rule in medical malpractice cases, the concern is whether there has been continuous representation, and not merely a continuing relationship between the attorney and client, *Shumsky v Eisenstein*, *supra*. see *Glamm v Allen*, 57 NY2d 87, 453 NYS2d 674, 439 NE2d 390 (1982); see also *Weiss v Manfredi*, 83 NY2d 974, 616 NYS2d 325, 639 NE2d 1122 (1994). For the continuous representation doctrine to apply, there must be clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney, which often includes an attempt by the attorney to rectify an alleged act of malpractice, *Lavelle-Tomko v Aswad & Ingraham*, 191 AD3d 1142, 143 NYS3d 109 (3d Dept 2021); *Leeder v Antonucci*, 174 AD3d 1469, 106 NYS3d 490 (4th Dept 2019); *Dischiavi v Calli*, 125 AD3d 1435, 3 NYS3d 491 (4th Dept 2015); *DeStaso v Condon Resnick, LLP*, 90 AD3d 809, 936 NYS2d 51 (2d Dept 2011).

The Court of Appeals has recognized that a professional's failure to

take action or provide services necessary to protect a client's interests does not, standing alone, constitute representation for purposes of tolling the statute of limitations, *Shumsky v Eisenstein*, 96 NY2d 164, 726 NYS2d 365, 750 NE2d 67 (2001); *Ashmead v Groper*, 251 AD2d 716, 673 NYS2d 779 (3d Dept 1998). However, in *Shumsky v Eisenstein*, *supra*, plaintiffs retained defendant attorney for the sole purpose of investigating, researching and prosecuting a specific breach of contract claim against a home inspector, *Shumsky v Eisenstein*, *supra*. The defendant did not contact plaintiffs to keep them informed of the progress of the matter, avoided plaintiffs' inquiries regarding the status of the matter and failed to commence the action against the home inspector. Nevertheless, the Court applied the continuous representation doctrine. Plaintiffs and defendant reasonably intended that their professional relationship of trust and confidence, focused entirely upon the very matter in which the alleged malpractice was committed, would continue, *id.* Plaintiffs' attempt to contact defendant on at least one occasion after the expiration of the statute of limitations on the underlying claim, inquiring about the status of their case and requesting a letter in response, confirmed this understanding and supported application of the continuous representation doctrine, *id.* Similarly, a two-year gap in communications between the client and an attorney did not preclude application of the continuous representation doctrine where there was no need to consult during that period and the attorney never communicated to the client that its representation had ended, *Red Zone LLC v Cadwalader, Wickersham & Taft LLP*, 118 AD3d 581, 988 NYS2d 588 (1st Dept 2014).

Where a legal malpractice claim is grounded in the alleged failure of the attorney to advise the client of certain claims, the statute of limitations on the malpractice claim accrues when the statute of limitations has run on the underlying claims, *Davis v Isaacson, Robustelli, Fox, Fine, Greco & Fogelgaren, P.C.*, 258 AD2d 321, 685 NYS2d 216 (1st Dept 1999). Where a legal malpractice claim is grounded in the alleged failure to commence a lawsuit on behalf of the client, absent continuous representation the cause of action accrues when the statute of limitations on the underlying claim expires, *Shumsky v Eisenstein*, 96 NY2d 164, 726 NYS2d 365, 750 NE2d 67 (2001).

A claim for legal malpractice arising out of representation in a criminal matter accrues when the criminal proceeding is terminated, i.e., on the day when the indictment against the plaintiff is dismissed, *Britt v Legal Aid Soc., Inc.*, 95 NY2d 443, 718 NYS2d 264, 741 NE2d 109 (2000). This rule may extend the accrual of a legal malpractice claim in these types of cases well beyond the termination of the attorney-client relationship, *id.*; see Comment to PJI 2:152.

In addition to the continuous representation toll, a client is entitled to an additional 18-month toll under CPLR 210(b) where the attorney is still representing the client at the time of the attorney's death, *Glamm v Allen*, 57 NY2d 87, 453 NYS2d 674, 439 NE2d 390 (1982).

With respect to those cases to which the 1996 amendment to CPLR

214(6) may not apply, the following discussion is germane. “[A]n action for failure to exercise due care in the performance of a contract insofar as it seeks recovery for damages to property or pecuniary interests . . . is governed by the six year contract Statute of Limitations (CPLR 213, subd 2),” *Video Corp. of America v Frederick Flatto Associates, Inc.*, 58 NY2d 1026, 462 NYS2d 439, 448 NE2d 1350 (1983). Video Corp. was applied to attorney malpractice in *Santulli v Englert, Reilly & McHugh, P.C.*, 78 NY2d 700, 579 NYS2d 324, 586 NE2d 1014 (1992). Video Corp. expressly overruled *Gilbert Properties, Inc. v Millstein*, 33 NY2d 857, 352 NYS2d 198, 307 NE2d 257 (1973) and *Adler & Topal, P. C. v Exclusive Envelope Corp.*, 84 AD2d 365, 446 NYS2d 337 (2d Dept 1982), “to the extent that [they] are to the contrary . . .” 58 NY2d at 1028; see *Padilla v New York City Transit Authority*, 184 AD2d 760, 585 NYS2d 491 (2d Dept 1992); *Sinopoli v Coccozza*, 105 AD2d 743, 481 NYS2d 177 (2d Dept 1984) (client’s action against attorney for failing to timely commence trespass action governed by six year contract statute of limitations, with damages recoverable limited to property or pecuniary interests arising from breach of contract). *Adler & Topal* held the *Sears* case inapplicable to the informal contract between insurance agent and client. The application of the six year statute is not dependent upon the existence of an express promise to obtain a specific result, *Santulli v Englert, Reilly & McHugh, P.C.*, 78 NY2d 700, 579 NYS2d 324, 586 NE2d 1014 (1992), however, where the three-year statute governing malpractice actions has run, plaintiff should be able to point with specificity to some contractual agreement, express or implied, that has been breached to avail herself of the additional time in which to bring an action for damages, *Hirsch v Weisman*, 189 AD2d 643, 592 NYS2d 337 (1st Dept 1993). The six year contract period of limitations is available in an action based on an implied promise to exercise due care in performing the services required by the contract, as well as to claims based on breach of a specific promise by the attorney to perform and claims predicated on the attorney’s failure to perform a specific task expressly undertaken, *id.* It appears that the application of the six year period based on an implied promise of due care may be avoided only by an express disclaimer in a written retainer, see 78 NY2d at 706, citing *Pacesetter Communications Corp. v Solin & Breindel, P.C.*, 150 AD2d 232, 541 NYS2d 404 (1st Dept 1989) (“[w]e have made no representations or guarantees to you that any result can or will be obtained, or is likely to be obtained, in this matter”). Note that, in an action founded on breach of contract, the contract measure of damages applies and, to the extent that those damages may be different from or greater than the damages for legal malpractice, plaintiff is relegated to the three year malpractice limitations period, *Santulli v Englert, Reilly & McHugh, P.C.*, *supra*; *Jorgensen v Silverman*, 224 AD2d 665, 638 NYS2d 482 (2d Dept 1996); see *Pilewski v Solymosy*, 266 AD2d 83, 698 NYS2d 660 (1st Dept 1999).

While a separate cause of action may be established based upon fraud in the intentional concealment by an attorney of his or her malpractice, see *Simcusi v Saeli*, 44 NY2d 442, 406 NYS2d 259, 377 NE2d 713 (1978), the cause of action is not viable unless the damages

sustained by reason of the fraud are different or additional to those sustained by virtue of the malpractice, *Kaiser v Van Houten*, 12 AD3d 1012, 785 NYS2d 569 (3d Dept 2004); *LaBrake v Enzien*, 167 AD2d 709, 562 NYS2d 1009 (3d Dept 1990); see *White of Lake George Inc. v Bell*, 251 AD2d 777, 674 NYS2d 162 (3d Dept 1998). Thus, where an attorney was alleged to have concealed for years from the client the failure to properly institute a personal injury claim, there could be no recovery for fraud since the damages from the fraud were the same as the damages from the malpractice, i.e., the loss of the personal injury claim, *LaBrake v Enzien*, *supra*. Standing alone, an attorney's failure to disclose malpractice does not give rise to a fraud claim separate and apart from a malpractice action, *Weiss v Manfredi*, 83 NY2d 974, 616 NYS2d 325, 639 NE2d 1122 (1994); *Kaiser v Van Houten*, *supra*; see *Simcusi v Saeli*, *supra*.

B. Architect's Malpractice

Pursuant to an amendment to CPLR 214(6) effective September 4, 1996, an action for architects' malpractice is governed by a three year statute of limitations, "regardless of whether the underlying theory is based on contract or tort," see *Germantown Cent. School Dist. v Clark*, *Clark, Millis & Gilson, AIA*, 294 AD2d 93, 743 NYS2d 599 (3d Dept 2002), *aff'd* on other grounds, 100 NY2d 202, 761 NYS2d 141, 791 NE2d 398 (2003); *Regency Club at Wallkill, LLC v Appel Design Group, P.A.*, 112 AD3d 603, 976 NYS2d 164 (2d Dept 2013). This amendment effectively overrules a substantial body of caselaw holding that a six year statute of limitations governs malpractice actions against architects. Under the statute, the three-year limitations period applies to causes of action arising from express, as well as implied, contract duties where the complaint is essentially a malpractice claim and the breached contractual provision is not inconsistent with an architect's ordinary professional obligations (e.g., a clause requiring compliance with applicable building codes), *Matter of R.M. Kliment & Frances Halsband, Architects (McKinsey & Co., Inc.)*, 3 NY3d 538, 788 NYS2d 648, 821 NE2d 952 (2004).

The statute applies not only to causes of action accruing after its effective date but also to previously accrued claims not yet interposed by that date, *Brothers v Florence*, 95 NY2d 290, 716 NYS2d 367, 739 NE2d 733 (2000). However, the Court of Appeals has provided a one-year grace period for previously accrued claims which would have been extinguished immediately upon the statute's effective date, *id.* Therefore, nonmedical malpractice plaintiffs immediately time-barred by the September 4, 1996 amendment will have the shorter of either the remaining time under the former six-year limitations period or one year from the amendment's effective date in which to commence their actions, *id.* Nonmedical malpractice plaintiffs whose claims were not immediately time-barred by the amendment have the longer of either the one-year period measured from the amendment's effective date or the new three-year statute of limitations in CPLR 214(6) to bring suit, *id.*; see *Shumsky v Eisenstein*, 96 NY2d 164, 726 NYS2d 365, 750 NE2d 67 (2001).

The period of limitations in an action for malpractice against an architect begins to run no later than the completion of the building or the termination of the parties' relationship with respect to it, *City School Dist. of City of Newburgh v Hugh Stubbins & Associates, Inc.*, 85 NY2d 535, 626 NYS2d 741, 650 NE2d 399 (1995); *Sosnow v Paul*, 43 AD2d 978, 352 NYS2d 502 (2d Dept 1974), *aff'd*, 36 NY2d 780, 369 NYS2d 693, 330 NE2d 643 (1975); *Williamsville Cent. School Dist. v Cannon Partnership*, 187 AD2d 1011, 591 NYS2d 125 (4th Dept 1992); *Regency Club at Wallkill, LLC v Appel Design Group, P.A.*, 112 AD3d 603, 976 NYS2d 164 (2d Dept 2013); see *Frank v Mazs Group, LLC*, 30 AD3d 369, 815 NYS2d 738 (2d Dept 2006). No matter how a claim is characterized in the complaint—negligence, malpractice, breach of contract—an owner's claim arising out of defective construction accrues on date of completion, since all liability has its genesis in the contractual relationship of the parties, *Brushton-Moira Cent. School Dist. v Fred H. Thomas Associates, P.C.*, 91 NY2d 256, 669 NYS2d 520, 692 NE2d 551 (1998); *City School Dist. of City of Newburgh v Hugh Stubbins & Associates, Inc.*, *supra*; *Sears, Roebuck & Co. v Enco Associates, Inc.*, 43 NY2d 389, 401 NYS2d 767, 372 NE2d 555 (1977); *West Seneca v Kideney Architects, P.C.*, 187 AD3d 1509, 132 NYS3d 472 (4th Dept 2020). For accrual purposes, the completion of the architect's work must be viewed in light of the particular circumstances of the case, *Frank v Mazs Group, LLC*, *supra*. Even if plaintiff is not a party to the underlying construction contract, its claim may accrue upon completion of the construction where plaintiff is not a "stranger to the contract," and the relationship between plaintiff and defendant is the "functional equivalent of privity", *Oyster Bay v Lizza Industries, Inc.*, 22 NY3d 1024, 981 NYS2d 643, 4 NE3d 944 (2013); see *City School Dist. of City of Newburgh v Hugh Stubbins & Associates, Inc.*, *supra*; *West Seneca v Kideney Architects, P.C.*, *supra* (plaintiff who was deemed third-party beneficiary is not a stranger to the contract).

Where the architect was obliged to obtain a certificate of occupancy, applied for such a certificate after completion of the work and thereafter made a supplemental submission in support of the application, plaintiff's cause of action did not begin to run until after the certificate of occupancy was issued, *id.* If the architect's obligation includes issuance by him of a final certificate, that event marks completion by the architect, *Board of Educ. of Tri-Valley Central School Dist. at Grahamsville v Celotex Corp.*, 88 AD2d 713, 451 NYS2d 290 (3d Dept 1982), *aff'd*, 58 NY2d 684, 458 NYS2d 542, 444 NE2d 1006 (1982); *Methodist Hosp. v Perkins & Will Partnership*, 203 AD2d 435, 610 NYS2d 572 (2d Dept 1994); *Williamsville Cent. School Dist. v Cannon Partnership*, 187 AD2d 1011, 591 NYS2d 125 (4th Dept 1992); see also *Gelwicks v Campbell*, 257 AD2d 601, 684 NYS2d 264 (2d Dept 1999) (claim against professional engineer accrued upon date certificate of construction compliance was countersigned); *Samaritan Hosp. v McManus, Longe, Brockwehl, Inc.*, 92 AD2d 957, 460 NYS2d 842 (3d Dept 1983), otherwise the statute commences upon completion of the building, *State v Lundin*, 60 NY2d 987, 471 NYS2d 261, 459 NE2d 486 (1983), see also *Phillips Const. Co., Inc. v New York*, 61 NY2d 949, 475 NYS2d 244, 463 NE2d

585 (1984). Where the defendant architect continues contractual duties after the work is “substantially completed” by assisting plaintiff with obtaining a final certificate of occupancy and reviewing “as built” drawings, the statute of limitations does not begin to run until after those tasks are completed, see *New York City School Const. Authority v Ennead Architects, LLP*, 148 AD3d 618, 49 NYS3d 462 (1st Dept 2017).

Notwithstanding the general rule of accrual upon completion, the “continuous representation” doctrine may be invoked to postpone accrual where plaintiff demonstrates reliance on a continued course of services related to the original professional services provided, *Regency Club at Wallkill, LLC v Appel Design Group, P.A.*, 112 AD3d 603, 976 NYS2d 164 (2d Dept 2013); see *New York City School Const. Authority v Ennead Architects, LLP*, supra (alternative holding that continuous representation doctrine toll applied based on defendant’s attempts to remedy faulty design of custom-etched glass windows within three years of commencement of action). The doctrine may be applicable under appropriate circumstances unless the facts establish a gap between the provision of professional services on the particular matter that is so great that representation cannot be deemed continuous as a matter of law, *Regency Club at Wallkill, LLC v Appel Design Group, P.A.*, supra.

If the architect learns of certain building problems during construction and continues to act with respect to them after issuance of a final certificate of completion, the statute is tolled for as long as the professional relationship continues to exist between owner and architect, *Board of Educ. of Hudson City School Dist. v Thompson Const. Corp.*, 111 AD2d 497, 488 NYS2d 880 (3d Dept 1985). A claim against an architect for the negligent failure to remove asbestos during an abatement project is governed by the three year period in CPLR 214(6), running from completion of the architect’s work, *Germantown Cent. School Dist. v Clark, Clark, Millis & Gilson, AIA*, 100 NY2d 202, 761 NYS2d 141, 791 NE2d 398 (2003). In *Germantown Central School District*, the Court held that plaintiff’s property damage claim did not fall within the purview of CPLR 214-c, the toxic tort remedial statute of limitations.

If the architect’s malpractice causes personal injuries to a third party, the statute of limitations on plaintiff’s personal injury claim is three years from the date of the injury, not from the date of completion of the architect’s services, *Cubito v Kreisberg*, 51 NY2d 900, 434 NYS2d 991, 415 NE2d 979 (1980); see *Belunes v Minskoff Grant Realty and Management Corp.*, 278 AD2d 143, 718 NYS2d 318 (1st Dept 2000). Recent legislation imposes the following burdens on the personal injury plaintiff if the accident occurs more than ten years after the building was completed, CPLR 214-d. The ten year period begins to run at the completion of the professional relationship, which is usually signaled by the issuance of the final payment certificate, *Belunes v Minskoff Grant Realty and Management Corp.*, supra; *Matter of Kohn Pederson Fox Associates, P.C. (FDIC)*, 189 AD2d 557, 592 NYS2d 16 (1st Dept 1993). First, plaintiff must serve a notice of claim upon the architect at least 90 days prior to suit. Secondly, plaintiff may obtain discovery from the

potential defendant during the 90 day waiting period. Thirdly, after suit is commenced, defendant may move to dismiss and the burden will be on the plaintiff to make an immediate evidentiary showing that there is a “substantial basis” to believe that defendant’s negligence was the proximate cause of the injuries, *Castle Village Owners Corp. v Greater New York Mut. Ins. Co.*, 58 AD3d 178, 868 NYS2d 189 (1st Dept 2008) (applying “substantial basis” standard). The requirements of CPLR 214-d do not affect the applicable statute of limitations, *Gelwicks v Campbell*, 257 AD2d 601, 684 NYS2d 264 (2d Dept 1999), nor is compliance with CPLR 214-d a jurisdictional prerequisite to commencing an action, *Kretschmann v Board of Educ. of Corning Painted Post School Dist.*, 294 AD2d 39, 744 NYS2d 106 (4th Dept 2002).

C. Accountants’ Malpractice

The six year contract statute of limitations was earlier held to apply even though the complaint was phrased in terms of professional malpractice, *Nate B. & Frances Spingold Foundation v Wallin, Simon, Black and Co.*, 184 AD2d 464, 585 NYS2d 416 (1st Dept 1992). Pursuant to an amendment to CPLR 214(6) effective September 4, 1996, however, an action for accountants’ malpractice is governed by a three year statute of limitations, “regardless of whether the underlying theory is based in contract or tort,” see *Symbol Technologies, Inc. v Deloitte & Touche, LLP*, 69 AD3d 191, 888 NYS2d 538 (2d Dept 2009). However, a six-year statute of limitations applies to breach of contract claims alleging intentional conduct such as knowingly and willfully disregarding appropriate accounting practices, purposefully participating in inappropriate accounting practices or manipulating annual reports and misrepresenting financial conditions, *New York State Workers’ Compensation Bd. v Fuller & LaFiura, CPAs, P.C.*, 146 AD3d 1110, 46 NYS3d 266 (3d Dept 2017). Breach of contract claims that are predicated upon an accountant’s alleged malpractice are subject to a three-year statute of limitations (*id.*). This amendment effectively overrules a substantial body of caselaw holding that a six year statute of limitations governs malpractice actions against accountants.

Malpractice actions against accountants are governed by the same general rules applicable to malpractice by attorneys and architects, see *Video Corp. of America v Frederick Flatto Associates, Inc.*, 58 NY2d 1026, 462 NYS2d 439, 448 NE2d 1350 (1983); *MTG Enterprises, Inc. v Berkowitz*, 182 AD2d 388, 582 NYS2d 130 (1st Dept 1992), including the “continuous treatment” jurisprudence, *Ackerman v Price Waterhouse*, 252 AD2d 179, 683 NYS2d 179 (1st Dept 1998); see *Symbol Technologies, Inc. v Deloitte & Touche, LLP*, 69 AD3d 191, 888 NYS2d 538 (2d Dept 2009); *Fred Smith Plumbing and Heating Co., Inc. v Christensen*, 233 AD2d 207, 649 NYS2d 684 (1st Dept 1996); *Zaref v Berk & Michaels, P.C.*, 192 AD2d 346, 595 NYS2d 772 (1st Dept 1993) (fraud action against accountants); *Yandel v Loeb & Troper*, 84 AD2d 710, 443 NYS2d 959 (1st Dept 1981). Further, the basic principles that inform the “continuous treatment” doctrine applicable in medical malpractice actions apply to the “continuous representation” rule, *Williamson ex rel.*

Lipper Convertibles, L.P. v PricewaterhouseCoopers LLP, 9 NY3d 1, 840 NYS2d 730, 872 NE2d 842 (2007). Thus, by analogy to the continuous treatment doctrine, the continuous representation must be in connection with the particular transaction which is the subject of the action and not merely during the continuation of a general accountant-client relationship, *id.*; Ackerman v Price Waterhouse, *supra*; Zaref v Berk & Michaels, P.C., *supra*; see Symbol Technologies, Inc. v Deloitte & Touche, LLP, *supra*. Applying this principle, the Court of Appeals held in Williamson *ex rel.* Lipper Convertibles, L.P. v PriceWaterhouseCoopers LLP, *supra*, that the continuous representation rule could not be invoked by a client that had annually engaged the defendant accounting firm to provide separate and discrete auditing services in connection with its year-end financial statements. In so ruling, the Court noted that there was no allegation that the parties had explicitly contemplated further work on each year's audit and that the client had never engaged the defendant accounting firm to provide corrective or remedial services, see Symbol Technologies, Inc. v Deloitte & Touche, LLP, *supra*. Thus, the continuous representation toll was not available where defendant-accountant annually prepared plaintiff's tax returns, even though defendant-accountant made the same error on each return, Booth v Kriegel, 36 AD3d 312, 825 NYS2d 193 (1st Dept 2006).

In the context of a malpractice action against an accountant, the claim accrues upon the client's receipt of the accountant's work product since this is the point that a client reasonably relies on the accountant's skill and advice and, as a consequence of such reliance, can become liable for tax deficiencies, Williamson *ex rel.* Lipper Convertibles, L.P. v PricewaterhouseCoopers LLP, 9 NY3d 1, 840 NYS2d 730, 872 NE2d 842 (2007); Ackerman v Price Waterhouse, 84 NY2d 535, 620 NYS2d 318, 644 NE2d 1009 (1994); Grosso Moving & Packing Co., Inc. v Damens, 233 AD2d 128, 649 NYS2d 136 (1st Dept 1996); Fred Smith Plumbing and Heating Co., Inc. v Christensen, 233 AD2d 207, 649 NYS2d 684 (1st Dept 1996). It is at this time when all of the facts necessary to the cause of action have occurred and an injured party can obtain relief in court, *id.*; see Snyder v Town Insulation, Inc., 81 NY2d 429, 599 NYS2d 515, 615 NE2d 999 (1993); see also Requa v Coopers & Lybrand, 303 AD2d 159, 756 NYS2d 43 (1st Dept 2003) (cause of action against accountants for failure to conduct audit accrued at point when plaintiffs knew audit had not been completed, that subject of audit was placed in receivership, and that accountants had not informed plaintiffs audit was delayed). The Court of Appeals has rejected the proposition that the statute of limitations can only accrue in a malpractice action against an accountant when the IRS assesses a deficiency, Ackerman v Price Waterhouse, *supra*.

III. Burden of Proof

The statute of limitations is a defense, CPLR 3018(b), upon which the defendant bears the burden of pleading and proof, Martin v Edwards Laboratories, Div. of American Hosp. Supply Corp., 60 NY2d 417, 469 NYS2d 923, 457 NE2d 1150 (1983); Connell v Hayden, 83 AD2d 30, 443

NYS2d 383 (2d Dept 1981). Plaintiff, however, bears the burden of proving those facts which will support the application of one of the rules tolling or barring the statute of limitations, *Kasten v Blaustein*, 214 AD2d 539, 625 NYS2d 44 (2d Dept 1995); *Connell v Hayden*, *supra*; see also *Siegel v Wank*, 183 AD2d 158, 589 NYS2d 934 (3d Dept 1992) (continuous treatment); *Ferrer v Methodist Hosp.*, 101 AD2d 806, 475 NYS2d 136 (2d Dept 1984) (continuous treatment); *Brush v Olivo*, 81 AD2d 852, 438 NYS2d 857 (2d Dept 1981) (foreign object); *Barrella v Richmond Memorial Hosp.*, 88 AD2d 379, 453 NYS2d 444 (2d Dept 1982) (continuous treatment).

IV. Disposition of Statute of Limitations Defense

As a general rule, the statute of limitations question will arise in a pre-answer motion to dismiss, CPLR 3211(a)(5), a post-answer motion to dismiss the defense, CPLR 3211(b), or for summary judgment, CPLR 3212(c). Both CPLR 3211(c) and CPLR 3212(c) authorize the court to direct an immediate trial of any issue of fact arising on the motion "when appropriate for the expeditious disposition of the controversy." CPLR 2218 provides "that an issue of fact raised on a motion shall be separately tried by the court or a referee. If the issue is triable of right by jury, the court shall give the parties an opportunity to demand a jury trial of such issue," see *Baseball Office of Com'r v Marsh & McLennan, Inc.*, 295 AD2d 73, 742 NYS2d 40 (1st Dept 2002); *Barrella v Richmond Memorial Hosp.*, 88 AD2d 379, 453 NYS2d 444 (2d Dept 1982). Although disposition of the statute of limitations defense usually comes to an early stage of the action the decision to defer the question until the main trial lies in the discretion of the trial court, see *Mateo v Rish*, 86 AD2d 736, 446 NYS2d 598 (3d Dept 1982).

Lynch v Carlozzi, 284 AD2d 865, 727 NYS2d 504 (3d Dept 2001), holds that the determination of whether a person is entitled to the CPLR 208 toll for insanity is for the court. The Lynch court determined that plaintiff was entitled to a hearing to determine if he was under the disability of insanity as of the accrual of his cause of action, see also *Smith v Kelley*, 228 AD2d 831, 643 NYS2d 764 (3d Dept 1996); but see *Siegel's Practice Review No. 126* (August, 2002) (discussing right to jury trial in analogous circumstances).

As stated above in section I, B, 3 to this Introductory Statement, the statute of limitations is tolled until the end of the course of continuous treatment by a professional. Where the exact nature of a plaintiff's continuing visits to a doctor's office presents a question of fact upon which there is conflicting evidence, the issue of whether or not the continuous treatment doctrine may be applied is a question of fact for the jury's resolution, *Bartolo v Monaco*, 202 AD2d 535, 609 NYS2d 275 (2d Dept 1994). The following pattern charge is suggested in medical malpractice cases when the continuous treatment presents questions of fact:

PJI 2:149. Continuous Treatment

A medical malpractice action must be filed

within two years and six months of the act, omission or failure complained of or from the last treatment where there is a continuous treatment for the same (illness, injury or condition) that gave rise to the (act, omission or failure). Plaintiff AB claims that the last date of continuous treatment was on *[state date]*, while defendant CD claims that *[state date]* was the last time (he, she, it) provided care or treatment to plaintiff AB for *[state illness, injury or condition]*.

Continuous treatment means a course of care or treatment for the condition from which the patient was suffering. Therefore, you must decide when defendant CD last treated plaintiff AB for *[state illness, injury or condition]*.

[Since there are many variations on the basis of the claim of continuous treatment, if applicable, charge some or all of the following:] visits must have been for more than an examination or routine check-up and must not have been for consultation about or treatment for another condition unrelated to the condition at issue. Rather the return visit must be for aftercare, complaints, symptoms, or corrective treatment related to the original condition. If the plaintiff initiates a return visit solely for (an examination, to have the condition checked, or to obtain documentation) that does not constitute continuous treatment.

Treatment by other physicians for the same condition may be some evidence of a break in continuity, but does not in and of itself mean that there was no continuing treatment. A doctor-initiated follow-up appointment is evidence of a continuing relation even if the appointment is missed. Similarly, a prescription may extend the relationship until the expiration of the prescription.]

In deciding whether continuous treatment existed and when the treatment ended, you will consider whether a continuous course of treatment

has been established, who initiated the final contact, and whether the final contact was for the purpose of further or corrective care and treatment of the (illness, injury or condition), the treatment of which gave rise to the claim of malpractice.

Interrogatory

What was the last date of the continuous course of treatment by defendant for the (illness, injury or condition) that plaintiff claims was negligently treated?

PJI 2:150. Malpractice—Physician

Malpractice is professional negligence and medical malpractice is the negligence of a doctor. Negligence is the failure to use reasonable care under the circumstances, doing something that a reasonably prudent doctor would not do under the circumstances, or failing to do something that a reasonably prudent doctor would do under the circumstances. It is a deviation or departure from accepted practice.

A doctor who renders medical service to a patient is obligated to have that reasonable degree of knowledge and skill that is expected of an (average doctor, average specialist) who (performs, provides) that (operation, treatment, medical service) in the medical community in which the doctor practices. (*If there is evidence that the doctor should have complied with standards that exceed the standards of the medical community in which the doctor practices, the following should be charged:*) **The doctor must also comply with minimum (statewide, national) standards of care.)**

The law recognizes that there are differences in the abilities of doctors, just as there are differences in the abilities of people engaged in other activities. To practice medicine a doctor is not required to have the extraordinary knowledge and ability that belongs to a few doctors of exceptional ability. However every doctor is required to keep reasonably informed of new developments in (his,

her) field and to practice (medicine, surgery) in accordance with approved methods and means of treatment in general use. A doctor must also use his or her best judgment and whatever superior knowledge and skill (he, she) possesses, even if the knowledge and skill exceeds that possessed by the (average doctor, average specialist) in the medical community where the doctor practices.

By undertaking to perform a medical service, a doctor does not guarantee a good result. The fact that there was a bad result to the patient, by itself, does not make the doctor liable. The doctor is liable only if (he, she) was negligent. Whether the doctor was negligent is to be decided on the basis of the facts and conditions existing at the time of the claimed negligence.

[This paragraph should only be charged when there is evidence that the doctor made a choice among medically acceptable alternatives. See Caveat 2 below:] A doctor is not liable for an error in judgment if (he, she) does what (he, she) decides is best after careful evaluation if it is a judgment that a reasonably prudent doctor could have made under the circumstances. In other words, a doctor is not liable for malpractice if he or she chooses one of two or more medically acceptable courses of action.

If the doctor is negligent, that is, lacks the skill or knowledge required of (him, her) in providing a medical service, or fails to use reasonable care in providing the service, or fails to exercise his or her best judgment, and such failure is a substantial factor in causing harm to the patient, then the doctor is responsible for the injury or harm caused.

[Where appropriate, add:]

A doctor's responsibility is the same regardless of whether (he, she) was paid.

Comment

The charge should be preceded by a separate charge defining

negligence, see PJI 2:10, and followed by a charge on proximate cause, see PJI 2:70. It can be adapted for use with respect to claims against other health care providers such as dentists, podiatrists, nurses, chiropractors, physical therapists, etc.

Caveat 1: Each claimed departure from accepted medical practice should be the subject of a separate jury question, *Steidel v Nassau*, 182 AD2d 809, 582 NYS2d 805 (2d Dept 1992); see *Davis v Caldwell*, 54 NY2d 176, 445 NYS2d 63, 429 NE2d 741 (1981); see also *Harris v Parwez*, 13 AD3d 675, 785 NYS2d 781 (3d Dept 2004).

Caveat 2: The fifth paragraph of the Charge (“error in judgment”) should not be charged unless there is a showing that defendant considered and chose among several medically acceptable alternatives, *Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125 (2002); *Mancuso v Kaleida Health*, 172 AD3d 1931, 100 NYS3d 469 (4th Dept 2019), *aff’d*, 34 NY3d 1020, 114 NYS3d 773, 138 NE3d 502 (2019); *Lacqua v Silich*, 141 AD3d 690, 35 NYS3d 488 (2d Dept 2016); *Wulbrecht v Jehle*, 89 AD3d 1470, 933 NYS2d 467 (4th Dept 2011); *Dumas v Adirondack Medical Center*, 89 AD3d 1184, 932 NYS2d 230 (3d Dept 2011) (citing PJI); *Anderson v House of Good Samaritan Hosp.*, 44 AD3d 135, 840 NYS2d 508 (4th Dept 2007); see Comment, *infra*. The fact that defendant physician’s diagnosis or treatment involved the exercise of medical judgment does not by itself provide a basis for giving an “error in judgment” charge, *Anderson v House of Good Samaritan Hosp.*, *supra*. Further, it is improper to give the “error in judgment” charge when the evidence simply raises the issue of whether defendant physician deviated from the degree of care that a reasonable physician would have exercised under the same circumstances, *Lacqua v Silich*, *supra*; *Rospierski v Haar*, 59 AD3d 1048, 873 NYS2d 802 (4th Dept 2009); *Martin v Lattimore Road Surgicenter, Inc.*, 281 AD2d 866, 727 NYS2d 836 (4th Dept 2001). An error in giving the “error in judgment” charge when the case does not involve a physician’s choice among medically acceptable alternatives is not harmless if the primary issue is whether the physician deviated from accepted standards of care, *Anderson v House of Good Samaritan Hosp.*, *supra*; see *Lacqua v Silich*, *supra*; *Rospierski v Haar*, *supra*.

Caveat 3: In a medical malpractice action, a plaintiff may, under certain circumstances, pursue a theory of loss of chance. Although all four Departments recognize the loss of chance theory, the Court of Appeals has not squarely addressed the issue, see *Wild v Catholic Health System*, 21 NY3d 951, 969 NYS2d 846, 991 NE2d 704 (2013). For a charge and commentary on the loss of chance doctrine, see PJI 2:150.1; this Comment, *infra*.

The second paragraph of the charge is based on the analysis in *Toth v Community Hospital at Glen Cove*, 22 NY2d 255, 292 NYS2d 440, 239 NE2d 368 (1968), which applied the locality rule as a minimum standard, and then added the further requirement that doctors use their “best judgment and whatever superior knowledge, skill and

intelligence” they possess, see *Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125 (2002).

The fifth paragraph of the charge (“error in judgment”) is based on *Toth v Community Hospital at Glen Cove*, 22 NY2d 255, 292 NYS2d 440, 239 NE2d 368 (1968); *Pike v Honsinger*, 155 NY 201, 49 NE 760 (1898); *Wulbrecht v Jehle*, 89 AD3d 1470, 933 NYS2d 467 (4th Dept 2011); *Dumas v Adirondack Medical Center*, 89 AD3d 1184, 932 NYS2d 230 (3d Dept 2011) (citing PJI); *Hale v State*, 53 AD2d 1025, 386 NYS2d 151 (4th Dept 1976); see *Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125 (2002); *Lacqua v Silich*, 141 AD3d 690, 35 NYS3d 488 (2d Dept 2016); *Scofield v Moreland*, 23 AD3d 1082, 804 NYS2d 207 (4th Dept 2005) (citing PJI). The use of the phrase “medical community” in the pattern charge is supported by *Toth*, as well as by such cases as *Schrempf v State*, 66 NY2d 289, 496 NYS2d 973, 487 NE2d 883 (1985) (“[a] physician’s duty is to provide the level of care acceptable in the professional community in which he practices”); *Bovay v Podolsky*, 266 AD2d 843, 697 NYS2d 427 (4th Dept 1999) (same); *Kelly v State*, 259 AD2d 962, 687 NYS2d 843 (4th Dept 1999) (same); *Ressis v Mactye*, 108 AD2d 960, 485 NYS2d 132 (3d Dept 1985) (psychologists must have skill of “the average member of their profession”); *Littlejohn v State*, 87 AD2d 951, 451 NYS2d 225 (3d Dept 1982) (physician must have skill of “the average member of the medical profession”); *Hale v State*, supra (doctor must have the skill of “the average member of the medical community”); see *Stuart v Stuart v Ellis Hosp.*, 198 AD2d 559, 603 NYS2d 212 (3d Dept 1993); *Schoch v Dougherty*, 122 AD2d 467, 504 NYS2d 855 (3d Dept 1986).

As to the statute of limitations applicable to malpractice claims, see *Introductory Statement*, supra. As to itemized verdicts in malpractice cases, see PJI 2:151A(1) and PJI 2:151A(2); as to collateral source payments, see PJI 2:151B; as to fraudulent concealment of an act of malpractice, see PJI 2:151C; as to informed consent, see PJI 2:150A.

In *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 (1986), the Court of Appeals held that, in a medical malpractice action, once defendant has made a prima facie showing that he or she was not negligent, plaintiff must submit evidentiary facts in rebuttal to establish the existence of a triable question of fact, see *Pullman v Silverman*, 28 NY3d 1060, 43 NYS3d 793, 66 NE3d 663 (2016). The First and Third Departments have held that, when defendant has moved for summary judgment and has made a prima facie showing that there was no deviation from accepted medical practice, plaintiff must meet that showing with evidence of both a departure from accepted practice and a proximate cause between the departure and plaintiff’s injuries, *Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 5 NYS3d 92 (1st Dept 2015); *Ramos v Weber*, 118 AD3d 408, 987 NYS2d 51 (1st Dept 2014); *Kristal R. v Nichter*, 115 AD3d 409, 981 NYS2d 399 (1st Dept 2014); *Bacani v Rosenberg*, 74 AD3d 500, 903 NYS2d 30 (1st Dept 2010); *Chase v Cayuga Medical Center at Ithaca, Inc.*, 2 AD3d 990, 769 NYS2d 311 (3d Dept 2003); see *Park v Kovachevich*, 116 AD3d 182, 982 NYS2d 75

(1st Dept 2014). In contrast, the Second and Fourth Departments held that a plaintiff opposing a motion for summary judgment dismissing the complaint need only adduce evidence rebutting the prima facie showing that the defendant has made, *Sessa v Peconic Bay Medical Center*, 200 AD3d 1085, 159 NYS3d 126 (2d Dept 2021); *Montanari v Lorber*, 200 AD3d 676, 157 NYS3d 102 (2d Dept 2021); *Bubar v Brodman*, 177 AD3d 1358, 111 NYS3d 483 (4th Dept 2019) (disavowing *O'Shea v Buffalo Medical Group, P.C.*, 64 AD3d 1140, 882 NYS2d 619 (4th Dept 2009)); *Guctas v Pessolano*, 132 AD3d 632, 17 NYS3d 749 (2d Dept 2015); *Ahmed v Pannone*, 116 AD3d 802, 984 NYS2d 104 (2d Dept 2014); *Makinen v Torelli*, 106 AD3d 782, 965 NYS2d 529 (2d Dept 2013); *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 (2d Dept 2011) (disavowing *Amsler v Verrilli*, 119 AD2d 786, 501 NYS2d 411 (2d Dept 1986)). Under the Second and Fourth Departments' rule, where defendant has made a prima facie showing that there was no departure from accepted practice, plaintiff may defeat summary judgment with evidentiary proof that such a departure occurred and need not adduce evidence that the departure was a proximate cause of the alleged injuries, *Bubar v Brodman*, supra; *Stukas v Streiter*, supra. In *Pullman v Silverman*, 28 NY3d 1060, 43 NYS3d 793, 66 NE3d 663 (2016), the Court noted that the issue of the proper medical malpractice summary judgment standard, which was discussed in a concurring opinion, was not before the Court, and the Court therefore did not address it.

The Court of Appeals' decision *Orsi v Haralabatos*, 20 NY3d 1079, 965 NYS2d 71, 987 NE2d 631 (2013), indicates that the approach of the Second Department is proper. In *Orsi*, the Court reversed an order granting defendants' summary judgment motion, finding that triable issues of fact existed as to whether defendants departed from the applicable standard of medical care. The Court observed that summary judgment in defendants' favor on the issue of proximate cause was not warranted because defendants failed to make a prima facie showing that any alleged departure was not a proximate cause of plaintiff's injuries. The *Orsi* decision tacitly suggests that a plaintiff opposing a summary judgment motion need only rebut the prima facie showing a defendant has made, leaving without comment the Second Department's statement to that effect in the order under review, 89 AD3d 997, 934 NYS2d 195 (2d Dept 2011).

I. Elements Generally

The required elements of proof in a medical malpractice case are (1) a deviation or departure from accepted practice and (2) evidence that such departure was a proximate cause of injury or damage, *Anarumo v Herzog*, 201 AD3d 778, 162 NYS3d 381 (2d Dept 2022); *Donnelly v Parikh*, 150 AD3d 820, 55 NYS3d 274 (2d Dept 2017); *Gallagher v Cayuga Medical Center*, 151 AD3d 1349, 57 NYS3d 544 (3d Dept 2017); *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 (2d Dept 2011); *Giambona v Stein*, 265 AD2d 775, 697 NYS2d 399 (3d Dept 1999); *De Stefano v Immerman*, 188 AD2d 448, 591 NYS2d 47 (2d Dept 1992); *Amsler v Verrilli*, 119 AD2d 786, 501 NYS2d 411 (2d Dept 1986); see *Sessa v*

Peconic Bay Medical Center, 200 AD3d 1085, 159 NYS3d 126 (2d Dept 2021); *Mazella v Beals*, 27 NY3d 694, 37 NYS3d 46, 57 NE3d 1083 (2016); *Rivera v Kleinman*, 16 NY3d 757, 919 NYS2d 480, 944 NE2d 1119 (2011). In addition to being held liable for conduct falling short of the generally accepted standards of care in the medical community, a doctor may be liable if the doctor's treatment decisions do not reflect his or her own best judgment, *Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125 (2002). Claims for medical malpractice should be distinguished from claims for breach of contract arising out of the rendering of medical care. The latter class of claims will be held legally sufficient only if they are based on an express special promise to effect a cure or accomplish a definite result, *Duquette v Oliva*, 75 AD3d 727, 905 NYS2d 316 (3d Dept 2010); *Delaney v Krafte*, 98 AD2d 128, 470 NYS2d 936 (3d Dept 1984). For a charge and comment on breach of contract claims based on the rendering of medical care, see PJI 4:35.

With respect to proximate cause, plaintiff must establish the requisite nexus between the malpractice allegedly committed by defendant and the injury, unless the causal relationship is readily apparent to the trier of fact, *Horth v Mansur*, 243 AD2d 1041, 663 NYS2d 703 (3d Dept 1997). The mere offering of expert opinion on proximate cause does not suffice absent a showing of the requisite nexus between the malpractice allegedly committed and plaintiff's injuries, *Koeppel v Park*, 228 AD2d 288, 644 NYS2d 210 (1st Dept 1996). Thus, where plaintiff's expert could not state with a reasonable degree of medical certainty that defendant's departures were a proximate cause of plaintiff's injuries, plaintiff's malpractice claim did not lie, *Giambona v Stein*, 265 AD2d 775, 697 NYS2d 399 (3d Dept 1999); *Evans v Holleran*, 198 AD2d 472, 604 NYS2d 958 (2d Dept 1993); see *Callistro ex rel. Rivera v Bebbington*, 94 AD3d 408, 941 NYS2d 137 (1st Dept 2012), *aff'd*, 20 NY3d 945, 958 NYS2d 319, 982 NE2d 81 (2012); see also *Bossio v Fiorillo*, 210 AD2d 836, 620 NYS2d 596 (3d Dept 1994) (malpractice claim did not lie where plaintiff presented no evidence that plaintiff's physical condition would have been any different absent alleged malpractice).

A complaint sounds in medical malpractice rather than ordinary negligence where the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician to a particular patient, *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 26 NYS3d 231, 46 NE3d 614 (2015); *Dupree v Giugliano*, 20 NY3d 921, 958 NYS2d 312, 982 NE2d 74 (2012) (citing PJI); *Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 650 NYS2d 629, 673 NE2d 914 (1996); *Scott v Uljanov*, 74 NY2d 673, 543 NYS2d 369, 541 NE2d 398 (1989); *Bleiler v Bodnar*, 65 NY2d 65, 489 NYS2d 885, 479 NE2d 230 (1985); *Caso v St. Francis Hosp.*, 34 AD3d 714, 825 NYS2d 127 (2d Dept 2006); *Toepp v Myers Community Hosp.*, 280 AD2d 921, 721 NYS2d 177 (4th Dept 2001); *Cullinan v Pignataro*, 266 AD2d 807, 698 NYS2d 381 (4th Dept 1999). While a cause of action based on medical malpractice must be predicated on an express or implied physician-patient relationship, *Lee v New York*, 162 AD2d 34, 560

NYS2d 700 (2d Dept 1990); *Hickey v Travelers Ins. Co.*, 158 AD2d 112, 558 NYS2d 554 (2d Dept 1990), the absence of such a relationship does not preclude recovery in ordinary negligence where the physician's alleged negligence is readily determinable by the trier of fact based on common knowledge, *McKinney v Bellevue Hosp.*, 183 AD2d 563, 584 NYS2d 538 (1st Dept 1992). Thus, the failure to inform a prospective employee that his pre-employment physical revealed a serious medical condition constituted a basis for an action against the employer where the omission induced plaintiff to rely on his otherwise good health and resulted in his failure to seek treatment, *McKinney v Bellevue Hosp.*, supra; see *Mosezhnik v Berenstein*, 33 AD3d 895, 823 NYS2d 459 (2d Dept 2006) (defendant may be liable in ordinary negligence for failing to communicate significant medical findings to patient or treating physician). For a detailed discussion of the distinction between actions sounding in medical malpractice and those sounding in ordinary negligence, see *Malpractice*, Introductory Statement, *Malpractice Statute of Limitations*.

II. Standard of Care

A. Generally

"A doctor is charged with the duty to exercise due care, as measured against the conduct of his or her own peers—the reasonably prudent doctor standard," *Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125 (2002); see *Pike v Honsinger*, 155 NY 201, 49 NE 760 (1898). Not every instance of failed treatment or diagnosis may be attributed to a doctor's failure to exercise due care, *Nestorowich v Ricotta*, supra.

The practice of chiropractic is distinct from the practice of medicine, and therefore a chiropractor is generally held to the standard of care that a reasonably prudent chiropractor would exercise under the circumstances, *Hoagland v Kamp*, 155 AD2d 148, 552 NYS2d 978 (3d Dept 1990). A physician's standard of care applies only when a chiropractor exceeds the restrictions placed upon the practice of his or her profession, *Taormina v Goodman*, 63 AD2d 1018, 406 NYS2d 350 (2d Dept 1978); see *Education Law* § 6551; *Annot*: 58 ALR3d 590; 77 ALR4th 273; see also 73 ALR4th 24. A physical therapist is generally held to the standard of care that a reasonably prudent physical therapist would exercise under the circumstances, and may be held liable for professional malpractice where he or she deviates from good and accepted standards of physical therapy practice, see *Shank v Mehling*, 84 AD3d 776, 922 NYS2d 495 (2d Dept 2011).

The standard of care imposed on a pharmacist is generally described as ordinary care in the conduct of his or her business, *Burton v Sciano*, 110 AD3d 1435, 972 NYS2d 755 (4th Dept 2013); see *Abrams v Bute*, 138 AD3d 179, 27 NYS3d 58 (2d Dept 2016). The rule of ordinary care as applied to a pharmacist means the highest practicable degree of prudence, thoughtfulness and vigilance commensurate with the dangers

involved and the consequences that may attend inattention, *Burton v Sciano*, supra; *Brumaghim v Eckel*, 94 AD3d 1391, 944 NYS2d 329 (3d Dept 2012); *Eberle v Hughes*, 77 AD3d 1398, 909 NYS2d 273 (4th Dept 2010); *Hand v Krakowski*, 89 AD2d 650, 453 NYS2d 121 (3d Dept 1982). Generally, a pharmacist cannot be held liable for negligence in the absence of an allegation that he or she failed to fill a prescription precisely as directed by the physician or was aware that the customer had a condition that would render the prescription of the drug at issue contraindicated, *Burton v Sciano*, supra; *Brumaghim v Eckel*, supra; *Elliott v A.H. Robins Co.*, 262 AD2d 132, 691 NYS2d 501 (1st Dept 1999). In addition, liability or culpable conduct on the part of a pharmacy may be found where there was some active negligence on the part of the pharmacist, *Brumaghim v Eckel*, supra (holding that pharmacist had no duty to warn customer or contact customer's physician prior to filling a prescription that was not contraindicated on its face but which plaintiff alleged was inappropriate for her). In *Abrams v Bute*, supra, the Second Department concluded that when a pharmacist has demonstrated that he or she did not undertake to exercise any independent professional judgment in filling and dispensing prescription medication, he or she cannot be held liable for negligence unless he or she failed to fill the prescription precisely as directed by the prescribing physician or that the prescription was so clearly contraindicated that ordinary prudence required the pharmacist to take additional measures before dispensing the medication.

The courts have often evaluated medical malpractice claims by reference to the extent to which an exercise in judgment was involved. In this regard, a distinction must be made between an "error in judgment" and a doctor's failure to use his or her best judgment, *Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125 (2002); see *Spadacini v Dolan*, 63 AD2d 110, 407 NYS2d 840 (1st Dept 1978) (citing PJI) (failure to select any accepted method of treatment does not constitute an "error in judgment"). For a discussion of that distinction, see *Anderson v House of Good Samaritan Hosp.*, 44 AD3d 135, 840 NYS2d 508 (4th Dept 2007).

Clinical practice guidelines are sometimes used to inform a medical expert's opinion as to the standard of care, *Ellis v Eng*, 70 AD3d 887, 895 NYS2d 462 (2d Dept 2010). However, practice guidelines are not conclusive and are not necessary elements of plaintiff's proof in a medical malpractice case, *id.*

In some situations, the courts have limited the scope of a medical practitioner's duty based on the type and expected level of care, *Revere v Burke*, 200 AD3d 1607, 160 NYS3d 503 (4th Dept 2021) (physician's duty may be limited to medical functions undertaken by physician and relied upon by patient). After making a referral to an appropriate specialist, a primary care physician does not have an independent duty to assess the course of treatment set and monitored by the specialist, *Revere v Burke*, supra. For example, an attending physician who had been consulted for the purpose of treating a patient for fractures follow-

ing the patient's discharge from the emergency room had no duty to scan the patient's chart for irregularities outside the scope of the treatment, *Dombroski v Samaritan Hosp.*, 47 AD3d 80, 846 NYS2d 430 (3d Dept 2007); *Donnelly v Parikh*, 150 AD3d 820, 55 NYS3d 274 (2d Dept 2017). The failure to investigate a condition that would have led to an incidental discovery of an unindicated condition does not constitute malpractice, *Brooks v April*, 154 AD3d 564, 63 NYS3d 331 (1st Dept 2017); *David v Hutchinson*, 114 AD3d 412, 980 NYS2d 38 (1st Dept 2014); see *Curry v Dr. Elena Vezza Physician, P.C.*, 106 AD3d 413, 963 NYS2d 661 (1st Dept 2013); *Rivera v Greenstein*, 79 AD3d 564, 914 NYS2d 94 (1st Dept 2010). Similarly, an emergency room physician has no duty to follow up on the results of all of the tests performed on a patient while he or she was in the emergency room, since a contrary rule would be inconsistent with the limited purpose of the emergency-room service, *id.*; see *Ellis v Eng*, 70 AD3d 887, 895 NYS2d 462 (2d Dept 2010). Thus, there was no liability for the emergency-room physician's failure to follow up on a patient's elevated glucose level, which was revealed by a test he had ordered. In concluding that the emergency room physician could not be held liable, the *Dombrowski* court stressed that he had noted the condition on of patient's chart before discharging him to the inpatient attending physician, there were a number of possible non-serious explanations for the condition, a urinalysis had not yet been performed, there was no immediate threat to the patient, and the condition was in no way related to the trauma for which the patient had sought emergency-room treatment, *id.*

B. Best Judgment

Implicit in the concept of due care is the principle that doctors must employ their best judgment in exercising skill and applying their knowledge, *Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125 (2002). This principle assures conformity to the prevailing standard of care and accepted medical practice, *id.* A cause of action for medical malpractice may be premised on a physician's failure to use his or her best judgment, as well as lack of knowledge or lack of ability, see *Brazie v Williams*, 221 AD2d 993, 634 NYS2d 274 (4th Dept 1995) (citing PJI). A doctor may be liable if his or her treatment decisions do not reflect the doctor's best judgment, *Nestorowich v Ricotta*, *supra*; *Pike v Honsinger*, 155 NY 201, 49 NE 760 (1898). In other words, liability may be predicated upon a failure to exercise any professional judgment, *Pigno v Bunim*, 43 AD2d 718, 350 NYS2d 438 (2d Dept 1973), *aff'd*, 35 NY2d 841, 362 NYS2d 865, 321 NE2d 785 (1974); *Larkin v State*, 84 AD2d 438, 446 NYS2d 818 (4th Dept 1982).

C. Error in Judgment

When used in the context of medical malpractice litigation, the term "error in judgment" is something of a misnomer, as it is not properly used in a case where the issue involves a claimed misjudgment by the defendant practitioner, see *Anderson v House of Good Samaritan Hosp.*, 44 AD3d 135, 840 NYS2d 508 (4th Dept 2007). Rather, the so-

called “error in judgment” rule represents a narrow principle of law that protects medical practitioners from liability when they are sued for making non-negligent choices among medically acceptable alternatives, *Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125 (2002); *Mancuso v Kaleida Health*, 172 AD3d 1931, 100 NYS3d 469 (4th Dept 2019), *aff’d*, 34 NY3d 1020, 114 NYS3d 773, 138 NE3d 502 (2019); *Michalko v DeLuccia*, 187 AD3d 1365, 133 NYS3d 122 (3d Dept 2020); *Anderson v House of Good Samaritan Hosp.*, *supra*; see *Schrempf v State*, 66 NY2d 289, 496 NYS2d 973, 487 NE2d 883 (1985); *Weinreb v Rice*, 266 AD2d 454, 698 NYS2d 862 (2d Dept 1999); *Ibguy v State*, 261 AD2d 510, 690 NYS2d 604 (2d Dept 1999); *Darren v Safier*, 207 AD2d 473, 615 NYS2d 926 (2d Dept 1994). Where alternative procedures are available to a physician, any one of which is medically acceptable and proper under the circumstances, there is no negligence in using one rather than another, *Koehler v Schwartz*, 48 NY2d 807, 424 NYS2d 119, 399 NE2d 1140 (1979); *Henry v Bronx Lebanon Medical Center*, 53 AD2d 476, 385 NYS2d 772 (1st Dept 1976); *Schreiber v Cestari*, 40 AD2d 1025, 338 NYS2d 972 (2d Dept 1972); see *Gross v Friedman*, 138 AD2d 571, 526 NYS2d 152 (2d Dept 1988), *aff’d*, 73 NY2d 721, 535 NYS2d 586, 532 NE2d 92 (1988); Annot: 89 ALR4th 799. To be distinguished from true “error in judgment” cases involving choices among medically acceptable alternatives are those in which the term “error in judgment” or a similar formulation is used but the real question is simply whether the practitioner’s treatment represented a permissible exercise of medical judgment, see *Oelsner v State*, 66 NY2d 636, 495 NYS2d 359, 485 NE2d 1024 (1985); *Johnson v Yeshiva University*, 42 NY2d 818, 396 NYS2d 647, 364 NE2d 1340 (1977); *Davis v Patel*, 287 AD2d 479, 731 NYS2d 204 (2d Dept 2001).

The “error in judgment” charge implies the exercise of some judgment in choosing from among two or more available, medically acceptable alternatives, *Lacqua v Silich*, 141 AD3d 690, 35 NYS3d 488 (2d Dept 2016); *Martin v Lattimore Road Surgicenter, Inc.*, 281 AD2d 866, 727 NYS2d 836 (4th Dept 2001); *Spadaccini v Dolan*, 63 AD2d 110, 407 NYS2d 840 (1st Dept 1978) (citing PJI). Thus, it should not be given unless there is a showing that defendant considered and chose among several medically acceptable alternatives, *Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125 (2002) (citing PJI) (“error in judgment” charge improper where neither party contended that ligation of renal artery was acceptable alternative means of treatment); *Mancuso v Kaleida Health*, 172 AD3d 1931, 100 NYS3d 469 (4th Dept 2019), *aff’d* on other grounds, 34 NY3d 1020, 114 NYS3d 773, 138 NE3d 502 (2019) (per Fourth Department’s decision: “error in judgment” charge not warranted where there was no evidence hospital personnel exercised judgment or chose between medically acceptable treatment alternatives in administering statin at prescribed dose); *Michalko v DeLuccia*, 187 AD3d 1365, 133 NYS3d 122 (3d Dept 2020) (error in judgment charge should not have been given where there was no evidence that defendant chose between two or more medically accepted alternatives); *Lacqua v Silich*, *supra* (“error in judgment” charge appropriate only in narrow category of cases in which there is evidence that defendant physician

considered and chose between or among several medically acceptable treatment alternatives); *Anderson v House of Good Samaritan Hosp.*, 44 AD3d 135, 840 NYS2d 508 (4th Dept 2007) (citing PJI) (“error in judgment” charge improper where claim involved physician’s alleged misdiagnosis and there was no issue as to whether physician had failed to use best judgment in choosing among medically acceptable alternatives); *Martin v Lattimore Road Surgicenter, Inc.*, supra (citing PJI) (“error in judgment” charge appropriate only in narrow category of cases in which there is evidence that defendant physician considered and chose among several medically acceptable treatment alternatives); *Grasso v Capella*, 260 AD2d 600, 688 NYS2d 666 (2d Dept 1999) (where there was no evidence that defendant surgeon had to consider and choose among medically acceptable alternatives, trial court properly refused to give “error in judgment” charge); see *Capolino v New York City Health & Hospitals Corp.*, 199 AD2d 173, 605 NYS2d 87 (1st Dept 1993) (“error in judgment” charge should have been given where it was possible for jury to determine that there was more than one course acceptable under medical standards at time of treatment); *Petko v Ghoorah*, 178 AD2d 1013, 580 NYS2d 668 (4th Dept 1991) (court did not err in giving “error in judgment” charge where each party’s expert testified to acceptable methods of diagnosing and treating condition). It is improper to give the “error in judgment” charge when the evidence simply raises the issue of whether defendant physician deviated from the degree of care that a reasonable physician would have exercised under the same circumstances, *Martin v Lattimore Road Surgicenter, Inc.*, supra; see *Lacqua v Silich*, supra.

A mere difference of opinion among medical providers is not, standing alone, sufficient to sustain a prima facie case of medical malpractice, *Weinreb v Rice*, 266 AD2d 454, 698 NYS2d 862 (2d Dept 1999); *Ibguy v State*, 261 AD2d 510, 690 NYS2d 604 (2d Dept 1999); *Darren v Safier*, 207 AD2d 473, 615 NYS2d 926 (2d Dept 1994). The permissible exercise of medical judgment is measured by the state of medical knowledge at the time of the act or omission, *Johnson v Yeshiva University*, 42 NY2d 818, 396 NYS2d 647, 364 NE2d 1340 (1977); *Fallon v Loree*, 136 AD2d 956, 525 NYS2d 93 (4th Dept 1988); *Paradies v Benedictine Hospital*, 77 AD2d 757, 431 NYS2d 175 (3d Dept 1980). Liability for malpractice must be based on the facts confronting defendant at the time of the occurrence and should not be subjected to “the second guess of a jury,” *Topel v Long Island Jewish Medical Center*, 55 NY2d 682, 685, 446 NYS2d 932, 431 NE2d 293 (1981); see *Krapivka v Maimonides Medical Center*, 119 AD2d 801, 501 NYS2d 429 (2d Dept 1986); *Henry v Bronx Lebanon Medical Center*, 53 AD2d 476, 385 NYS2d 772 (1st Dept 1976).

For the application of the “error in judgment” principle to actions against mental health professionals, see VII. Mental Health Professionals: B. Error in Judgment, *infra*.

D. The Locality Rule

Under the “locality rule,” a physician or surgeon is held only to the

degree of diligence, skill and learning that is possessed by physicians or surgeons in the particular locality where he or she practices, *Pike v Honsinger*, 155 NY 201, 49 NE 760 (1898). New York has apparently not abandoned the locality rule, see *Toth v Community Hospital at Glen Cove*, 22 NY2d 255, 292 NYS2d 440, 239 NE2d 368 (1968), as have some other jurisdictions, see *Brune v Belinkoff*, 354 Mass 102, 235 NE2d 793 (1968); *Pederson v Dumouchel*, 72 Wash 2d 73, 431 P2d 973 (1967). However, *Toth v Community Hospital at Glen Cove*, *supra*, recognized a two-tiered rule, holding that a specialist may be held liable where a general practitioner would not be and that a specialist must use whatever superior knowledge, skill and intelligence he or she has, see *Riley v Wieman*, 137 AD2d 309, 528 NYS2d 925 (3d Dept 1988); see also *Darren v Safier*, 207 AD2d 473, 615 NYS2d 926 (2d Dept 1994) (defendant who was specialist in gastroenterology not subject to liability for failing to exercise that degree of skill and care expected of specialist in psychiatry where defendant referred patient to appropriate specialist). For further discussion, see Annot: 18 ALR4th 603; AmJur2d, Physicians, Surgeons, and Other Healers § 209.

The two-tiered *Toth* approach applies the locality rule as a minimum standard and then adds the further requirement that doctors use their “best judgment and whatever superior knowledge, skill and intelligence” they possess, see *Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125 (2002); *McGinn v Sellitti*, 150 AD2d 967, 541 NYS2d 648 (3d Dept 1989) (oral surgeon subject to “higher standard of practice” than general dentist). Thus, as used in New York, the locality rule does not prohibit plaintiff from establishing that defendant failed to comply with a minimum local, state-wide or national standard of care, *McCullough v University of Rochester Strong Memorial Hosp.*, 17 AD3d 1063, 794 NYS2d 236 (4th Dept 2005); see *Payant v Imobersteg*, 256 AD2d 702, 681 NYS2d 135 (3d Dept 1998) (national); *Hoagland v Kamp*, 155 AD2d 148, 552 NYS2d 978 (3d Dept 1990) (state-wide). If the standard of care in a particular locality is less demanding than that which is necessary to attain and maintain licensure within the State, the local standard of care is unacceptably low, *Hoagland v Kamp*, *supra*. The Court of Appeals has declared that “[a] physician will usually be insulated from tort liability where there is evidence that he or she conformed to accepted community standards of practice,” *Spensieri v Lasky*, 94 NY2d 231, 701 NYS2d 689, 723 NE2d 544 (1999). Nevertheless, the Court approved the trial court’s charge that the standard of care for the physician defendants was measured by “the degree of knowledge and ability of the average Board-certified obstetrician/gynecologist in good standing practicing that specialty in the State of New York.” However, there is no rule setting up a separate standard or third analytical tier for specialists who are board-certified, *Mayer v Oswego County Ob-Gyn, P.C.*, 207 AD2d 985, 617 NYS2d 92 (4th Dept 1994). As to the statute of limitations applicable to malpractice claims, see Introductory Statement, *supra*.

III. Persons Who May Be Liable

One who holds himself or herself out as qualified to give treatment

but who is not in fact licensed to practice medicine will be held to the professional standards of skill and care of those lawfully offering such treatment, *Brown v Shyne*, 242 NY 176, 151 NE 197 (1926); *Monahan v Devinny*, 223 App Div 547, 229 NYS 60 (3d Dept 1928). The fact that defendant practiced medicine without a license is *prima facie* evidence of negligence, CPLR 4504(d); see also *Pagano v Massapequa General Hosp.*, 99 AD2d 769, 472 NYS2d 15 (2d Dept 1984) (error to charge that defendant's qualifications were a question of fact and to refuse charge, as a matter of law, that defendant was not a licensed physician, where defendant had certificate from Educational Council for Foreign Medical Graduates); *Ellenberger v Pena*, 88 AD2d 373, 453 NYS2d 436 (2d Dept 1982) (certificate from Educational Council for Foreign Medical Graduates is not equivalent to permit from State Education Department; holder of the certificate is merely eligible to obtain permit). However, the failure of a licensed physician to obtain board certification before practicing in a specialized area does not constitute malpractice, and a hospital is not negligent in allowing a non-certified but licensed physician to practice a specialty, see *Thomas v Solon*, 121 AD2d 165, 502 NYS2d 475 (1st Dept 1986). Additionally, treating a patient at a location other than the address registered with the Education Department does not give rise to a fraud cause of action by the patient, *Boothe v Weiss*, 133 AD2d 603, 519 NYS2d 710 (2d Dept 1987).

A complaint sounds in medical malpractice rather than ordinary negligence where the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician to a particular patient, *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 26 NYS3d 231, 46 NE3d 614 (2015); *Dupree v Giugliano*, 20 NY3d 921, 958 NYS2d 312, 982 NE2d 74 (2012); *Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 650 NYS2d 629, 673 NE2d 914 (1996); *Scott v Uljanov*, 74 NY2d 673, 543 NYS2d 369, 541 NE2d 398 (1989); *Bleiler v Bodnar*, 65 NY2d 65, 489 NYS2d 885, 479 NE2d 230 (1985); *Rabinovich v Maimonides Medical Center*, 179 AD3d 88, 113 NYS3d 198 (2d Dept 2019); *Jeter v New York Presbyterian Hospital*, 172 AD3d 1338, 101 NYS3d 411 (2d Dept 2019); *Levinson v Health South Manhattan*, 17 AD3d 247, 793 NYS2d 401 (1st Dept 2005); *Toepp v Myers Community Hosp.*, 280 AD2d 921, 721 NYS2d 177 (4th Dept 2001); *Cullinan v Pignataro*, 266 AD2d 807, 698 NYS2d 381 (4th Dept 1999). In distinguishing whether conduct should be deemed medical malpractice or ordinary negligence, the critical factor is the nature of the duty owed to the plaintiff that the defendant is alleged to have breached, *Rabinovich v Maimonides Medical Center*, *supra*; *Jeter v New York Presbyterian Hospital*, *supra*. The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts, *Rabinovich v Maimonides Medical Center*, *supra*; *Jeter v New York Presbyterian Hospital*, *supra*. Therefore, a nurse performing a medical service is subject to a claim for medical malpractice, *Bleiler v Bodnar*, *supra*. As

to the duty of care a nurse owes to a patient, see *Applewhite v Accuhealth, Inc.*, 81 AD3d 94, 915 NYS2d 223 (1st Dept 2010). The allegations sounded in medical malpractice where a hospital inadequately provided for the treatment and supervision of a patient with memory loss who disappeared from the hospital for five days, *Rabinovich v Maimonides Medical Center*, supra; see *Jeter v New York Presbyterian Hospital*, supra. However, a resident who assists a doctor during a medical procedure cannot be held liable so long as he or she did not exercise any independent medical judgment and the doctor's directions did not so greatly deviate from normal practice that the resident had a duty to intervene, *Tsocanos v Zaidman*, 180 AD3d 841, 118 NYS3d 219 (2d Dept 2020); *Hatch v St. Joseph's Hospital Health Center*, 174 AD3d 1404, 105 NYS3d 742 (4th Dept 2019); *Soto v Andaz*, 8 AD3d 470, 779 NYS2d 104 (2d Dept 2004); see *Macancela v Wyckoff Heights Medical Center*, 176 AD3d 795, 109 NYS3d 411 (2d Dept 2019) (question of fact as to whether resident was obligated to intervene in attending physician's treatment of decedent).

Where full-time psychiatric, psychological and social work personnel were employed at a center for the emotionally disturbed to provide clinical as well as educational services, and where plaintiff was referred to the facility for treatment, she was entitled to assert a claim for medical malpractice against the center based on allegations that the staff failed to exercise reasonable care in their initial evaluation and in the administration of a deleterious course of treatment, *Cantone by Cantone v Rosenblum*, 186 AD2d 167, 587 NYS2d 743 (2d Dept 1992). In contrast, non-professional staff members who provide supportive and oversight services but not treatment and make daily visits to a residential facility maintained for individuals receiving psychiatric care elsewhere are not engaged in an activity that bears a substantial relationship to the rendition of medical treatment, *Avins v Federation Employment and Guidance Service, Inc.*, 52 AD3d 30, 857 NYS2d 550 (1st Dept 2008). Thus, a cause of action for medical malpractice cannot be sustained against such staff members, *id.*

Allegations challenging a nursing home's assessment of a patient's need for supervision sound in medical malpractice, not ordinary negligence; however, allegations relating to a nursing home's general duty to safeguard residents, measured by the capacity of the resident to provide for his or her own safety, sound in ordinary negligence, see *Noga v Brothers of Mercy Nursing & Rehabilitation Center*, 198 AD3d 1277, 155 NYS3d 503 (4th Dept 2021) (allegations challenging nursing home's assessment of patient's need for supervision sounded in medical malpractice; allegations challenging nursing home's failure to follow care plan sounded in negligence); *Bell ex rel. Todzia v WSNCHS North, Inc.*, 153 AD3d 498, 59 NYS3d 475 (2d Dept 2017); *Carthon v Buffalo General Hosp. @ Deaconess Skilled Nursing Facility Div.*, 83 AD3d 1404, 921 NYS2d 746 (4th Dept 2011) (allegations challenging nursing home's assessment of decedent's need for supervision sounded in malpractice; allegations that nursing home staff failed to carry out direc-

tions of physicians sounded in ordinary negligence); *Santana v St. Vincent Catholic Medical Center of New York*, 65 AD3d 1119, 886 NYS2d 57 (2d Dept 2009) (allegations of failure to assess level of supervision, nursing care and security after administration of pain medication sounded in malpractice, not ordinary negligence). For a further discussion of the distinction between medical malpractice and ordinary negligence relating to Statute of Limitations issues, see Introductory Statement, *supra*.

Education Law § 6951(1) limits the practice of the profession of midwifery to the management of “normal” pregnancies, *Liquori v Dolkart*, 204 AD3d 1099, 166 NYS3d 352 (3d Dept 2022). Thus, where a patient presented with a high-risk pregnancy, only the midwife practice’s collaborating physician had authority to direct the course of treatment, *id*.

An individual who is trained in first aid techniques, but is not a member of the medical profession, is not subject to suit for medical malpractice, *Lazzaro v Nassau*, 245 AD2d 342, 665 NYS2d 441 (2d Dept 1997). A physician may also be liable for breach of contract, if there is an express contract with the patient to effect a cure or to accomplish some definite result, *Chvetsova v Family Smile Dental*, 202 AD3d 657, 163 NYS3d 98 (2d Dept 2022) (promise dental implants last lifetime); *Derby v Bitan*, 89 AD3d 889, 933 NYS2d 315 (2d Dept 2011); *Nicoleau v Brookhaven Memorial Hosp. Center*, 201 AD2d 544, 607 NYS2d 703 (2d Dept 1994); see PJI 4:35.

IV. Physician-Patient Relationship

A. Gratuitously Provided Services

That the physician’s services are rendered gratuitously does not affect the physician’s liability, *Du Bois v Decker*, 130 NY 325, 332, 29 NE 313 (1891), except in cases to which the so-called Good Samaritan statute applies, Education Law §§ 6527(2) (physicians); 6611 (dentists); 6909(1) (nurses), 6537 (licensed physical therapist); 6457 (physician’s assistant); Public Health Law § 3013 (“certified emergency medical technician,” “voluntary ambulance service,” and “advanced emergency medical technician”); Public Authorities Law § 1266-b (emergency first aid treatment by employees of LIRR). However, the Good Samaritan statute applicable to voluntary ambulance services does not protect against claims of gross negligence, see *Kowal v Deer Park Fire Dist.*, 13 AD3d 489, 787 NYS2d 352 (2d Dept 2004), or claims of negligence based on an alleged failure to provide qualified, competent personnel, *Estate of Klinger v Corona Community Ambulance Corps., Inc.*, 301 AD2d 495, 753 NYS2d 126 (2d Dept 2003). Medical personnel requested by a police officer to take blood samples pursuant to VTL § 1194(4) are immune from liability, VTL § 1194(4)(a)(2).

General Business Law § 627-a imposes a duty on certain health clubs to have on the premises both automated external defibrillators and individuals trained to use those devices. That provision, however,

does not create a duty running from a health club to its members to use that device, *Miglino v Bally Total Fitness of Greater New York, Inc.*, 20 NY3d 342, 961 NYS2d 364, 985 NE2d 128 (2013); *Digiulio v Gran, Inc.*, 74 AD3d 450, 903 NYS2d 359 (1st Dept 2010), *aff'd*, 17 NY3d 765, 929 NYS2d 71, 952 NE2d 1064 (2011). When an employee of a club certified to use the device does so to render emergency medical treatment or first aid to a stricken individual, the employee is only liable for gross negligence, General Business Law § 627-a(3); Public Health Law § 3000-a. The club that provided the device is insulated from liability except for its own negligence, gross negligence or intentional misconduct, General Business Law § 627-a(3); Public Health Law § 3000-a(2). Thus, General Business Law § 627-a, in conjunction with Public Health Law §§ 3000-a and 3000-b, protects health clubs and their employees from the risk of liability for ordinary negligence with respect to those devices, *Miglino v Bally Total Fitness of Greater New York, Inc.*, *supra*. A health club does owe a limited, common law duty of care to a patron struck down by a heart attack or cardiac arrest while engaged in athletic activities on the club's premises, *id* (club owes common law duty to employ proper lifesaving measures to patron who suffered cardiac arrest at club).

B. Physician's Undertaking to Provide Services

Generally, whether a physician owed a duty of care to plaintiff is a legal question, not a question of medical expertise, *McCarthy v Ashikari*, 206 AD3d 718, 169 NYS3d 352 (2d Dept 2022); *Liquori v Dolkart*, 204 AD3d 1099, 166 NYS3d 352 (3d Dept 2022); *Burtman v Brown*, 97 AD3d 156, 945 NYS2d 673 (1st Dept 2012); *Koeppel v Park*, 228 AD2d 288, 644 NYS2d 210 (1st Dept 1996); *Sawh v Schoen*, 215 AD2d 291, 627 NYS2d 7 (1st Dept 1995); *Lipton by Lipton v Kaye*, 214 AD2d 319, 624 NYS2d 590 (1st Dept 1995). Thus, an affidavit by a defense expert that a defendant physician's duty of care did not extend to the treatment provided by another physician was insufficient to establish *prima facie* entitlement to summary judgment, *McCarthy v Ashikari*, 206 AD3d 718, 169 NYS3d 352 (2d Dept 2022). Moreover, an affidavit by plaintiff's medical expert on the subject intrudes upon the exclusive province of the court and will not defeat summary judgment, *Kamhi v Tay*, 244 AD2d 266, 664 NYS2d 288 (1st Dept 1997); *Sawh v Schoen*, *supra*; *Lipton by Lipton v Kaye*, *supra*. However, whether a physician's giving of advice furnishes a sufficient basis upon which to conclude that an implied physician-patient relationship has arisen has been deemed to be a question of fact for the jury, *Marshall v Rosenberg*, 196 AD3d 817, 151 NYS3d 240 (3d Dept 2021); *Campbell v Haber*, 274 AD2d 946, 710 NYS2d 495 (4th Dept 2000); *Cogswell by Cogswell v Chapman*, 249 AD2d 865, 672 NYS2d 460 (3d Dept 1998).

A physician-patient relationship is created when the professional services of a physician are rendered to and accepted by another person for the purposes of medical or surgical treatment, *Liquori v Dolkart*, 204 AD3d 1099, 166 NYS3d 352 (3d Dept 2022); *Pizzo-Juliano v Southside Hosp.*, 129 AD3d 695, 10 NYS3d 572 (2d Dept 2015); *Cygan v*

Kaleida Health, 51 AD3d 1373, 857 NYS2d 869 (4th Dept 2008); Garofalo v State, 17 AD3d 1109, 794 NYS2d 269 (4th Dept 2005). To overcome a motion to dismiss based on the question whether a physician-patient relationship existed, it is not necessary to show that the physician saw, examined, took a history or treated the patient, Pizzo-Juliano v Southside Hosp., supra (dismissal denied where plaintiffs alleged that defendant physician, in his role as on-call plastic surgeon for hospital, made medical determination over telephone that infant plaintiff's laceration was not an emergency requiring defendant's expertise); Tom v Sundaresan, 107 AD3d 479, 966 NYS2d 434 (1st Dept 2013) (summary judgment dismissing complaint denied where defendant physician had consulted by telephone with neurosurgeon and both physicians planned to treat plaintiff as surgical team); see Scalisi v Oberlander, 96 AD3d 106, 943 NYS2d 23 (1st Dept 2012) (summary judgment denied where physician had formulated plans with other medical professionals who later relied on those recommendations); Santos v Rosing, 60 AD3d 500, 875 NYS2d 59 (1st Dept 2009) (summary judgment denied where evidence that physician consulted with nurse midwife concerning plaintiff's treatment). Whether there was in fact an undertaking to provide medical attention may be a question for the jury, Dillon v Silver, 134 AD2d 159, 520 NYS2d 751 (1st Dept 1987); O'Neill v Montefiore Hospital, 11 AD2d 132, 202 NYS2d 436 (1st Dept 1960). If there is such an undertaking, the physician will be liable if he or she abandons treatment prematurely, Meiselman v Crown Heights Hospital, 285 NY 389, 34 NE2d 367 (1941); Lewis v Capalbo, 280 AD2d 257, 720 NYS2d 455 (1st Dept 2001); O'Neill v Montefiore Hospital, supra; see Shapira v United Medical Service, Inc., 15 NY2d 200, 257 NYS2d 150, 205 NE2d 293 (1965); AmJur2d, Physicians, Surgeons, and Other Healers § 218; Annot: 57 ALR2d 432, unless the patient consents or the physician gives the patient sufficient notice so that another physician can be employed, Becker v Janinski, 15 NYS 675 (CP Ct 1891).

The duty owed by a physician may, however, be limited to those medical functions undertaken by the physician and relied upon by the patient, Liquori v Dolkart, 204 AD3d 1099, 166 NYS3d 352 (3d Dept 2022); Revere v Burke, 200 AD3d 1607, 160 NYS3d 503 (4th Dept 2021); Mann v Okere, 195 AD3d 910, 150 NYS3d 306 (2d Dept 2021); Mosezhnik v Berenstein, 33 AD3d 895, 823 NYS2d 459 (2d Dept 2006); Wasserman v Staten Island Radiological Associates, 2 AD3d 713, 770 NYS2d 108 (2d Dept 2003); Markley by Markley v Albany Medical Center Hosp., 163 AD2d 639, 558 NYS2d 688 (3d Dept 1990). Consistent with that principle, a physician may satisfy his or her duty of care by referring the patient to an appropriate specialist who is better equipped to handle the patient's condition, Revere v Burke, supra.

Thus, a radiologist to whom the decedent was referred for a routine mammogram did not assume any duty of care beyond that of reading the mammography images and reporting his findings, despite the fact that the decedent indicated on the intake worksheet that she experienced pain and/or soreness in her breast and allegedly told the radiologist's employee that she felt a lump in her breast, Mann v Okere, 195

AD3d 910, 150 NYS3d 306 (2d Dept 2021). A primary care physician has no independent duty to supervise or override a course of treatment initiated by another physician actively treating a patient, *Revere v Burke*, 200 AD3d 1607, 160 NYS3d 503 (4th Dept 2021); *Burtman v Brown*, 97 AD3d 156, 945 NYS2d 673 (1st Dept 2012). Moreover, a physician's participation in surgery did not give rise to a duty to supervise or participate in the patient's postoperative care where the physician did not undertake to supervise the case and the patient had a primary care physician, *Bettencourt v Long Island College Hosp., Inc.*, 306 AD2d 425, 762 NYS2d 261 (2d Dept 2003). Similarly, a physician group that deferred to orthopedic specialists for the assessment and treatment of plaintiff's ankle condition was not chargeable with the failure to properly diagnose that condition, *Wasserman v Staten Island Radiological Associates*, 2 AD3d 713, 770 NYS2d 108 (2d Dept 2003).

C. Medical Examinations Conducted on Referral of Employers and Insurance Carriers

Ordinarily, a physician conducting an independent medical examination for a workers' compensation carrier cannot be held liable in negligence or malpractice to the examinee for a misdiagnosis or failure to report a proper diagnosis to the carrier, *Zajac v Wilson*, 2 AD3d 1410, 768 NYS2d 889 (4th Dept 2003); *Lee v New York*, 162 AD2d 34, 560 NYS2d 700 (2d Dept 1990); *LoDico v Caputi*, 129 AD2d 361, 517 NYS2d 640 (4th Dept 1987); see *Bazakos v Lewis*, 12 NY3d 631, 883 NYS2d 785, 911 NE2d 847 (2009); *Savarese v Allstate Ins. Co.*, 287 AD2d 492, 731 NYS2d 226 (2d Dept 2001); see also *White v Southside Hosp.*, 281 AD2d 474, 721 NYS2d 678 (2d Dept 2001) (physician-patient relationship not established where doctor who performed pre-employment physical advised decedent of positive tuberculosis test and advised her to obtain second opinion); but see *McKinney v Bellevue Hosp.*, 183 AD2d 563, 584 NYS2d 538 (1st Dept 1992).

A person referred to a physician by a third party such as an employer or workers' compensation carrier is deemed to have a "limited physician-patient relationship." In such a relationship, the physician will ordinarily not be liable for damages resulting from the conclusions he or she reaches or reports, but he or she may be held liable in malpractice for performing the examination in a manner that causes physical harm, *Bazakos v Lewis*, 12 NY3d 631, 883 NYS2d 785, 911 NE2d 847 (2009); see *Smith v Pasquarella*, 201 AD2d 782, 607 NYS2d 489 (3d Dept 1994); *Twitchell v MacKay*, 78 AD2d 125, 434 NYS2d 516 (4th Dept 1980). Additionally, in such situations, the examinee may maintain a medical malpractice action against the physician based on the physician's providing negligent treatment or rendering negligent medical advice, *Badolato v Rosenberg*, 67 AD3d 937, 890 NYS2d 85 (2d Dept 2009); *Lawliss v Quellman*, 38 AD3d 1123, 832 NYS2d 328 (3d Dept 2007); *Hickey v Travelers Ins. Co.*, 158 AD2d 112, 558 NYS2d 554 (2d Dept 1990) (physician who conducted examination for the purpose of evaluating an injury for workers' compensation carrier may be held liable for alleged malpractice in advising examinee that surgery was not

necessary); see *Rojas v McDonald*, 267 AD2d 130, 701 NYS2d 21 (1st Dept 1999); *Heller v Peekskill Community Hosp.*, 198 AD2d 265, 603 NYS2d 548 (2d Dept 1993). To establish such liability, plaintiff must show: (1) the advice was incorrect, (2) the issuance of such advice constituted medical malpractice, (3) it was foreseeable that the examinee would rely upon the advice, and (4) the examinee did, in fact, rely upon the advice to the his or her detriment, *Hickey v Travelers Ins. Co.*, supra; *Badolato v Rosenberg*, supra; see also *Violandi v New York*, 184 AD2d 364, 584 NYS2d 842 (1st Dept 1992) (physician who examined plaintiff solely for convenience of plaintiff's employer not liable for advice in which plaintiff's personal physician independently concurred, since lack of reliance established as matter of law); but see *Durso v New York*, 251 AD2d 8, 673 NYS2d 651 (1st Dept 1998) (examining doctor's recommendation to plaintiff that he stop taking prescribed pain medication that made him nauseous did not take case out of "well-established rule" that, absent "something more," physician-patient relationship does not exist where examination was conducted solely for the purpose, convenience or on behalf of employer).

D. Relationship Arising From Physician's Providing Medical Advice or Consultation Services

Liability may be imposed on non-treating physicians in situations of joint action in diagnosis or treatment or some control over the course of treatment of one by the other, *Cygan v Kaleida Health*, 51 AD3d 1373, 857 NYS2d 869 (4th Dept 2008). For example, a question of fact existed as to the involvement of a non-treating physician where there was evidence that the physician, as director of cardiac surgery, affirmatively directed the cancellation of the decedent's previously scheduled surgery, *id.* Such evidence may have indicated more than an informal interest and involvement on the part of the non-treating physician, *id.*; see *Campbell v Haber*, 274 AD2d 946, 710 NYS2d 495 (4th Dept 2000). However, a referring physician is not liable if he or she did not undertake to monitor the patient's condition and, in fact, left that function to the physician to whom the patient was referred, *Ellis v Eng*, 70 AD3d 887, 895 NYS2d 462 (2d Dept 2010).

An implied physician-patient relationship may arise when a physician gives advice to a patient, even where the advice was communicated though another health care professional, *Liquori v Dolkart*, 204 AD3d 1099, 166 NYS3d 352 (3d Dept 2022) (issue of fact whether implied physician-patient relationship arose between collaborating physician of midwifery practice and patient); *Marshall v Rosenberg*, 196 AD3d 817, 151 NYS3d 240 (3d Dept 2021); *Campbell v Haber*, 274 AD2d 946, 710 NYS2d 495 (4th Dept 2000); *Cogswell by Cogswell v Chapman*, 249 AD2d 865, 672 NYS2d 460 (3d Dept 1998). A doctor-patient relationship can be established by a telephone call when the doctor affirmatively advises a prospective patient as to a course of treatment, it is foreseeable that the patient will rely on the advice, and the patient did in fact rely on the advice, *Marshall v Rosenberg*, supra; *Cogswell by Cogswell v Chapman*, supra; *Miller v Sullivan*, 214 AD2d 822, 625 NYS2d 102 (3d

Dept 1995); see *Campbell v Haber*, supra. An implied physician-patient relationship can arise with a specialist if the patient's treating physician reasonably and foreseeably relied upon the specialist's advice to the patient's detriment, *Marshall v Rosenberg*, supra.

The exposure of a non-treating physician engaged in a consulting capacity is limited, *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 (1986); *Lipton by Lipton v Kaye*, 214 AD2d 319, 624 NYS2d 590 (1st Dept 1995). A non-treating physician is not responsible for the future treatment of a patient for whom the doctor has made an accurate diagnosis, *Lipton by Lipton v Kaye*, supra. Although physicians ordinarily owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physicians and relied on by the patient, *Mosezhnik v Berenstein*, 33 AD3d 895, 823 NYS2d 459 (2d Dept 2006); *Chulla v DiStefano*, 242 AD2d 657, 662 NYS2d 570 (2d Dept 1997). Similarly, radiologists who had the limited role of interpreting mammography films and documenting their findings had no duty to schedule or urge further testing or diagnose plaintiff's medical conditions, *Mosezhnik v Berenstein*, supra. However, a fertility specialist who performed in vitro fertilization and embryo implantation on referral from the patient's treating physician had an obligation to ensure that the patient was fully informed of the risks attendant to a potential pregnancy in view of the patient's personal health and circumstances, even though the treating physician had "medically cleared" the patient for the procedure and was responsible for monitoring her pregnancy, *Nieves v Montefiore Medical Center*, 305 AD2d 161, 760 NYS2d 419 (1st Dept 2003). Further, a non-treating physician's failure to communicate significant medical findings to a patient or his treating physician may constitute ordinary negligence, see *Yaniv v Taub*, 256 AD2d 273, 683 NYS2d 35 (1st Dept 1998); *McKinney v Bellevue Hosp.*, 183 AD2d 563, 584 NYS2d 538 (1st Dept 1992) (failure to disclose a potentially life threatening condition detected in a pre-employment physical examination may give rise to liability by employer based on ordinary negligence); see also *Glasheen v Long Island Diagnostic Imaging*, 303 AD2d 365, 756 NYS2d 589 (2d Dept 2003).

A doctor's participation in weekly group staff meetings of a professional corporation at which a patient's care was discussed does not, without more, give rise to a physician-patient relationship between the doctor and the patient discussed, *Sawh v Schoen*, 215 AD2d 291, 627 NYS2d 7 (1st Dept 1995); but see *Tom v Sundaresan*, 107 AD3d 479, 966 NYS2d 434 (1st Dept 2013) (distinguishing *Sawh* where defendant physician had detailed conversation with neurosurgeon and both physicians planned for surgery to be jointly performed). Similarly, a physician-patient relationship did not arise between a patient and members of a team to assess impaired physicians whose involvement with the patient-doctor terminated after they concluded that he did not suffer from a psychological or psychiatric illness, *Gedon v Bry-Lin Hospitals, Inc.*, 286 AD2d 892, 730 NYS2d 641 (4th Dept 2001).

V. Persons to Whom Duty of Care is Owed

A. Duty to General Public

A physician's duty of care is ordinarily owed to the patient and not the general public, *Purdy v Public Adm'r of Westchester County*, 72 NY2d 1, 530 NYS2d 513, 526 NE2d 4 (1988); *Fox v Marshall*, 88 AD3d 131, 928 NYS2d 317 (2d Dept 2011); *Adams v Elgart*, 213 AD2d 436, 623 NYS2d 637 (2d Dept 1995) (nursing home and its admitting physician owe no duty to general public to prevent voluntary patient from driving or to warn of dangers presented by such driving); *Cartier v Long Island College Hosp.*, 111 AD2d 894, 490 NYS2d 602 (2d Dept 1985) (physicians practicing in alcoholism clinic do not owe duty to public at large to control behavior of out-patients and are not liable for failing to prevent out-patient from driving while intoxicated); see *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 26 NYS3d 231, 46 NE3d 614 (2015). A physician who completes a health report on a patient owes a duty of care only to the patient and those persons the physician knew or reasonably should have known were relying upon the report, *Eiseman v State*, 70 NY2d 175, 518 NYS2d 608, 511 NE2d 1128 (1987) (prison physician, who erroneously reported that ex-convict seeking college admission was not emotionally unstable, was not liable when ex-convict murdered another student). For a discussion of mental health professionals' duty to third persons for claimed negligence in releasing mentally ill patients, see VII. Mental Health Professionals: A. Duty to Persons Other Than Patient, *infra*.

B. Duty to Family Members and Others in Contact with Patient

A doctor does not owe a duty of care to a nonpatient who is caring for the patient, even where the nonpatient's role and identity are known to the doctor, unless the physician's treatment of the patient is the cause of the injury to the nonpatient, *Candelario v Teperman*, 15 AD3d 204, 789 NYS2d 133 (1st Dept 2005). Thus, a doctor does not owe a duty of care to a friend of a patient treated for infectious meningitis based on the doctor's negative answer to the friend's question whether she needed treatment after being in close contact with the patient, *McNulty v New York*, 100 NY2d 227, 762 NYS2d 12, 792 NE2d 162 (2003). In *McNulty*, there was no allegation that plaintiff's injury arose from the doctors' treatment of the primary patient. The principle that a doctor ordinarily owes no duty of care to a nonpatient who is caring for the patient applies even though the nonpatient caregiver is a close relative of the patient and the action is cast as one for ordinary negligence rather than medical malpractice, *Candelario v Teperman*, *supra*.

In *Tenuto v Lederle Laboratories, Div. of American Cyanamid Co.*, 90 NY2d 606, 665 NYS2d 17, 687 NE2d 1300 (1997), the Court held that a doctor treating an infant patient with an oral polio vaccine had a duty to warn the infant's parents to take precautions against contracting polio from exposure to the infant's feces or saliva, see *Doe v Lai-Yet Lam*, 268 AD2d 206, 701 NYS2d 347 (1st Dept 2000). The *Tenuto* Court

stressed that a special relationship existed sufficient to supply the predicate for extending a duty to warn and advise plaintiffs of the danger and the need to use precautions, especially since the physician was a pediatrician engaged by the parents to provide medical services to their infant and the physician's role necessarily required advising the patient's parents. However, courts that have analyzed *Tenuto* suggest that the more significant consideration was the fact that the physician's treatment of the patient was the cause of the nonpatient's injury, *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 26 NYS3d 231, 46 NE3d 614 (2015); *McNulty v New York*, 100 NY2d 227, 762 NYS2d 12, 792 NE2d 162 (2003); *Candelario v Teperman*, 15 AD3d 204, 789 NYS2d 133 (1st Dept 2005).

A company that provided nursing services for a ventilator-dependent child requiring 24-hour nursing care did not owe a duty of care to a non-patient parent who allegedly suffered emotional distress when she observed her child in a state of suffocation, hypoxia and/or apoxia as a result of the alleged negligence of a nurse the company provided, *Shaw v QC-Medi New York, Inc.*, 10 AD3d 120, 778 NYS2d 791 (4th Dept 2004); see also *Landon by Landon v New York Hosp.*, 65 NY2d 639, 491 NYS2d 607, 481 NE2d 239 (1985), affg for reasons stated in opinion below, 101 AD2d 489, 476 NYS2d 303 (doctor owed no duty to parents to prevent emotional harm from either their witnessing child's deterioration from meningitis or their fear that they might have contracted meningitis where doctor failed to make timely diagnosis of child's meningitis). Although the Court of Appeals allowed a mother to recover emotional-distress damages because of medical malpractice resulting in a stillbirth, *Broadnax v Gonzalez*, 2 NY3d 148, 777 NYS2d 416, 809 NE2d 645 (2004), the court in *Shaw v QC-Medi New York, Inc.*, supra, reasoned that the Court of Appeals' holding was limited to the physical and psychological injuries suffered by reason of the mother's pregnancy. The fact that the parents in *Shaw* sent the defendant a letter giving written notice of their concerns did not create an independent duty running from the defendant to the non-patient parents, *id.*

Where a medical provider has administered medication that impairs or could impair the patient's ability to operate an automobile, the medical provider has a duty to third parties to warn the patient of that danger, *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 26 NYS3d 231, 46 NE3d 614 (2015). The imposition of such a duty in *Davis* was appropriate because the medical provider administered the medication without warning the patient about the effects of it, thereby creating a peril affecting every motorist in the vicinity of the automobile operated by the patient; the medical provider was the only one who could have provided a proper warning; and the cost imposed on the medical provider by the obligation to warn the patient was small, *id.*

VI. Malpractice Claims Asserting Wrongful Life or Wrongful Birth

A negligent failure to test for or advise prospective parents of the

potential for the birth of a disabled child is not actionable by the child as “wrongful life” or “wrongful conception,” *Becker v Schwartz*, 46 NY2d 401, 413 NYS2d 895, 386 NE2d 807 (1978) (Down’s Syndrome); *Howard v Lecher*, 42 NY2d 109, 397 NYS2d 363, 366 NE2d 64 (1977) (Tay-Sachs disease); *Stewart v Long Island College Hospital*, 35 AD2d 531, 313 NYS2d 502 (2d Dept 1970), *aff’d*, 30 NY2d 695, 332 NYS2d 640, 283 NE2d 616 (1972) (effect on fetus of mother’s measles during pregnancy); *John v De Vivo*, 179 AD3d 597, 117 NYS3d 230 (1st Dept 2020); *Weed v Meyers*, 251 AD2d 1062, 674 NYS2d 242 (4th Dept 1998) (cause of action on behalf of children cannot be maintained against defendant doctor based on alleged failure to provide genetic counseling to father for retinoblastoma, a hereditary form of eye cancer); see *Williams v State*, 18 NY2d 481, 276 NYS2d 885, 223 NE2d 343 (1966) (no cause of action for plaintiff born out of wedlock to mentally deficient mother who conceived while patient in State hospital). Likewise, negligence in performing an amniocentesis test and in issuing an erroneous report that a normal child should be expected does not give rise to a “wrongful life” claim on the part of an infant who was born with birth defects, *Alquijay by Alquijay v St. Luke’s-Roosevelt Hosp. Center*, 63 NY2d 978, 483 NYS2d 994, 473 NE2d 244 (1984) (Down’s Syndrome). An infant plaintiff born with a genetic condition may not recover under the theory that the doctor’s advice led to a delayed diagnosis and treatment of the condition, since he did not owe the infant plaintiff a duty before he was conceived or born, *John v De Vivo*, *supra*. The parents of such a child are not entitled to recover damages for emotional distress occasioned by the birth and premature death of the child, *Becker v Schwartz*, *supra*; *Howard v Lecher*, *supra*; *Weed v Meyers*, *supra*; PJI 2:280. The parents may, however, recover damages measured by the cost of care and treatment of the child under a “wrongful birth” theory, *Becker v Schwartz*, *supra*; see *B.F. v Reproductive Medicine Associates of New York, LLP*, 30 NY3d 608, 69 NYS3d 543, 92 NE3d 766 (2017); *Foote v Albany Medical Center Hosp.*, 16 NY3d 211, 919 NYS2d 472, 944 NE2d 1111 (2011); *Mayzel v Moretti*, 105 AD3d 816, 962 NYS2d 656 (2d Dept 2013). Since parents have no legal obligation to support children who attain age 21, see Family Court Act, § 413; Domestic Relations Law, § 32; Social Services Law, § 101, such recovery is limited to the extraordinary expenses incurred or to be incurred prior to the child’s 21st birthday, *Bani-Esraili v Lerman*, 69 NY2d 807, 513 NYS2d 382, 505 NE2d 947 (1987). The existence of government programs that provide resources to a disabled child will not, as a matter of law, eliminate the parents’ financial obligation for their child’s extraordinary medical and educational expenses during the child’s minority, *Foote v Albany Medical Center Hosp.*, *supra*. Therefore, the existence of such programs is not necessarily fatal to the parents’ claim, *id*. The parents, however, must demonstrate that they have incurred or will incur some extraordinary expenses in caring for the child; conclusory or speculative assertions that such expenses have been or will be incurred are insufficient, see *Mayzel v Moretti*, *supra* (parents failed to raise triable issue of fact regarding whether they sustained damages as a result of child’s “wrongful birth”; child’s care was provided by a residential care facility and paid for by Medicaid, and parents offered no evidence that resources

provided by government were insufficient or that they actually intended to care for child in future).

Where a normal child is conceived and born after an ineffective sterilization procedure upon one of the parents, the claim sounds in “wrongful life” or “wrongful conception” and there can be no recovery for the future maintenance and support of the child, *O’Toole v Greenberg*, 64 NY2d 427, 488 NYS2d 143, 477 NE2d 445 (1985) (tubal ligation); *Miller v Rivard*, 180 AD2d 331, 585 NYS2d 523 (3d Dept 1992) (vasectomy); *Abbariao v Blumenthal*, 107 AD2d 556, 483 NYS2d 296 (1st Dept 1985) (tubal ligation); *Weintraub v Brown*, 98 AD2d 339, 470 NYS2d 634 (2d Dept 1983) (vasectomy); see *Mears v Alhadeff*, 88 AD2d 827, 451 NYS2d 133 (1st Dept 1982) (negligently performed abortion). However, there can be recovery for medical expenses, including the expenses of the unsuccessful sterilization procedure and costs of delivery, loss of services and consortium, and physical pain and suffering arising from the unanticipated pregnancy, *Miller v Rivard*, supra; *Weintraub v Brown*, supra; *Sorkin v Lee*, 78 AD2d 180, 434 NYS2d 300 (4th Dept 1980); *Sala v Tomlinson*, 73 AD2d 724, 422 NYS2d 506 (3d Dept 1979).

There is a split of authority regarding whether a malpractice claim for “wrongful life” exists when a defendant medical provider resuscitated or provided treatment to a patient in violation of a patient’s advance directives to withhold treatment, see *Greenberg v Montefiore New Rochelle Hospital*, 205 AD3d 47, 164 NYS3d 615 (1st Dept 2022); *Cronin v Jamaica Hosp. Medical Center*, 60 AD3d 803, 875 NYS2d 222 (2d Dept 2009). In *Cronin v Jamaica Hosp. Medical Center*, supra, the plaintiff decedent, was resuscitated by the defendant hospital on two occasions in violation of two do-not-resuscitate orders issued by the hospital and executed by the decedent’s family. The Second Department held that the decedent did not sustain any legally cognizable injury since “the status of being alive does not constitute an injury in New York”, *id.* In contrast, in *Greenberg v Montefiore New Rochelle Hospital*, supra, the First Department held that the plaintiff stated a valid cause of action alleging medical malpractice where the plaintiff alleged that the hospital administered intravenous antibiotics and other medications in direct contravention of the decedent’s advance directives, and that the decedent endured an additional month of pain and suffering as a result, *id.* The First Department expressly disagreed with the Second Department’s jurisprudence in *Cronin v Jamaica Hosp. Medical Center*, supra, finding that a medical provider’s provision of medical care to an adult patient in contravention of that patient’s advance directives is not analogous to claims asserted by infants for “wrongful life” that are barred by *Alquijay v St. Luke’s-Roosevelt Hosp. Center*, 63 NY2d 978, 483 NYS2d 994, 473 NE2d 244 (1984) and *Becker v Schwartz*, 46 NY2d 401, 413 NYS2d 895, 386 NE2d 807 (1978), *id.*

VII. Malpractice Relating to Fetuses and Newborns

A. Birth Defects

A claim for malpractice may be asserted on behalf of a child who

sustained injuries in utero or as a result of premature birth because of defendant physician's failure to advise the mother of the special risks involved in her pregnancy and the need for special monitoring to prevent such occurrences, *Nieves v Montefiore Medical Center*, 305 AD2d 161, 760 NYS2d 419 (1st Dept 2003).

Neither the parent nor the malformed child may recover for failure to perform an abortion, *Stewart v Long Island College Hospital*, 35 AD2d 531, 313 NYS2d 502 (2d Dept 1970), *aff'd*, 30 NY2d 695, 332 NYS2d 640, 283 NE2d 616 (1972).

B. Emotional Injury

The circumstances under which recovery may be had for purely emotional injury are limited, see *Nadal v Jaramillo*, 102 AD3d 843, 959 NYS2d 505 (2d Dept 2013) (woman not informed of pregnancy could not recover for emotional distress arising from fear that unborn child might be harmed by CT-scan); *Lancellotti v Howard*, 155 AD2d 588, 547 NYS2d 654 (2d Dept 1989) (woman erroneously advised that she was pregnant and treated for that condition for months limited to recovery for pecuniary loss and may not, absent physical trauma, recover for emotional distress); see *Creed v United Hosp.*, 190 AD2d 489, 600 NYS2d 151 (2d Dept 1993) (plaintiffs suing for alleged negligent implanting of wife's fertilized ova in another woman may not recover for emotional injury where there was no allegation of negligence or physical injury from initial physical intrusion into wife's body). One such circumstance arises when a pregnant woman generally opposed to abortion decides to submit to one only because of negligent medical advice that the fetus was grossly abnormal. In such circumstances the woman may recover for the emotional distress resulting from the abortion and the death of the fetus, which was in fact normal, *Martinez v Long Island Jewish Hillside Medical Center*, 70 NY2d 697, 518 NYS2d 955, 512 NE2d 538 (1987). The Martinez Court reasoned that, unlike cases such as *Tebbutt v Virostek*, 65 NY2d 931, 493 NYS2d 1010, 483 NE2d 1142 (1985), and *Becker v Schwartz*, 46 NY2d 401, 413 NYS2d 895, 386 NE2d 807 (1978), Martinez did not involve the claim of a bystander seeking to recover for emotional harm caused by observing or learning of injury or death to a third person (the fetus). Instead, the mother's mental distress was the direct result of the breach of a duty owed directly to her. Similarly, recovery was allowed where defendant negligently failed to advise plaintiff that she could still be pregnant due to an incomplete abortion and plaintiff miscarried, *Ferrara v Bernstein*, 81 NY2d 895, 597 NYS2d 636, 613 NE2d 542 (1993). Likewise, where a physician negligently failed to detect plaintiff's pregnancy before prescribing a drug potentially harmful to the fetus and plaintiff, fearful that the fetus was harmed, underwent an abortion, plaintiff could recover for the physical and emotional injuries resulting from the abortion and the decision to have the abortion, *Lynch v Bay Ridge Obstetrical and Gynecological Associates, P.C.*, 72 NY2d 632, 536 NYS2d 11, 532 NE2d 1239 (1988). Lynch held that, unlike *Tebbutt v Virostek*, *supra*, and *Vaccaro v Squibb Corp.*, 52 NY2d 809, 436 NYS2d 871, 418 NE2d

386 (1980), plaintiff was not seeking to recover for an injury to the fetus itself or for emotional distress in witnessing or knowing of an injury to the fetus, but rather for her own physical and emotional injuries.

In *Broadnax v Gonzalez*, 2 NY3d 148, 777 NYS2d 416, 809 NE2d 645 (2004), the Court of Appeals overruled *Tebbutt v Virostek*, 65 NY2d 931, 493 NYS2d 1010, 483 NE2d 1142 (1985), and held that an expectant mother may recover damages for emotional distress resulting from a miscarriage or stillbirth that was caused by medical malpractice, even in the absence of independent physical injury. Further, although the physician owes no duty of care to an expectant father, the father may maintain a derivative cause of action for loss of services and consortium where the mother has a cause of action for emotional distress and the facts support such a derivative claim, see *Brashaw v Cohen*, 154 AD3d 1327, 62 NYS3d 251 (4th Dept 2017). *Broadnax* appears to have overruled or at least undermined the analyses in such cases as *Bauch v Verrilli*, 146 AD2d 835, 536 NYS2d 240 (3d Dept 1989) (no recovery for emotional distress suffered by mother when baby died after birth where only injury to mother was episiotomy), and *Sceusa v Mastor*, 135 AD2d 117, 525 NYS2d 101 (4th Dept 1988) (mother may not recover for emotional distress resulting from loss of twins after emergency caesarean section where no physical injury in addition to those inherent in surgery was sustained); see also *Arroyo v New York City Health and Hospitals Corp.*, 163 AD2d 9, 558 NYS2d 8 (1st Dept 1990) (where two siblings underwent similar hospital treatment, surviving sibling cannot recover for emotional harm resulting from other sibling's death since surviving sibling was not in physical danger).

The holding in *Broadnax v Gonzalez*, 2 NY3d 148, 777 NYS2d 416, 809 NE2d 645 (2004) was intended to remedy an anomaly in tort jurisprudence that exposed medical caregivers to malpractice liability for in utero injuries when the fetus survived but immunized them when their malpractice caused miscarriage or still birth, see *Sheppard-Mobley ex rel. Mobley v King*, 4 NY3d 627, 797 NYS2d 403, 830 NE2d 301 (2005); *Brashaw v Cohen*, 154 AD3d 1327, 62 NYS3d 251 (4th Dept 2017); *Ward v Safajou*, 145 AD3d 836, 43 NYS3d 447 (2d Dept 2016). Thus, the holding is a narrow one intended to permit recovery where none would otherwise be available and, as such, does not apply in situations where a fetus injured in utero was carried to term and born alive, see *Sheppard-Mobley ex rel. Mobley v King*, *supra*; *Ward v Safajou*, *supra*; *Levin v New York City Health and Hospitals Corp.*, 119 AD3d 480, 990 NYS2d 490 (1st Dept 2014). In *Sheppard-Mobley*, for example, a mother was not permitted to recover for emotional distress resulting from the birth of an impaired child where she allegedly was negligently advised to terminate her pregnancy through a chemical abortion and the chemical abortion was incomplete. However, the mother in *Sheppard-Mobley* could recover for the emotional injuries she suffered independent of the birth of an impaired child, specifically the injuries she suffered because she had to decide whether to seek an out-of-state late-term abortion or risk the birth of a child with congenital defects. The *Broadnax* holding does not extend to a non-patient parent's emotional distress resulting from allegedly negligent medical treatment of a child, *Shaw v QC-Medi New York, Inc.*, 10 AD3d 120, 778 NYS2d 791 (4th Dept 2004).

A woman may not normally recover for the physical pain and suffering that are natural accompaniments of the childbirth process, *Fahey v Canino*, 304 AD2d 1069, 758 NYS2d 708 (3d Dept 2003), rev'd on other grounds, 2 NY3d 148, 777 NYS2d 416, 809 NE2d 645 (2004); *Parsons v Chenango Memorial Hosp.*, 210 AD2d 847, 620 NYS2d 604 (3d Dept 1994); *Guialdo v Allen*, 171 AD2d 535, 567 NYS2d 255 (1st Dept 1991); *Prado v Catholic Medical Center of Brooklyn and Queens, Inc.*, 145 AD2d 614, 536 NYS2d 474 (2d Dept 1988); *Wittrock v Maimonides Medical Center-Maimonides Hosp.*, 119 AD2d 748, 501 NYS2d 684 (2d Dept 1986); see *Kakoullis v Harri H. Janssen M.D. P.C.*, 188 AD2d 769, 591 NYS2d 224 (3d Dept 1992). However, recovery may be had for pain and suffering experienced during a miscarriage resulting from the negligent failure to notify a pregnant woman of her incomplete abortion and to secure her prompt return to the abortion facility, *Ferrara v Bernstein*, 81 NY2d 895, 597 NYS2d 636, 613 NE2d 542 (1993).

Damages may be recoverable for emotional injuries suffered by a couple whose embryo was mistakenly placed in another woman, *Perry-Rogers v Obasaju*, 282 AD2d 231, 723 NYS2d 28 (1st Dept 2001). In *Perry-Rogers v Obasaju*, the couple suffered emotional harm, established through medical affidavits attesting to objective manifestations of their trauma, because of their having been deprived of the opportunity of experiencing pregnancy, prenatal bonding and the birth of their own child, and by their separation from the child for more than four months after his birth.

C. Sterility

Where sterility results from medical malpractice, there can be no recovery for the loss of offspring as such or the deprivation of the companionship of children, but recovery may be had for any physical injuries sustained by the patient, the loss of fertility and any mental and emotional distress attending those injuries, *Hahn v Taefi*, 115 AD2d 946, 497 NYS2d 522 (4th Dept 1985); see *Stewart v New York City Health and Hospitals Corp.*, 207 AD2d 703, 616 NYS2d 499 (1st Dept 1994). The spouse of a patient being treated for male infertility may not maintain a cause of action against the doctor based on the alleged treatment failure, *Cohen v Cabrini Medical Center*, 94 NY2d 639, 709 NYS2d 151, 730 NE2d 949 (2000).

D. In Utero Injuries

Becker v Schwartz, 46 NY2d 401, 413 NYS2d 895, 386 NE2d 807 (1978), recognizes the continued vitality of the rule that an infant injured in utero by the tort of another "should, when born, be allowed to sue," *Woods v Lancet*, 303 NY 349, 353, 102 NE2d 691 (1951); *Brashaw v Cohen*, 154 AD3d 1327, 62 NYS3d 251 (4th Dept 2017). Thus, in *Sheppard-Mobley ex rel. Mobley v King*, 4 NY3d 627, 797 NYS2d 403, 830 NE2d 301 (2005), an infant plaintiff with congenital defects resulting from an incomplete chemical abortion was permitted to sue for

injuries caused by defendants' erroneous advice to his pregnant mother that she would not be able to carry the fetus to term and should have a chemical abortion. Physicians who discontinued plaintiff's mother's tuberculosis medication while she was pregnant with plaintiff, resulting in his contracting tuberculosis meningitis from his mother shortly after his birth, owed a duty of care to plaintiff at the time of the alleged act of malpractice, *Moreta v New York City Health and Hospitals Corp.*, 238 AD2d 149, 655 NYS2d 517 (1st Dept 1997). The fact that the fetus was not viable at the time the in utero injury occurred does not preclude recovery if the child was ultimately born alive, *Leighton v New York*, 39 AD3d 84, 830 NYS2d 749 (2d Dept 2007).

1. Accrual of Cause of Action for In Utero Injury

An infant plaintiff's medical malpractice cause of action premised on alleged injurious acts or omissions occurring prior to birth accrues on the infant's date of birth, *LaBello v Albany Medical Center Hosp.*, 85 NY2d 701, 628 NYS2d 40, 651 NE2d 908 (1995).

E. Pre-conception Torts

A child has no cause of action for injuries sustained as a result of a preconception tort committed against the mother, *Albala v New York*, 54 NY2d 269, 445 NYS2d 108, 429 NE2d 786 (1981); see *Enright by Enright v Eli Lilly & Co.*, 77 NY2d 377, 568 NYS2d 550, 570 NE2d 198 (1991); *Weed v Meyers*, 251 AD2d 1062, 674 NYS2d 242 (4th Dept 1998) (defendant doctor owed no duty to children prior to their birth independent of duty owed to the father).

VII. Mental Health Professionals

A. Duty to Persons Other Than Patient

While there is no bright-line rule regarding whether a mental health care provider treating a patient on a voluntary basis owes a duty of care to the general public, a member of the general public may have a cognizable cause of action for negligence against the mental health care provider where that defendant has the necessary authority or ability to exercise control over a patient's conduct, *Fox v Marshall*, 88 AD3d 131, 928 NYS2d 317 (2d Dept 2011); see *Purdy v Public Adm'r of Westchester County*, 72 NY2d 1, 530 NYS2d 513, 526 NE2d 4 (1988); *Winters v New York City Health & Hospitals Corp.*, 223 AD2d 405, 636 NYS2d 320 (1st Dept 1996).

In *Pingtella v Jones*, 305 AD2d 38, 758 NYS2d 717 (4th Dept 2003), the court held that a psychiatrist owed no duty of care to the child of his patient, who was stabbed by the patient during a psychotic episode, see *Cardenas v Rochester Regional Health*, 192 AD3d 1543, 144 NYS3d 774 (4th Dept 2021) (in the absence of specific threat, mental health care providers did not owe duty to patient's son, who was killed by patient after she was discharged from in-patient facility and was being treated

on an outpatient basis); see also *Engelhart v Orange*, 16 AD3d 369, 790 NYS2d 704 (2d Dept 2005) (doctor who failed to advocate for hospitalization of psychiatric out-patient not liable to person injured in car accident with patient). It has also been held that a physician who prescribed a sedative for a parent was not liable for injuries sustained by her children when the parent lost consciousness while driving an automobile, since there was no indication that the physician knew the children were relying upon the advice he had given the parent, *Conboy v Mogeloff*, 172 AD2d 912, 567 NYS2d 960 (3d Dept 1991); see *Adams v Elgart*, 213 AD2d 436, 623 NYS2d 637 (2d Dept 1995) (doctor treating patient for delirium tremens in surgical unit and who knew of patient's propensities owed no duty to nurse working in the hospital who was injured by patient). With respect to psychiatric institutions operated by the State, the Court of Appeals has held that a third person injured as a result of a negligent release decision is not required to establish a special relationship between himself and the State as a condition to maintaining the claim, *Schrempf v State*, 66 NY2d 289, 496 NYS2d 973, 487 NE2d 883 (1985).

The California state legislature has enacted a statute protecting psychotherapists from "failing to warn of or protect from" a patient's violent behavior except where the patient (or a member of the patient's family) has communicated to the psychotherapist a "serious threat of physical violence against a reasonably identified victim or victims," Cal Civ Code § 43.92(a) (modifying holding in *Tarasoff v Regents of University of California*, 17 Cal 3d 425, 131 Cal Rptr 14, 551 P2d 334 (1976)); see *Ewing v Goldstein*, 120 Cal App 4th 807, 15 Cal Rptr 3d 864 (2nd Dist 2004). There are no cases in New York indicating whether this State's courts will follow that rule.

B. Error in Judgment

When a mental health provider conducts a proper examination and evaluation and chooses a course of treatment within a range of medically accepted choices, the professional judgment doctrine will insulate the provider from liability, *Park v Kovachevich*, 116 AD3d 182, 982 NYS2d 75 (1st Dept 2014); see *Tkacheff v Roberts*, 147 AD3d 1271, 47 NYS3d 782 (3d Dept 2017). Thus, the decision by physicians to release a psychiatric patient from an institutional setting does not give rise to liability on the part of the physicians for harm done by the released patient where the decision to release the patient constituted an exercise of professional judgment, *Schrempf v State*, 66 NY2d 289, 496 NYS2d 973, 487 NE2d 883 (1985); *St. George v State*, 283 App Div 245, 127 NYS2d 147 (3d Dept 1954), *aff'd*, 308 NY 681, 124 NE2d 320 (1954); *Ozugowski v New York*, 90 AD3d 875, 935 NYS2d 613 (2d Dept 2011); *Vera v Beth Israel Medical Hosp.*, 214 AD2d 384, 625 NYS2d 499 (1st Dept 1995); *Smith v Fishkill Health-Related Center, Inc.*, 169 AD2d 309, 572 NYS2d 762 (3d Dept 1991). In order for liability to attach, it must be shown that the decision to release the patient was "something less than a professional medical determination," *Gallagher v Cayuga Medical Center*, 151 AD3d 1349, 57 NYS3d 544 (3d Dept 2017);

Ozugowski v New York, *supra*; Darren v Safer, 207 AD2d 473, 615 NYS2d 926 (2d Dept 1994); Bell v New York City Health & Hospitals Corp., 90 AD2d 270, 456 NYS2d 787 (2d Dept 1982); see Huntley v State, 62 NY2d 134, 476 NYS2d 99, 464 NE2d 467 (1984); Vera v Beth Israel Medical Hosp., *supra*; Wilson v State, 112 AD2d 366, 491 NYS2d 818 (2d Dept 1985), or that the psychiatrist's decisions were not the product of a careful evaluation, Tkacheff v Roberts, *supra*; Gallagher v Cayuga Medical Center, *supra*; Ozugowski v New York, *supra*, or a careful examination, Park v Kovachevich, *supra*. A conclusory claim that the release decision constituted a departure from accepted standards of practice is not enough to present a triable issue, Smith v Fishkill Health-Related Center, Inc., *supra*; Mohan v Westchester County Medical Center, 145 AD2d 474, 535 NYS2d 431 (2d Dept 1988); see Weinreb v Rice, 266 AD2d 454, 698 NYS2d 862 (2d Dept 1999).

Likewise, with respect to the failure to hospitalize voluntary outpatients, a doctor generally does not have sufficient control over the patient to justify imposition of liability, Engelhart v Orange, 16 AD3d 369, 790 NYS2d 704 (2d Dept 2005). The medical decision to treat a mentally ill person as an outpatient, rather than as an inpatient, necessarily involves calculated risks and disagreements among experts and is not actionable if made consistent with accepted standards of practice. Likewise, where the treating physician learns that a mental outpatient is not taking prescribed medication, a medical decision not to intervene is not negligence where made as an exercise of professional judgment, Schrempf v State, 66 NY2d 289, 496 NYS2d 973, 487 NE2d 883 (1985); Killeen v State, 66 NY2d 850, 498 NYS2d 358, 489 NE2d 245 (1985). However, a physician's decision to change an existing course of medication for a mentally retarded patient may be found to be malpractice where expert testimony supported a finding that the physician had deviated from accepted practices, Leal v Simon, 147 AD2d 198, 542 NYS2d 328 (2d Dept 1989). An attempted suicide by the patient may give rise to a claim against the psychiatrist if the decision to discharge the patient was not a mere "error in judgment" but the result of a failure to make a decision based upon a careful examination of the patient, Bell v New York City Health & Hospitals Corp., 90 AD2d 270, 456 NYS2d 787 (2d Dept 1982); see D'Avolio v Prado, 277 AD2d 877, 715 NYS2d 827 (4th Dept 2000) (reinstating claim based on defendant's failure to remove mentally ill patient from her home); Wilson v State, 112 AD2d 366, 491 NYS2d 818 (2d Dept 1985).

VIII. Negligence in Prescribing Medication

The Physicians' Desk Reference (PDR) is an annual encyclopedia of medications and their side effects, written and compiled by drug manufacturers, Spensieri v Lasky, 94 NY2d 231, 701 NYS2d 689, 723 NE2d 544 (1999); Martin v Hacker, 83 NY2d 1, 607 NYS2d 598, 628 NE2d 1308 (1993). The PDR is hearsay if offered into evidence to establish, by itself, the standard of care for a doctor in prescribing and monitoring a drug, Spensieri v Lasky, *supra*. The PDR may have some significance in identifying a doctor's standard of care in the administration

and use of prescription drugs, but it is not the sole determinant. The information contained in the PDR can only be analyzed in the context of the medical condition of the patient. The testimony of an expert is necessary to interpret whether the drug in question presented an unacceptable risk for the patient in either its administration or the monitoring of its use. Therefore, a plaintiff may offer testimony concerning her expert's professional evaluation of defendant's conduct based, in part, on reliance on the PDR. However, the contents of the PDR may not be offered as the sole evidence of the standard of care in a medical malpractice action.

In *Anarumo v Herzog*, 201 AD3d 778, 162 NYS3d 381 (2d Dept 2022), the Second Department denied a motion to set aside a jury's determination that a physician did not depart from accepted standards of medical care by prescribing an oral contraceptive to a patient with a history of strokes and by failing to inform her of the risks of the medication. Notwithstanding that the physician admitted that the medication was contraindicated for the patient, the court found that the jury's determination was supported by evidence that the patient misled the physician by requesting a refill of the medication even though the physician had never prescribed it for her, and the patient failed to disclose her prior medical history, see also *Elkins v Ferencz*, 263 AD2d 372, 694 NYS2d 27 (1st Dept 1999) (comparative fault charge warranted based upon patient's heavy use of tobacco and prescription medications, failure to give complete medical history, and delay); *Ogle v State*, 191 AD2d 878, 594 NYS2d 824 (3d Dept 1993) (comparative fault charge warranted based upon patient's failure to reveal part of medical history).

IX. Other Specific Instances of Malpractice

A physician may be liable for failure to terminate treatment upon discovery that it was adversely affecting the patient, *Eisele v Malone*, 2 AD2d 550, 157 NYS2d 155 (1st Dept 1956). If the physician has reason to doubt that he or she has sufficient competence to handle the case, the physician may be liable for failure to advise the patient to consult a more skillful physician or surgeon, *Benson v Dean*, 232 NY 52, 133 NE 125 (1921); see Annot: 35 ALR3d 349.

The physician's obligation includes not only diagnosis and treatment, but also the giving of proper instructions to the patient, *Pike v Honsinger*, 155 NY 201, 49 NE 760 (1898); *Carpenter v Blake*, 75 NY 12 (1878), and to hospital staff nurses and physicians who treat or care for the patient, *Hollant v North Shore Hospital, Inc.*, 24 Misc2d 892, 206 NYS2d 177 (Sup 1960), *aff'd*, 17 AD2d 974, 235 NYS2d 372 (2d Dept 1962). The physician's duty also includes seeing to it that the physician's orders to hospital personnel are carried out, *Toth v Community Hospital at Glen Cove*, 22 NY2d 255, 292 NYS2d 440, 239 NE2d 368 (1968); *Kless v Paul T.S. Lee, M.D., P.C.*, 19 AD3d 1083, 796 NYS2d 502 (4th Dept 2005). On the other hand, a hospital that has followed the physician's instructions as set forth in the pre-operative paperwork may

not be shielded from liability if the patient has expressed doubts to a hospital nurse about the site of the planned surgery. Thus, in *Muskopf v Maron*, 309 AD2d 1232, 764 NYS2d 741 (4th Dept 2003), the court held that a triable issue of fact as to the hospital's liability was raised where a hospital nurse gave deposition testimony that she would customarily speak to the treating physician if the patient raised such doubts and plaintiff's expert testified, based in part on the nurse's statement, that the failure to follow that practice in plaintiff's case was a departure from accepted standards of care.

Although the federal Food and Drug Administration (FDA) has not approved the marketing and promotion of a prosthetic device for a particular condition, the off-label use of the device is not precluded and does not necessarily constitute malpractice, *Sita v Long Island Jewish-Hillside Medical Center*, 22 AD3d 743, 803 NYS2d 112 (2d Dept 2005). Thus, where there was evidence that the use of a pedicle screw system to treat plaintiff's back condition was considered the standard of care in the medical community, the off-label use of the product for that purpose was not actionable as malpractice. Further, since plaintiff was not participating in a clinical study, FDA regulations requiring disclosure of the product's regulatory status, see 21 USC § 360j(g); 21 CFR 50.25, were inapplicable, see *Sita v Long Island Jewish-Hillside Medical Center*, supra.

The physician's duty with respect to organ transplants runs to the patient; therefore, the donor of an organ has no claim against the doctor whose negligence necessitated the transplant, *Moore v Shah*, 90 AD2d 389, 458 NYS2d 33 (3d Dept 1982). For the same reason, a physician has no duty to a person holding the patient's health care proxy, and Public Health Law article 29-C, which authorizes such proxies, does not confer an independent right to recover, *DeCintio v Lawrence Hosp.*, 299 AD2d 165, 753 NYS2d 26 (1st Dept 2002).

Where defendant-physician prescribed a course of treatment for plaintiff-patient's mental health problems, including medication and counseling, plaintiff may assert a cause of action for medical malpractice stemming from a sexual relationship between plaintiff and defendant on the theory, supported by expert evidence, that defendant failed to manage the "transference" phenomenon, i.e., phenomenon in which patient experiences near-psychotic attraction to treating physician, *Dupree v Giugliano*, 20 NY3d 921, 958 NYS2d 312, 982 NE2d 74 (2012).

For further specific examples of medical malpractice, see Comment to PJI 2:149(I)(A).

The following annotations are pertinent: 41 ALR2d 329 (X-ray); 54 ALR2d 200 (treatment of a fracture or dislocation); 54 ALR2d 273 (diagnosis of a fracture or dislocation); 55 ALR2d 461 (treating cancer); 57 ALR2d 379 (failure to attend diligently); 76 ALR2d 783 (surgery of the

ear); 97 ALR2d 473 (burn cases); 99 ALR2d 599 (mental disease generally); 10 ALR3d 9 (foreign object left in patient); 10 ALR3d 1071 (liability of physician hired by employer or insurer); 14 ALR3d 967 (insertion of prosthetic device); 17 ALR3d 796 (heart attack while undergoing unrelated procedure); 19 ALR3d 825 (heart disease and diseases of the vascular system); 23 ALR3d 1334 (mistakenly administering drug); 27 ALR3d 906 (sterilization or birth control procedures); 28 ALR3d 1364 (diagnosis and treatment of tetanus); 30 ALR3d 988 (diagnosis and treatment of epilepsy); 63 ALR3d 1020 (doctor's duty to warn nurse or attendant); 76 ALR3d 890 (organ or tissue transplants); 79 ALR3d 915 (cancer diagnosis); 80 ALR3d 583 (secs. 3–7 superseded in part by 26 ALR5th 245) (limitation of recovery and submission of claim to pretrial panel); 89 ALR3d 32 (conditions of sexual or urinary organs); 94 ALR3d 317 (electroshock treatment); 8 ALR4th 464 (physical measures in treatment of mental disease); 19 ALR5th 563 (treatment of skin diseases); 30 ALR5th 571 (eyes); 48 ALR5th 575 (male urinary tract and related organs). As to malpractice by others than physicians, see Annot: 51 ALR2d 970 (nurse); 53 ALR2d 142 (sec. 2(c) superseded by 49 ALR4th 63) (anesthetist); 80 ALR2d 1278 (chiropodist); 83 ALR2d 7 (sec. 10 superseded in part by 11 ALR4th 748) (dentist); 58 ALR3d 590 (chiropractor's liability for failure to refer patient to medical practitioner); 58 ALR3d 828 (druggist's liability for suicide); 71 ALR4th 811 (veterinarian); 77 ALR4th 273 (chiropractors and other drugless practitioners); see 6 ALR3d 704 (validity of exculpatory contract); see also 73 ALR4th 24 (osteopath).

X. Expert Opinion Evidence

A. When Expert Opinion is Required

Ordinarily, expert medical opinion evidence is necessary to make out a prima facie case of malpractice, *Koehler v Schwartz*, 48 NY2d 807, 424 NYS2d 119, 399 NE2d 1140 (1979); *Meiselman v Crown Heights Hospital*, 285 NY 389, 34 NE2d 367 (1941); *Gross v Friedman*, 138 AD2d 571, 526 NYS2d 152 (2d Dept 1988), *aff'd*, 73 NY2d 721, 535 NYS2d 586, 532 NE2d 92 (1988); *Anarumo v Herzog*, 201 AD3d 778, 162 NYS3d 381 (2d Dept 2022); *McGinn v Sellitti*, 150 AD2d 967, 541 NYS2d 648 (3d Dept 1989) (alleged inadequate communication between dentist and oral surgeon); *Mertsaris v 73rd Corp.*, 105 AD2d 67, 482 NYS2d 792 (2d Dept 1984) (failure of house physician to examine patient, while patient's own physician was en route); *Gibson v D'Amico*, 97 AD2d 905, 470 NYS2d 739 (3d Dept 1983); Annot: 81 ALR2d 597; see also *Elliott v Fay*, 105 AD2d 512, 481 NYS2d 462 (3d Dept 1984) (proper to instruct jury to find for defendant if it rejected plaintiff's claim that operation was unnecessary since no expert opinion supported any alternative theory).

Notably, the rule in informed-consent actions is unequivocal. Under CPLR 4401-a, which applies to "cause[s] of action for medical malpractice based solely on lack of informed consent," such causes must be dismissed "if the plaintiff has failed to adduce expert medical testimony

in support of the alleged qualitative insufficiency of the consent,” see also *McDermott v Manhattan Eye, Ear and Throat Hospital*, 15 NY2d 20, 255 NYS2d 65, 203 NE2d 469 (1964); *Gardner v Wider*, 32 AD3d 728, 821 NYS2d 74 (1st Dept 2006); *Evans v Holleran*, 198 AD2d 472, 604 NYS2d 958 (2d Dept 1993); *Keane v Sloan-Kettering Institute for Cancer Research*, 96 AD2d 505, 464 NYS2d 548 (2d Dept 1983). This threshold requirement could not be satisfied by using defendant doctor as plaintiff’s expert witness, *Gardner v Wider*, 32 AD3d 728, 821 NYS2d 74 (1st Dept 2006); see *McDermott v Manhattan Eye, Ear and Throat Hospital*, 15 NY2d 20, 255 NYS2d 65, 203 NE2d 469 (1964), since it was unlikely that defendant doctor would testify, in direct contradiction of his deposition testimony, that he knowingly acted without having obtained the patient’s informed consent, *Gardner v Wider*, *supra*. Expert testimony concerning what a reasonable person would have done is not necessary to maintain a malpractice claim premised upon lack of informed consent, *Hugh v Ofodile*, 87 AD3d 508, 929 NYS2d 122 (1st Dept 2011); *Andersen v Delaney*, 269 AD2d 193, 703 NYS2d 714 (1st Dept 2000); *Osorio v Brauner*, 242 AD2d 511, 662 NYS2d 488 (1st Dept 1997); see *James v Greenberg*, 57 AD3d 849, 870 NYS2d 100 (2d Dept 2008).

The negligent failure to diagnose cancer is not a matter within the ken of a layperson and requires expert testimony, *Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47, 478 NE2d 188 (1985); *Lyons v McCauley*, 252 AD2d 516, 675 NYS2d 375 (2d Dept 1998). Expert testimony is also required on the issue of causal relation unless the matter is within the experience and observation of the ordinary juror, *Tatta v State*, 19 AD3d 817, 797 NYS2d 588 (3d Dept 2005) (whether and to what extent lack of nutritional supplement contributed to deterioration of plaintiff’s health and immune system is outside the ordinary experience and knowledge of layperson); *Giambona v Stein*, 265 AD2d 775, 697 NYS2d 399 (3d Dept 1999) (expert failed to demonstrate that defendant’s alleged deviation delayed diagnosis of Hodgkin’s disease, resulted in different treatment for plaintiff, or adversely affected his physical condition or ultimate prognosis); *Duffen v State*, 245 AD2d 653, 665 NYS2d 978 (3d Dept 1997) (whether and to what extent medications contributed to claimant’s condition is not matter of common knowledge that fact finder can decide in absence of expert testimony); *Prete v Rafla-Demetrious*, 224 AD2d 674, 638 NYS2d 700 (2d Dept 1996); see *Zak v Brookhaven Memorial Hosp. Medical Center*, 54 AD3d 852, 863 NYS2d 821 (2d Dept 2008) (although registered nurse qualified to give expert opinion that administration of heparin was departure from accepted standards of care, nurse not qualified to opine that negligent act was substantial cause of patient’s injury).

Failure to adduce expert testimony as to causation may result in the failure to make out a *prima facie* case, see *Park v Kovachevich*, 116 AD3d 182, 982 NYS2d 75 (1st Dept 2014) (conclusions that are speculative or unsupported by evidentiary foundation insufficient to withstand summary judgment); *Prete v Rafla-Demetrious*, 224 AD2d 674, 638 NYS2d 700 (2d Dept 1996); *Guillari v Gormley*, 142 AD2d 927, 530

NYS2d 353 (4th Dept 1988); *Kennedy v Peninsula Hosp. Center*, 135 AD2d 788, 522 NYS2d 671 (2d Dept 1987). On the other hand, the mere offering of expert opinion on proximate cause does not suffice absent a showing of the requisite nexus between the malpractice allegedly committed and plaintiff's injuries, *Koeppel v Park*, 228 AD2d 288, 644 NYS2d 210 (1st Dept 1996); see *Kaffka v New York Hosp.*, 228 AD2d 332, 644 NYS2d 243 (1st Dept 1996). Where causation is not an issue, testimony by a medical expert called by plaintiff that provides a basis for a finding that defendant's doctors deviated from accepted medical practice establishes a prima facie case, *Brown v New York*, 47 NY2d 927, 419 NYS2d 491, 393 NE2d 486 (1979); however, expert opinion that there was an error of professional medical judgment does not, *Centeno v New York*, 48 AD2d 812, 369 NYS2d 710 (1st Dept 1975), *aff'd*, 40 NY2d 932, 389 NYS2d 837, 358 NE2d 520 (1976).

In dealing with a motion to dismiss based on the fact that the testimony of plaintiff's experts is insufficient to establish causation, the court should, in the absence of prejudice, allow plaintiff to reopen and offer further expert testimony, see *Harding v Noble Taxi Corp.*, 182 AD2d 365, 582 NYS2d 1003 (1st Dept 1992); see also *Benjamin v Desai*, 228 AD2d 764, 643 NYS2d 717 (3d Dept 1996); *Lagana v French*, 145 AD2d 541, 536 NYS2d 95 (2d Dept 1988); *Kennedy v Peninsula Hosp. Center*, 135 AD2d 788, 522 NYS2d 671 (2d Dept 1987).

While, as a general rule, expert medical evidence is necessary in an action to recover damages for negligent medical treatment, *Martuscello v Jensen*, 134 AD3d 4, 18 NYS3d 463 (3d Dept 2015) (expert evidence is necessary part of medical malpractice action), such evidence is not required where the allegations of lack of due care can be determined by the trier of fact on the basis of common knowledge or the action sounds in ordinary negligence, *Reardon v Presbyterian Hosp. in City of New York*, 292 AD2d 235, 739 NYS2d 65 (1st Dept 2002). Thus, where plaintiff alleged that the physician was negligent in helping plaintiff alight from an examination table, the crux of the allegations were the physician's failure to exercise ordinary and reasonable care to insure that no unnecessary harm befell plaintiff, and, consequently, no expert medical evidence was required to establish plaintiff's prima facie case, *id*; see *Kerker by Kerker v Hurwitz*, 163 AD2d 859, 558 NYS2d 388 (4th Dept 1990).

Opinion evidence is also not necessary when common sense and ordinary experience demonstrate that the condition is incompatible with competent treatment. Thus, opinion testimony is not necessary where a psychiatrist beats his patient in the course of treatment, *Hammer v Rosen*, 7 NY2d 376, 198 NYS2d 65, 165 NE2d 756 (1960), or engages in sexual intercourse with the patient as part of "therapy," *Roy v Hartogs*, 85 Misc2d 891, 381 NYS2d 587 (AppT 1976), or a patient with known suicidal tendencies is left alone near an opened unscreened window, *Wright v State*, 31 AD2d 421, 300 NYS2d 153 (4th Dept 1969), or a dentist extracts the wrong tooth, *Griffin v Norman*, 192 NYS 322 (AppT 1922), (nor), or a part of a broken needle is left at the operative

site, *Benson v Dean*, 232 NY 52, 133 NE 125 (1921), or a young boy is sent home from the hospital, over the protest of his parents, with both legs in casts, pus draining through windows in the casts, the boy running a high temperature and suffering intense pain, *Meiselman v Crown Heights Hospital*, 285 NY 389, 34 NE2d 367 (1941). However, where the defendant physician has presented expert evidence to rebut the inference thus arising, plaintiff may be required to come forward with expert evidence, *Benson v Dean*, *supra*; see *Morwin v Albany Hospital*, 7 AD2d 582, 185 NYS2d 85 (3d Dept 1959); see also *Shaw v Tague*, 257 NY 193, 177 NE 417 (1931); *Miller by Miller v Albany Medical Center Hosp.*, 95 AD2d 977, 464 NYS2d 297 (3d Dept 1983).

With respect to other forms of evidence aimed at establishing what constitutes due care and accepted practice, it is improper to allow the jury to view a videotape of defendant performing a surgical procedure similar to the one at issue upon a different patient, *Gluskas v John E. Hutchinson, III, M.D., P.C.*, 148 AD2d 203, 544 NYS2d 323 (1st Dept 1989).

Regarding the use of habit evidence in medical malpractice actions, see PJI 1:71.

In *Spensieri v Lasky*, 94 NY2d 231, 701 NYS2d 689, 723 NE2d 544 (1999), the Court of Appeals stated that the Physician's Desk Reference (PDR) "may have some significance in identifying a doctor's standard of care in the administration and use of prescription drugs, but is not the sole determinant." Thus, the PDR is inadmissible as hearsay and the testimony of an expert is necessary to interpret whether the drug in question presented an unacceptable risk for the patient in either its administration or the monitoring of its use. Other reliable medical reference materials may be admissible if used to explain a physician's decision-making process and not as per se evidence of the standard of care, *Hinlicky v Dreyfuss*, 6 NY3d 636, 815 NYS2d 908, 848 NE2d 1285 (2006) (approving use of algorithm, table and chart indicating cardiac risk "stratification" for non-cardiac surgical procedures, which were published by American College of Cardiology, where material offered to illustrate physician's decision-making methodology); see *Halls v Kiyici*, 104 AD3d 502, 960 NYS2d 423 (1st Dept 2013) (clinical guidelines of American Gastroenterological Association regarding recommended frequency of colonoscopies for patients were admissible as mere recommendations regarding treatment; trial court erred in not giving specific instruction to jury that guidelines were not the same as standards of care and that jury was to make its determination on the appropriate standard of care based on particular circumstances of case, not guidelines alone). Whether such out-of-court statements may become admissible evidence solely because of their use as a basis for an expert's testimony remains an open question in New York, *id.* In *Ellis v Eng*, 70 AD3d 887, 895 NYS2d 462 (2d Dept 2010), the court held that clinical practice guidelines may inform an expert's opinion, although they are generally not themselves conclusive, see *Leberman on Behalf of Miller v Glick*, 207 AD3d 1203, 171 NYS3d 677 (4th Dept 2022) (in opposition to

summary judgment motion, plaintiff's expert could rely on stroke scale to assist in establishing relevant standard of care for treating patient with stroke-like symptoms).

B. Who May Testify As an Expert

An expert witness in a medical malpractice case must possess the requisite skill, training, knowledge, or experience to insure that an opinion rendered is reliable, see *Montanari v Lorber*, 200 AD3d 676, 157 NYS3d 102 (2d Dept 2021); *LaMarque v North Shore University Hosp.*, 227 AD2d 594, 643 NYS2d 221 (2d Dept 1996) (plaintiff's witness, who was not medical doctor, failed to show her qualifications to render expert opinion as to appropriate standards of medical and psychiatric care). For a comprehensive discussion of this subject, see Comment to PJI 1:90(I)(B).

A medical expert, if sufficiently knowledgeable, does not have to be a specialist in the relevant field to testify as an expert in a malpractice action against a specialist, *Almeyda v Concourse Rehabilitation & Nursing Center, Inc.*, 195 AD3d 437, 150 NYS3d 67 (1st Dept 2021); *Michalko v DeLuccia*, 187 AD3d 1365, 133 NYS3d 122 (3d Dept 2020); *Leavy v Merriam*, 133 AD3d 636, 20 NYS3d 117 (2d Dept 2015); *Frank v Smith*, 127 AD3d 1301, 6 NYS3d 754 (3d Dept 2015); *Williams v Halpern*, 25 AD3d 467, 808 NYS2d 68 (1st Dept 2006); *Bodensiek v Schwartz*, 292 AD2d 411, 739 NYS2d 405 (2d Dept 2002); *Forte v Weiner*, 200 AD2d 421, 606 NYS2d 220 (1st Dept 1994); *Farkas v Saary*, 191 AD2d 178, 594 NYS2d 195 (1st Dept 1993); see *Montanari v Lorber*, 200 AD3d 676, 157 NYS3d 102 (2d Dept 2021). The fact that two doctors do not practice in the same specialty goes to the weight to be accorded to the testimony, not its admissibility, *Michalko v DeLuccia*, supra; see *Revere v Burke*, 200 AD3d 1607, 160 NYS3d 503 (4th Dept 2021). Thus, an expert with board certification in internal medicine may be qualified to testify even if the expert does not expressly state that he or she possesses the requisite background and knowledge regarding emergency-room medicine, *Ocasio-Gary v Lawrence Hosp.*, 69 AD3d 403, 894 NYS2d 11 (1st Dept 2010), and a cardiologist may be qualified to offer expert opinion on the standards of care of a general surgeon and an anesthesiologist, *Leavy v Merriam*, supra. An oncologist board certified in internal medicine was qualified to render an opinion as to the standard of care for a primary care physician regarding an alleged failure to diagnose cancer, *Goldschmidt v Cortland Regional Medical Center, Inc.*, 190 AD3d 1212, 141 NYS3d 522 (3d Dept 2021). A physician board certified in physical medicine and rehabilitation was qualified to offer an opinion as to whether defendant deviated from the standard of care appropriate for a rehabilitation center treating a geriatric diabetic patient, *Almeyda v Concourse Rehabilitation & Nursing Center, Inc.*, supra.

However, where a physician gives an opinion outside of his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion, *Montanari v Lorber*, 200 AD3d 676, 157 NYS3d

102 (2d Dept 2021); see *Keane v Dayani*, 178 AD3d 797, 114 NYS3d 93 (2d Dept 2019) (although radiologist was qualified to render opinion as to whether fracture was detectable on X-ray, he failed to lay foundation to render orthopedic opinion as to whether defendant's failure to diagnose fracture caused plaintiff's subsequent injuries); *Ozugowski v New York*, 90 AD3d 875, 935 NYS2d 613 (2d Dept 2011) (absent proper foundation, internist and cardiologist failed to raise triable issue of fact as to psychiatric treatment); *Mustello v Berg*, 44 AD3d 1018, 845 NYS2d 86 (2d Dept 2007) (general surgeon failed to raise a triable issue of fact as to gastroenterological treatment administered to plaintiff); *Behar v Coren*, 21 AD3d 1045, 803 NYS2d 629 (2d Dept 2005) (opinion of plaintiffs' expert, a pathologist, submitted in opposition to defendants' motion for summary judgment insufficient to raise issue of fact regarding efficacy of surgical and gastroenterological treatment where expert failed to lay foundation for his asserted familiarity with applicable standards of care); *Postlethwaite v United Health Services Hospitals, Inc.*, 5 AD3d 892, 773 NYS2d 480 (3d Dept 2004) (physician whose expertise was confined to anesthesiology and pharmacology was properly precluded from testifying as to whether surgeon and gastroenterologist correctly diagnosed and treated decedent based upon accepted diagnostic practices in their respective fields). A physiatrist may render an opinion with respect to a plaintiff's need for surgery, *Pares v La Prade*, 266 AD2d 852, 697 NYS2d 413 (4th Dept 1999). However, a chiropractor is not licensed to interpret X-rays for the detection of fractures and is not competent to render an opinion in that regard, *Machac v Anderson*, 261 AD2d 811, 690 NYS2d 762 (3d Dept 1999); see Education Law § 6551(2)(a). Nor is a chiropractor qualified to render an opinion regarding the standard of care applicable to spinal fusion surgery, *Young v Sethi*, 188 AD3d 1339, 134 NYS3d 571 (3d Dept 2020).

Accepted standards of practice for the defendant in question are properly the subject of expert testimony, but, where there is a conflict in testimony with regard to acceptable medical standards, the jury must be left to decide what that standard is, see *Ward v Kovacs*, 55 AD2d 391, 390 NYS2d 931 (2d Dept 1977).

The deposition of one authorized to practice medicine may be offered by any party for all purposes, including as evidence in chief, without the necessity of showing unavailability or special circumstances, CPLR 3117(a)(4).

Plaintiff may compel defendant doctor to testify as an expert at trial, *McDermott v Manhattan Eye, Ear and Throat Hospital*, 15 NY2d 20, 255 NYS2d 65, 203 NE2d 469 (1964); *Braun v Ahmed*, 127 AD2d 418, 515 NYS2d 473 (2d Dept 1987), and at an examination before trial, *Johnson v New York City Health & Hospitals Corp.*, 49 AD2d 234, 374 NYS2d 343 (2d Dept 1975); see *Hardter v Semel*, 197 AD2d 846, 602 NYS2d 259 (4th Dept 1993); *Lingener v State Farm Mut. Auto. Ins. Co.*, 195 AD2d 838, 600 NYS2d 395 (3d Dept 1993), even though plaintiff has other expert witnesses available, *Segreti v Putnam Community Hospital*, 88 AD2d 590, 449 NYS2d 785 (2d Dept 1982). A number of

early cases held that use of an opponent's expert is not permitted, *Maglione v Cunard S.S. Co.*, 30 AD2d 784, 291 NYS2d 604 (1st Dept 1968); *Gnoj v New York*, 29 AD2d 404, 288 NYS2d 368 (1st Dept 1968); *Gugliano v Levi*, 24 AD2d 591, 262 NYS2d 372 (2d Dept 1965). However, an expert who examines a party during pretrial proceedings and whose report is disclosed to all parties may be called by any adverse party to testify to the substance of the report, *Gilly v New York*, 69 NY2d 509, 516 NYS2d 166, 508 NE2d 901 (1987); see also *Onondaga v Hiawatha Plaza Associates*, 195 AD2d 1009, 600 NYS2d 573 (4th Dept 1993); *Liddy v Frome*, 85 AD2d 716, 445 NYS2d 841 (2d Dept 1981).

As a general rule, when the proposed opinion testimony of a witness who is not a medical doctor is offered against a defendant who is a medical doctor, the question of the course of treatment the defendant should have undertaken is beyond the witness's professional and educational experience and is not competent opinion evidence on the issue of negligence, *Parese v Shankman*, 300 AD2d 1087, 752 NYS2d 503 (4th Dept 2002); *Jordan v Glens Falls Hosp.*, 261 AD2d 666, 689 NYS2d 538 (3d Dept 1999); see *Elliot v Long Island Home, Ltd.*, 12 AD3d 481, 784 NYS2d 615 (2d Dept 2004); *LaMarque v North Shore University Hosp.*, 227 AD2d 594, 643 NYS2d 221 (2d Dept 1996). However, where the defendant physician and a non-medical practitioner such as a podiatrist are both licensed to treat the type of injury sustained by the plaintiff, the podiatrist's opinion testimony should not be precluded without consideration of his or her professional and educational experience, *Escobar v Allen*, 5 AD3d 242, 774 NYS2d 28 (1st Dept 2004); *Parese v Shankman*, *supra*.

C. Required Content of Expert Testimony

The expert's opinion, as a whole, must reflect an acceptable level of professional certainty, *Matott v Ward*, 48 NY2d 455, 423 NYS2d 645, 399 NE2d 532 (1979); *Gross v Friedman*, 138 AD2d 571, 526 NYS2d 152 (2d Dept 1988), *aff'd*, 73 NY2d 721, 535 NYS2d 586, 532 NE2d 92 (1988); see *Callistro ex rel. Rivera v Bebbington*, 94 AD3d 408, 941 NYS2d 137 (1st Dept 2012), *aff'd*, 20 NY3d 945, 958 NYS2d 319, 982 NE2d 81 (2012); *Duffen v State*, 245 AD2d 653, 665 NYS2d 978 (3d Dept 1997). Although experts often employ the phrase "reasonable degree of medical certainty" to describe the strength of their conclusions, use of that formula is not required as long as the witness's "whole opinion" reflects a degree of confidence sufficient to satisfy accepted standards of reliability, *Matott v Ward*, *supra*; *Jones v Davis*, 307 AD2d 494, 763 NYS2d 136 (3d Dept 2003); see *Rosario v Our Lady of Consolation Nursing and Rehabilitation Care Center*, 186 AD3d 1426, 128 NYS3d 906 (2d Dept 2020) (expert's opinion rendered with "fair" degree of medical certainty sufficient to raise issue of fact); see *Viera v Khasdan*, 185 AD3d 405, 126 NYS3d 462 (1st Dept 2020) (where dentist did not provide accepted standards of practice, opinion concluding no deviation was insufficient). If an expert's testimony on direct is somewhat general, the problem may be cured if the expert's testimony on cross-examination and re-direct is more specific and sufficient to estab-

lish the requisite certainty, *Nicholas v Reason*, 84 AD2d 915, 447 NYS2d 55 (4th Dept 1981); *Ward v Kovacs*, 55 AD2d 391, 390 NYS2d 931 (2d Dept 1977).

In contrast to the flexible approach reflected in *Matott v Ward*, 48 NY2d 455, 423 NYS2d 645, 399 NE2d 532 (1979), it has been held that, in order to establish a *prima facie* case based solely upon expert testimony, the expert must expressly state that defendant's conduct deviated from the required standard of care; merely reciting the areas of defendant's treatment with which the expert disagrees is insufficient, *Salzman v Alan S. Rosell, D.D.S., P.C.*, 129 AD2d 833, 132 AD2d 807, 513 NYS2d 846 (3d Dept 1987); see *Sohn v Sand*, 180 AD2d 789, 580 NYS2d 458 (2d Dept 1992); see also *Stuart by Stuart v Ellis Hosp.*, 198 AD2d 559, 603 NYS2d 212 (3d Dept 1993). However, in *Knutson v Sand*, 282 AD2d 42, 725 NYS2d 350, the court held the expert testimony sufficient although the expert did not use particular or special combination of words or phrases because an inference could be drawn from the expert's testimony, without the need for jury speculation, that defendant's conduct was a deviation from the requisite standard of care.

Generally, as to expert testimony, see PJI 1:90. For a discussion of the disclosure requirements of CPLR 3101(d)(1)(i), see the Comment to PJI 1:90, IIIA.

XI. Res Ipsa Loquitur

Where the actual cause of an accident is unknown, the doctrine of *res ipsa loquitur* permits the inference of negligence to be drawn, in a proper case, from the happening of the event and defendant's relationship to it, *Kambat v St. Francis Hosp.*, 89 NY2d 489, 655 NYS2d 844, 678 NE2d 456 (1997); see *States v Lourdes Hosp.*, 100 NY2d 208, 762 NYS2d 1, 792 NE2d 151 (2003). The inference arises from "our everyday experience" and a recognition that "some accidents by their very nature would ordinarily not happen without negligence," *Dermatossian v New York City Transit Authority*, 67 NY2d 219, 501 NYS2d 784, 492 NE2d 1200 (1986). For a discussion of the elements of the *res ipsa* doctrine, see PJI 2:65.

Res ipsa loquitur is particularly applicable in medical malpractice cases in which an injury to an anesthetized patient occurs during surgery in an area remote from the operative site, *States v Lourdes Hosp.*, 100 NY2d 208, 762 NYS2d 1, 792 NE2d 151 (2003); *Rosales-Rosario v Brookdale University Hosp. and Medical Center*, 1 AD3d 496, 767 NYS2d 122 (2d Dept 2003); *Ceresa v Karakousis*, 210 AD2d 884, 620 NYS2d 646 (4th Dept 1994); *Hill v Highland Hosp.*, 142 AD2d 955, 530 NYS2d 381 (4th Dept 1988); *Mack v Lydia E. Hall Hosp.*, 121 AD2d 431, 503 NYS2d 131 (2d Dept 1986); *Fogal v Genesee Hospital*, 41 AD2d 468, 344 NYS2d 552 (4th Dept 1973); see *Martinez v Adelphi Hospital*, 21 AD2d 675, 249 NYS2d 1001 (2d Dept 1964) (because plaintiff did not have to prove exact cause, it was error to charge that verdict must be for defendant if jury was "in doubt as to the exact way in which plaintiff contracted" dis-

ease); see also *Knapp v Soffer*, 196 AD3d 551, 147 NYS3d 463 (2d Dept 2021) (res ipsa loquitur charge not warranted where conflicting expert testimony on issue whether brachial plexus nerve injury caused by prior work-related incident as opposed to administration of anesthesia). Nonetheless, the application of the res ipsa doctrine is somewhat different in medical malpractice cases, where the common knowledge and everyday experience of lay jurors may not be sufficient to support the inference of negligence, *Kambat v St. Francis Hosp.*, 89 NY2d 489, 655 NYS2d 844, 678 NE2d 456 (1997).

There are some medical and surgical errors, such as when an physician leaves a sponge or implement inside the patient, that may give rise to an inference of negligence based solely on the common experience of lay persons, *Kambat v St. Francis Hosp.*, 89 NY2d 489, 655 NYS2d 844, 678 NE2d 456 (1997). However, there are also situations in which expert testimony is necessary to provide the basis for concluding that the event would not have occurred in the absence of negligence, *States v Lourdes Hosp.*, supra. In such cases, New York, like the majority of states that have considered the question, permit the use of expert testimony to bridge the gap, *States v Lourdes Hosp.*, 100 NY2d 208, 762 NYS2d 1, 792 NE2d 151 (2003) (plaintiff's right arm injured, allegedly as a result of anesthesiologist's procedure, during course of surgery to remove ovarian cyst); *Mattison v OrthopedicsNY, LLP*, 189 AD3d 2025, 137 NYS3d 814 (3d Dept 2020) (injury to distal sciatic nerve following total knee revision); *Smith v Sommer*, 189 AD3d 906, 137 NYS3d 99 (2d Dept 2020) (res ipsa charge properly given to jury where plaintiff's expert testified that, in first time fundoplication procedure, injury to vagus nerve does not normally occur if physician performs the proper surgical sequence). A plaintiff's failure to offer expert evidence demonstrating that the injury was of a kind that ordinarily would not occur in the absence of negligence or that the instrumentality that caused the injury was within the defendant's exclusive control may result in denial of plaintiff's motion for summary judgment based on res ipsa loquitur, *Lancia v Good Samaritan Hospital*, 201 AD3d 913, 162 NYS3d 120 (2d Dept 2022).

For examples of the application of res ipsa in medical malpractice cases, see *Benson v Dean*, 232 NY 52, 133 NE 125 (1921); *George v New York*, 22 AD2d 70, 253 NYS2d 550 (1st Dept 1964), aff'd, 17 NY2d 561, 268 NYS2d 325, 215 NE2d 507 (1966); *Lancia v Good Samaritan Hospital*, 201 AD3d 913, 162 NYS3d 120 (2d Dept 2022); *Mattison v OrthopedicsNY, LLP*, 189 AD3d 2025, 137 NYS3d 814 (3d Dept 2020); *Smith v Sommer*, 189 AD3d 906, 137 NYS3d 99 (2d Dept 2020); *Hawkins v Brooklyn-Caledonian Hosp.*, 239 AD2d 549, 658 NYS2d 375 (2d Dept 1997); *Schoch v Dougherty*, 122 AD2d 467, 504 NYS2d 855 (3d Dept 1986); *Cornacchia v Mount Vernon Hosp.*, 93 AD2d 851, 461 NYS2d 348 (2d Dept 1983); *Pipers v Rosenow*, 39 AD2d 240, 333 NYS2d 480 (2d Dept 1972); *Matlick v Long Island Jewish Hospital*, 25 AD2d 538, 267 NYS2d 631 (2d Dept 1966); *Robbins v Nathan*, 189 App Div 827, 179 NYS 281 (2d Dept 1919); PJI 2:65; Annot: 82 ALR2d 1262; see also *Kuhns v Millard Fillmore Hospitals*, 296 AD2d 839, 744 NYS2d 787

(4th Dept 2002) (application of *res ipsa loquitur* in support of negligence claim against hospital).

XII. Causation

The physician's act must be a substantial factor in bringing about the injury for there to be liability, *Wild v Catholic Health System*, 21 NY3d 951, 969 NYS2d 846, 991 NE2d 704 (2013) (citing PJI) (medical malpractice plaintiff must generally show that defendant's negligence was a substantial factor in producing the injury); *Oakes v Patel*, 20 NY3d 633, 965 NYS2d 752, 988 NE2d 488 (2013); *Clune v Moore*, 142 AD3d 1330, 38 NYS3d 852 (4th Dept 2016); *Goldberg v Horowitz*, 73 AD3d 691, 901 NYS2d 95 (2d Dept 2010) (plaintiff must offer sufficient evidence from which reasonable person might conclude that it was more probable than not that defendant's deviation was a substantial factor in causing injury); *Candia v Estepan*, 289 AD2d 38, 734 NYS2d 37 (1st Dept 2001) (plaintiff must demonstrate that, absent defendant's malpractice, there was a substantial possibility that decedent could have been cured or that life could have been prolonged); *Kenigsberg v Cohn*, 117 AD2d 652, 498 NYS2d 390 (2d Dept 1986) (plaintiff must show that the conduct depriving plaintiff of a better chance of success more probably than not resulted in injury); see *Koehler v Schwartz*, 48 NY2d 807, 424 NYS2d 119, 399 NE2d 1140 (1979) (no issue of fact on causation where no evidence that doctor's omission caused or enhanced alleged injury). In a medical malpractice action, causation is relevant both to liability and to damages, *Oakes v Patel*, 20 NY3d 633, 965 NYS2d 752, 988 NE2d 488 (2013). In such an action, liability cannot be established unless it is shown that the defendant's malpractice was a substantial factor in causing the plaintiff's injury, *id.* Even where liability is established, the plaintiff may recover only for those injuries and related damages proximately caused by the malpractice, *id.* Where the plaintiff had a pre-existing condition, the plaintiff is not entitled to recover for injuries that the pre-existing condition would have caused even in the absence of malpractice, *id.*

For a charge and comment on proximate cause, see PJI 2:70; for a charge and comment on concurrent causes (i.e., where two or more independent, negligent acts or omissions of two or more parties are alleged to have caused the same injury to plaintiff), see PJI 2:71; for a charge and comment on intervening causes (i.e., where defendant is negligent, but it is alleged that the act or omission of plaintiff or a third-party caused plaintiff's injury), see PJI 2:72.

A. Loss of Chance

In a medical malpractice action, a plaintiff may, under certain circumstances, pursue a theory of loss of chance. Although all four Departments recognize the loss of chance theory, the Court of Appeals has not squarely addressed the issue, see *Wild v Catholic Health System*, 21 NY3d 951, 969 NYS2d 846, 991 NE2d 704 (2013).

In *Kallenberg v Beth Israel Hospital*, 45 AD2d 177, 357 NYS2d 508

(1st Dept 1974), *aff'd*, 37 NY2d 719, 374 NYS2d 615, 337 NE2d 128 (1975), regarded as one of the first loss of chance cases in New York, there was expert testimony that decedent's chance of survival, absent the malpractice, was as much as 20 to 40%. The record on appeal indicates that the trial court charged the jury to "decide whether there was a substantial possibility that [decedent] would have survived if she received proper treatment." The Appellate Division upheld a verdict for plaintiff, finding that, on the issue of proximate cause, such evidence was sufficient to support the verdict. The Court of Appeals affirmed without opinion, *id.*

Under the loss of chance doctrine, a plaintiff may establish that a defendant's negligence was a substantial factor in bringing about injury, where the defendant's conduct diminished the plaintiff's chance of a better outcome or increased the injury, *Flaherty v Fromberg*, 46 AD3d 743, 849 NYS2d 278 (2d Dept 2007); see *Mortensen v Memorial Hosp.*, 105 AD2d 151, 483 NYS2d 264 (1st Dept 1984). The plaintiff must demonstrate that the possibility or chance of a better outcome or a decreased injury was substantial, *Mortensen v Memorial Hosp.*, *supra*. A plaintiff need not quantify the extent to which the defendant's negligence decreased the chance of a better outcome, *Hernandez v New York City Health and Hosp. Corp.*, 129 AD3d 532, 11 NYS3d 588 (1st Dept 2015); *King v St. Barnabas Hosp.*, 87 AD3d 238, 927 NYS2d 34 (1st Dept 2011); *Semel v Guzman*, 84 AD3d 1054, 924 NYS2d 414 (2d Dept 2011). The mere possibility that the plaintiff would have had a better chance for a better outcome or a decreased injury is insufficient to establish proximate cause, *Mortensen v Memorial Hosp.*, *supra*; see *Kimball v Scors*, 59 AD2d 984, 399 NYS2d 350 (3d Dept 1977). In *Neyman v Doshi Diagnostic Imaging Services, P.C.*, 153 AD3d 538, 59 NYS3d 456 (2d Dept 2017), the court held that a plaintiff need not establish that, but for a defendant doctor's malpractice, the patient would have been cured. Rather, a plaintiff need only show a diminished chance at a better outcome or an increased injury, such as a substantially improved chance for a prolonged life or reduced suffering, *id.*

Cases where the evidence at trial regarding loss of chance was legally sufficient for the jury to find proximate cause include: *Daniele v Pain Management Center of Long Island*, 168 AD3d 672, 91 NYS3d 496 (2d Dept 2019) (evidence was legally sufficient to establish defendants' failure to timely diagnose and treat infection and resulting abscesses deprived plaintiff of substantial chance for better outcome); *Clune v Moore*, 142 AD3d 1330, 38 NYS3d 852 (4th Dept 2016) (plaintiff presented legally sufficient evidence that defendants' negligence deprived decedent of substantial possibility of surviving bowel perforation and resultant peritonitis); *Wolf v Persaud*, 130 AD3d 1523, 14 NYS3d 601 (4th Dept 2015) (evidence legally sufficient where plaintiff's expert testified that defendant's failure to order timely MRI study of plaintiff's iliac vein diminished her chance of better outcome or increased her injury); *Semel v Guzman*, 84 AD3d 1054, 924 NYS2d 414 (2d Dept 2011) (defendant's failure to communicate that instruments had been placed in decedent's throat delayed diagnosis of perforated esophagus);

Goldberg v Horowitz, 73 AD3d 691, 901 NYS2d 95 (2d Dept 2010) (where defendant failed to recognize that EKG performed in his office indicated decedent was suffering from ischemia at rest, evidence was sufficient to infer decedent would have had better outcome if defendant had immediately referred him to hospital emergency room); Dockery v Sprecher, 68 AD3d 1043, 891 NYS2d 465 (2d Dept 2009) (evidence established defendant's failure to recommend surgery be performed within 24 hours diminished plaintiff's chance for better outcome or increased his injuries); Alicea v Ligouri, 54 AD3d 784, 864 NYS2d 462 (2d Dept 2008) (delayed diagnosis of chorioamnionitis and gestational diabetes contributed to plaintiff's development of cerebral palsy); Imbierowicz v A.O. Fox Memorial Hosp., 43 AD3d 503, 841 NYS2d 168 (3d Dept 2007) (evidence sufficient to establish that, if defendant doctor had ordered appropriate test be done right away, it could have been conducted, accurate diagnosis of aortic dissection could have been made, and corrective surgery begun before decedent suffered cardiac arrest); Flaherty v Fromberg, 46 AD3d 743, 849 NYS2d 278 (2d Dept 2007) (delay in performing cesarean section diminished infant plaintiff's chance for better outcome); Borawski v Huang, 34 AD3d 409, 824 NYS2d 362 (2d Dept 2006) (evidence sufficient to establish that earlier diagnosis would have afforded decedent greater chance of survival where plaintiff's expert opined that defendant's deviation reduced plaintiff's chances of survival from 65-90% chance of being cured, to only 10% chance of long-term survival); Wong v Tang, 2 AD3d 840, 769 NYS2d 381 (2d Dept 2003) (testimony of plaintiff's expert that defendant's failure to call ambulance was substantial factor in causing decedent's death was sufficient to demonstrate that some diminution in chance of survival had occurred); Cavlin v New York Medical Group, P.C., 286 AD2d 469, 730 NYS2d 337 (2d Dept 2001) (failure to perform chest x-ray, which would have revealed cancerous mass, proximate cause of decedent's death sufficient to show it was probable that some diminution in chance of survival occurred); Jump v Facelle, 275 AD2d 345, 712 NYS2d 162 (2d Dept 2000) (evidence of causation was legally sufficient where plaintiff's expert testified negligent delay of 11 to 12 hours in performing surgery increased harm to decedent and decreased his chance of survival); see Gagliardo v Jamaica Hosp., 288 AD2d 179, 732 NYS2d 353 (2d Dept 2001) (where plaintiffs' theory was that earlier performed sonogram would have detected testicular cancer that subsequently caused decedent's death, trial court erred in denying plaintiffs' request for jury instruction regarding deprivation of substantial chance for cure); Cannizzo v Wijeyasekaran, 259 AD2d 960, 689 NYS2d 315 (4th Dept 1999) (court erred in failing to instruct jury on loss of chance doctrine where plaintiff's theory was that defendants' negligence deprived her of substantial possibility of having functioning kidney).

Cases where the evidence of loss of chance was sufficient to raise a triable issue of fact include: Leberman on Behalf of Miller v Glick, 207 AD3d 1203, 171 NYS3d 677 (4th Dept 2022) (expert opined that failure to timely perform comprehensive neurological examination and evaluate patient for fibrinolytic therapy would have minimized damaged

caused by stroke depriving patient of substantial possibility of a better outcome); *Fischella v Saint Luke's Cornwall Hospital*, 204 AD3d 1343, 167 NYS3d 618 (3d Dept 2022) (plaintiff's expert urologist testified that testicular torsion is surgical emergency, that salvage rate is almost 100% if detorsion is accomplished in less than 6 hours from onset of symptoms or 50% if accomplished between 6 and 12 hours from onset, that defendant's unnecessary delay in performing detorsion surgery decreased chance of salvaging testicle); *Almonte v Shaukat*, 204 AD3d 402, 166 NYS3d 160 (1st Dept 2022) (plaintiff's experts testified that 13-month delay in diagnosis of breast cancer led to more advanced stage of breast cancer and reduced odds of survival by at least 13%); *Holland v Cayuga Medical Center at Ithaca, Inc.*, 195 AD3d 1292 (3d Dept 2021) (plaintiff's expert opined that nurse's error in programming pump, which resulted in plaintiff receiving improper dose of medication, deprived plaintiff of substantial possibility of better outcome, up to and including a 100% recovery); *Neyman v Doshi Diagnostic Imaging Services, P.C.*, 153 AD3d 538, 59 NYS3d 456 (2d Dept 2017) (plaintiff raised triable issue of fact through expert opinion that, had chemotherapy been instituted earlier, decedent's chances for recovery, or at least for prolonging her life and reducing her suffering, would have been substantially improved); *D'Orta v Margaretville Memorial Hosp.*, 154 AD3d 1229, 62 NYS3d 620 (3d Dept 2017) (issue of fact where plaintiff's expert opined that defendant's failure to administer drug to plaintiff after he sustained stroke deprived him of "a substantial possibility for a better long-term neurological outcome, meaning a substantial chance for improved speech, movement and cognition"); *Hernandez v New York City Health and Hosp. Corp.*, 129 AD3d 532, 11 NYS3d 588 (1st Dept 2015) (issue of fact as to whether plaintiff's partially severed finger could be salvaged where plaintiff's expert opined that viability of finger diminished with every passing hour, and that amputation could have been avoided had surgery occurred within 4–6 hours of injury, rather than 16–18 hours); *King v St. Barnabas Hosp.*, 87 AD3d 238, 927 NYS2d 34 (1st Dept 2011) (issue of fact as to whether first responders' negligent failure to follow resuscitation protocol diminished decedent's chance for recovery).

Cases where the evidence of loss of chance was insufficient include: *Foster v Kassab*, 201 AD3d 405, 156 NYS3d 720 (1st Dept 2022) (citing PJI) (delayed diagnosis, standing alone, even if deviation, insufficient to establish proximate cause and expert's conclusory statement insufficient to raise triable issue of fact); *Lopes v Lenox Hill Hospital*, 172 AD3d 699, 99 NYS3d 384 (2d Dept 2019) (verdict in favor of plaintiff properly set aside where there was no evidence that defendant OB/GYN would have changed his care and treatment of plaintiff if radiologist's interpretation of ultrasound had been communicated to him in timely manner); *Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 (2d Dept 2011) (citing PJI) (no rational interpretation of evidence at trial suggested that defendant doctor's negligence deprived plaintiff of substantial chance for cure); *Candia v Estepan*, 289 AD2d 38, 734 NYS2d 37 (1st Dept 2001) (in opposition to defendant's evidence that mesothelioma is, for all practical purposes, incurable, plaintiff failed to raise issue of fact

as to whether, absent defendant's failure to timely diagnose, there was substantial possibility that decedent could have been cured or that her life could have been prolonged); *Brown v State*, 192 AD2d 936, 596 NYS2d 882 (3d Dept 1993) (affirming dismissal of claim, after trial, where State's witnesses testified that delay in diagnosis and treatment of claimant's tumor would not have resulted in better outcome).

In *Wild v Catholic Health System*, 85 AD3d 1715, 927 NYS2d 250 (4th Dept 2011) (citing PJI), *aff'd*, 21 NY3d 951, 969 NYS2d 846, 991 NE2d 704 (2013), based on evidence presented, the court concluded that plaintiffs' "omission" theory should be subject to the trial court's loss of chance charge, while plaintiffs' "commission" theory should be subject to PJI 2:70's general proximate cause charge. On appeal, the Court of Appeals determined that the defendant's challenge to the viability of the loss of chance doctrine was not preserved for appellate review and, therefore, was not properly before it. The only issue preserved was whether the trial court's proximate cause charge improperly reduced the plaintiffs' burden of proof. In affirming, the Court of Appeals did not address the omission/commission distinction drawn by the Fourth Department, but concluded that the charge as a whole, which included PJI 2:70 and the standard preponderance of the evidence charge, PJI 1:23, did not improperly alter the causation standard or plaintiff's burden of proof.

In *Daniele v Pain Management Center of Long Island*, 168 AD3d 672, 91 NYS3d 496 (2d Dept 2019), the evidence was legally sufficient to establish that defendants' departures were a substantial factor in depriving plaintiff of a substantial chance for an improved outcome. However, the case was remitted for a new trial because the trial court deprived the defendant physicians of the opportunity, pursuant to CPLR 1601, to adduce evidence of the negligence of two nonparty physicians that may also have deprived plaintiff of a substantial chance for an improved outcome.

Case law from the Second Department uses the phrase "substantial chance," rather than the phrase "substantial possibility," used in the other departments, see *Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 (2d Dept 2011) (citing PJI); *Gagliardo v Jamaica Hosp.*, 288 AD2d 179, 732 NYS2d 353 (2d Dept 2001). The "substantial possibility" phrase employed by the First, Third, and Fourth Departments should not be confused with an instruction to the jury that plaintiff has the burden of demonstrating that there was "substantial probability" that the defendant's negligent conduct caused her injuries, *Dempsey v Methodist Hosp.*, 159 AD2d 541, 552 NYS2d 406 (2d Dept 1990). Such a charge would be erroneous because it incorporates an improper standard of proof, thereby increasing the plaintiff's burden of proof from the usual "more probable than not" language, *id.*, which, of course, is the applicable standard, *Leal v Simon*, 147 AD2d 198, 542 NYS2d 328 (2d Dept 1989); *Mertsaris v 73rd Corp.*, 105 AD2d 67, 482 NYS2d 792 (2d Dept 1984); see *Kimball v Scors*, 59 AD2d 984, 399 NYS2d 350 (3d Dept 1977).

In a case where the court has concluded a loss of chance contention

should be presented to the jury, the charge below should be given:

PJI 2:150.1

[Where the loss of chance theory does not apply to every alleged deviation or departure from the standard of care in the case, insert: I will now give you an additional instruction that applies only to AB's allegations that (state the deviations or departures to which the loss of chance theory applies)].

If you find that AB has established [state the deviations or departures to which the loss of chance theory applies], you must then consider whether (those deviations, those departures, CD's conduct) (were, was) (a) substantial factor(s) in depriving AB of a substantial (possibility, chance) for a (better outcome, recovery, cure).

AB is not required to quantify the exact extent to which CD's conduct deprived (him, her) of a substantial (possibility, chance) for a (better outcome, recovery, cure). A substantial (possibility, chance) does not have to be more than fifty percent, but it has to be more than slight. The mere possibility that AB would have had a better chance for an improved outcome or a decreased injury is insufficient.

Comment

Caveat 1: The foregoing charge should be given after PJI 2:150 and PJI 2:70, and in addition to an appropriate burden of proof charge, see PJI 1:23; PJI 1:60; PJI 1:61; PJI 1:62, see *Wild v Catholic Health System*, 21 NY3d 951, 969 NYS2d 846, 991 NE2d 704 (2013).

Caveat 2: Not all contentions of malpractice warrant a loss of chance instruction, see *Wild v Catholic Health System*, 85 AD3d 1715, 927 NYS2d 250 (4th Dept 2011) (citing PJI), *aff'd*, 21 NY3d 951, 969 NYS2d 846, 991 NE2d 704 (2013). The contours of the theory are the subject of developing case law.

Based on *Kallenberg v Beth Israel Hospital*, 45 AD2d 177, 357 NYS2d 508 (1st Dept 1974), *aff'd*, 37 NY2d 719, 374 NYS2d 615, 337 NE2d 128 (1975); *Daniele v Pain Management Center of Long Island*, 168 AD3d 672, 91 NYS3d 496 (2d Dept 2019); *Clune v Moore*, 142 AD3d 1330, 38 NYS3d 852 (4th Dept 2016); *Allen v Uh*, 82 AD3d 1025, 919

NYS2d 179 (2d Dept 2011) (citing PJI); *Flaherty v Fromberg*, 46 AD3d 743, 849 NYS2d 278 (2d Dept 2007); *Mortensen v Memorial Hosp.*, 105 AD2d 151, 483 NYS2d 264 (1st Dept 1984); *Kimball v Scors*, 59 AD2d 984, 399 NYS2d 350 (3d Dept 1977); see *Wild v Catholic Health System*, 21 NY3d 951, 969 NYS2d 846, 991 NE2d 704 (2013).

B. Delayed Diagnosis

A delayed diagnosis, even if the delay constitutes a deviation from accepted practice, is insufficient standing alone to establish proximate cause, *Foster v Kassab*, 201 AD3d 405, 156 NYS3d 720 (1st Dept 2022) (citing PJI); *Kaffka v New York Hosp.*, 228 AD2d 332, 644 NYS2d 243 (1st Dept 1996). In *Foster*, the plaintiff failed to raise a triable issue of fact on proximate cause with expert evidence that a delay in ordering EGD to rule out gastric cancer “more likely than not allowed for a significant period of progressive cancer growth and extent (sic) that limited decedent’s treatment options, as well as the expected extent of response to treatment” given that the expert offered no assessment of the stage of the cancer at first consultation with the defendant, the stage when cancer was discovered, and the resultant diminution in life expectancy or injury, if any, *Foster v Kassab*, *supra*. Similarly, in *Kaffka*, plaintiff alleged that defendant was negligent in failing to diagnose her breast cancer. Based on uncontested evidence that plaintiff’s cancer was at an advanced stage when the defendant had an opportunity to make a timely diagnosis, the court ruled that no factual nexus existed between the alleged malpractice and the affirmative harm to plaintiff and dismissed plaintiff’s claims, *Kaffka v New York Hosp.*, *supra*. Likewise, in *Lyons v McCauley*, 252 AD2d 516, 675 NYS2d 375 (2d Dept 1998), the court ruled that plaintiff’s medical malpractice claim for failure to diagnose cancer was properly dismissed because there was no expert testimony causally linking the defendant’s negligence with any delay in the diagnosis of her breast cancer or with any injury that was separate and apart from the underlying cancer, see also *Giambona v Stein*, 265 AD2d 775, 697 NYS2d 399 (3d Dept 1999). In *Grenyion v Mid-Hudson Comprehensive*, 205 AD3d 610, 168 NYS3d 78 (1st Dept 2022), the court found that any departure by the defendants in failing to inform plaintiff more emphatically of the urgent need to follow-up care was not a proximate cause of delayed diagnosis of breast cancer where plaintiff, among other things, canceled appointments due to loss of her health insurance and waited a year after discovery of a lump in her breast to see another doctor.

In contrast, recovery was permitted for defendant physician’s failure timely to diagnose a patient’s cancer, where there was expert evidence that the delay in diagnosis had reduced the patient’s life expectancy, there was no contention that the patient’s cancer was incurable at the time defendant failed to diagnose the condition and the patient’s chance of surviving five years had dropped from 78% to 7% by the time the condition was diagnosed, *Schaub v Cooper*, 34 AD3d 268, 824 NYS2d 241 (1st Dept 2006). In these circumstances, it could not be said as a matter of law that the delay was not responsible for a diminished chance

of survival or for a death that was earlier than it should have been, *id*; see *Polanco v Reed*, 105 AD3d 438, 963 NYS2d 57 (1st Dept 2013); *Hughes v New York Hospital-Cornell Medical Center*, 195 AD2d 442, 600 NYS2d 145 (2d Dept 1993). Similarly, in *Luna v Spadafora*, 127 AD3d 933, 7 NYS3d 413 (2d Dept 2015), a verdict in favor of a plaintiff was sustained for defendants-physicians' failure to timely diagnose plaintiff's thyroid cancer, where plaintiff adduced expert testimony that the delay caused the cancer condition to advance from stage II with a 10-year survival rate of 85-90% to stage IV with a 10-year survival rate of 40-50%. The Second Department determined that the jury rationally concluded that the delay in diagnosing plaintiff's cancer proximately caused her to have a worsened prognosis or decreased 10-year survival rate, *Luna v Spadafora*, *supra*.

However, a conclusory statement that a physician's departure from accepted practice resulted in delayed diagnosis and treatment leading to a less favorable prognosis is insufficient to raise a triable question of fact regarding causation, *Foster v Kassab*, 201 AD3d 405, 156 NYS3d 720 (1st Dept 2022) (citing PJI); *Mosezhnik v Berenstein*, 33 AD3d 895, 823 NYS2d 459 (2d Dept 2006). Recovery of damages proximately caused by malpractice for the possibility of the future outbreak of latent or new conditions not manifested at the time of trial requires medical proof of a reasonable certainty that such developments will occur, *Matott v Ward*, 48 NY2d 455, 423 NYS2d 645, 399 NE2d 532 (1979); *Bossio v Fiorillo*, 210 AD2d 836, 620 NYS2d 596 (3d Dept 1994).

Causation is relevant both to liability and to damages, *Oakes v Patel*, 20 NY3d 633, 965 NYS2d 752, 988 NE2d 488 (2013). For example, in a medical malpractice case, liability cannot be established unless it is shown that the defendant's malpractice was a substantial factor in causing the plaintiff's injury, *id*. But even where liability is established, the plaintiff may recover only for those injuries and related damages proximately caused by the malpractice, *id*. More specifically, where the plaintiff had a pre-existing condition, the plaintiff is not entitled to recover for injuries that the pre-existing condition would have caused even in the absence of malpractice, *id*.

C. Effect of Patient's Conduct

A failure by plaintiff to follow medical advice after the alleged malpractice occurred does not constitute comparative negligence, but rather may only be considered in mitigation of damages, *Dombrowski v Moore*, 299 AD2d 949, 752 NYS2d 183 (4th Dept 2002); but see *Bellas v Kurpis*, 182 AD2d 542, 582 NYS2d 708 (1st Dept 1992) (jury's finding of plaintiff's comparative negligence need not be disturbed where plaintiff declined to follow full course of treatment). The same principle was applied in pre-comparative fault cases, where the patient's failure to follow medical advice could be considered in mitigation of damages, but did not constitute contributory negligence barring recovery, *Du Bois v Decker*, 130 NY 325, 29 NE 313 (1891); *Ferrara v Leventhal*, 56 AD2d 490, 392 NYS2d 920 (2d Dept 1977); *Dunn v Catholic Medical Center of*

Brooklyn & Queens, Inc., 55 AD2d 597, 389 NYS2d 123 (2d Dept 1976); Heller v Medine, 50 AD2d 831, 377 NYS2d 100 (2d Dept 1975); Quinones v Public Adm'r of Kings County, 49 AD2d 889, 373 NYS2d 224 (2d Dept 1975).

A comparative fault charge is appropriate when there is evidence that a plaintiff shares responsibility for harm that was inflicted as a result of a defendant's medical malpractice, Vallone v Saratoga Hosp., 141 AD3d 886, 35 NYS3d 544 (3d Dept 2016); see DiCicco v Cattani, 59 AD3d 660, 874 NYS2d 518 (2d Dept 2009). Thus, where it was claimed that the patient bore major responsibility for her periodontal disease due to heavy use of prescription drugs and tobacco, failure to give complete medical history and delay in treatment, the patient's conduct could be considered on the issue of her comparative fault, Elkins v Ferencz, 263 AD2d 372, 694 NYS2d 27 (1st Dept 1999). The comparative fault rule may apply where prior to the malpractice, the patient fails to reveal part of his or her medical history, Ogle v State, 191 AD2d 878, 594 NYS2d 824 (3d Dept 1993). A comparative fault charge should not be given when a plaintiff's alleged negligence preceded the alleged medical malpractice and is not otherwise alleged to have contributed to the harm resulting from the medical malpractice, *id.*

Where a patient's criminal conduct is a foreseeable result of the alleged malpractice, recovery may be allowed, Levitt v Lenox Hill Hosp., 184 AD2d 427, 585 NYS2d 401 (1st Dept 1992).

For a charge on mitigation of damages, see PJI 2:325. For a proximate cause charge, see PJI 2:70.

XIII. Liability for Acts and Omissions of Another

When two or more physicians are employed together by the patient and make a joint diagnosis or treatment, they are jointly liable, see Arshansky v Royal Concourse Co., 28 AD2d 986, 283 NYS2d 646 (1st Dept 1967); Graddy v New York Medical College, 19 AD2d 426, 243 NYS2d 940 (1st Dept 1963); CJS, Physicians and Surgeons, § 107; AmJur2d, Physicians, Surgeons, and Other Healers § 270; see also Ruane v Stillwell, 195 AD2d 836, 600 NYS2d 803 (3d Dept 1993) (evidence insufficient to show that physician who only shared office space with alleged negligent doctor was acting in concert with his "partner"). Where physicians are partners, each is vicariously liable for the negligent acts of a partner undertaken in furtherance of partnership business, Hardter v Semel, 197 AD2d 846, 602 NYS2d 259 (4th Dept 1993); see Liquori v Dolkart, 204 AD3d 1099, 166 NYS3d 352 (3d Dept 2022) (partnership between midwifery practice and collaborating physician).

A physician may satisfy his or her duty of care by referring the patient to an appropriate specialist who is better equipped to handle the patient's condition, Revere v Burke, 200 AD3d 1607, 160 NYS3d 503 (4th Dept 2021). Referral of a patient by one physician to another

competent physician generally does not, absent partnership, employment or agency, furnish a basis for the referring physician's liability, *Kavanaugh by Gonzales v Nussbaum*, 71 NY2d 535, 528 NYS2d 8, 523 NE2d 284 (1988); *Mandel v New York County Public Adm'r*, 29 AD3d 869, 815 NYS2d 275 (2d Dept 2006); *Harrington v Neurological Institute of Columbia Presbyterian Medical Center*, 254 AD2d 129, 679 NYS2d 17 (1st Dept 1998), even where the referral is because of the temporary absence of the referring physician and the referring physician shares in the fee, *Arshansky v Royal Concourse Co.*, 28 AD2d 986, 283 NYS2d 646 (1st Dept 1967); *Graddy v New York Medical College*, 19 AD2d 426, 243 NYS2d 940 (1st Dept 1963).

A physician is not vicariously liable for the malpractice of another physician who, though not a partner or joint venturer, merely covers for the referring physician, *Kavanaugh by Gonzales v Nussbaum*, 71 NY2d 535, 528 NYS2d 8, 523 NE2d 284 (1988); *Reeck v Huntington Hosp.*, 215 AD2d 464, 626 NYS2d 516 (2d Dept 1995). However, a physician who commits malpractice does not avoid liability by referring the patient to another physician who thereafter commits further acts of malpractice, *Datz by Datz v Shoob*, 71 NY2d 867, 527 NYS2d 749, 522 NE2d 1047 (1988); see *Yanchynska v Wertkin*, 178 AD3d 1122, 115 NYS3d 84 (2d Dept 2019) (defendant who referred plaintiff to breast surgeon potentially liable for her own alleged malpractice in failing to advise breast surgeon that her own examination of plaintiff's breast differed from breast surgeon's examination that detected no palpable lumps); *Nicholas v Reason*, 84 AD2d 915, 447 NYS2d 55 (4th Dept 1981) (fact that one defendant attended patient while other was on vacation does not absolve former from liability as a matter of law); see also *Harding v Noble Taxi Corp.*, 182 AD2d 365, 582 NYS2d 1003 (1st Dept 1992); *Tiernan v Heinzen*, 104 AD2d 645, 480 NYS2d 24 (2d Dept 1984). Liability also may be imposed for negligence in the selection of a covering physician and for failure to advise the covering physician of the potential risks confronted by the patient, *Kavanaugh by Gonzales v Nussbaum*, *supra*. A referring physician may be held jointly liable for the negligence of the treating physician where the referring physician was involved in decisions regarding diagnosis and treatment to the extent of making them his or her own negligent acts, *Reyz v Khelemsky*, 44 AD3d 640, 844 NYS2d 49 (2d Dept 2007); *Mandel v New York County Public Adm'r*, 29 AD3d 869, 815 NYS2d 275 (2d Dept 2006); see *Yanchynska v Wertkin*, *supra*. In such circumstances, the referring physician and the treating physician are liable based on each one's relative responsibility, *Mandel v New York County Public Adm'r*, *supra*.

A physician can be vicariously liable for another physician's active negligence if the former had some control of the latter's treatment of the patient, *Ross v Mandeville*, 45 AD3d 755, 846 NYS2d 276 (2d Dept 2007). Thus, a hospital staff physician who allowed a third-year resident to make an incision could be held liable for the injuries resulting from the resident's negligence, since there was evidence that the resident was under defendant physician's direct supervision, *id*; see *Almonte v Shaukat*, 204 AD3d 402, 166 NYS3d 160 (1st Dept 2022) (triable issue

of fact whether physician's cosigning of physician assistant's chart was merely customary administrative function or whether physician must review physician assistant's chart to ensure conformity with standard of care to patient); *Macancela v Wyckoff Heights Medical Center*, 176 AD3d 795, 109 NYS3d 411 (2d Dept 2019) (question of fact as to whether attending physician deviated from good and accepted practice by failed to recommend repeat testing in light of notes prepared by medical residents and fellows). With respect to employment, a staff physician may, in the circumstances of a particular case, be the ad hoc employee of the patient's surgeon, *O'Rourke v Halcyon Rest*, 281 App Div 838, 118 NYS2d 693 (2d Dept 1953), *aff'd*, 306 NY 692, 117 NE2d 639 (1954), as may a staff nurse, *Annot*: 12 ALR3d 1017; 29 ALR3d 1065, 1075. As to ad hoc employees, see PJI 2:238. As to when a physician is an independent contractor, see *Brink v Muller*, 86 AD3d 894, 927 NYS2d 719 (3d Dept 2011); *Roberts v El-Hajal*, 23 AD3d 733, 804 NYS2d 819 (3d Dept 2005); *Santiago v Archer*, 136 AD2d 690, 524 NYS2d 106 (2d Dept 1988); *Campbell v Emma Laing Stevens Hosp.*, 118 AD2d 988, 499 NYS2d 993 (3d Dept 1986); *Felice v St. Agnes Hospital*, 65 AD2d 388, 411 NYS2d 901 (2d Dept 1978); *Mduba v Benedictine Hospital*, 52 AD2d 450, 384 NYS2d 527 (3d Dept 1976); PJI 2:255. The key consideration for finding that a medical practitioner was an independent contractor is the alleged principal's lack of power to regulate the manner in which the practitioner's work was performed, *Roberts v El-Hajal*, *supra*.

Physicians who are shareholders, employees, or agents of a professional service corporation are liable for their own acts of malpractice and those over whom they exert direct supervision and control when rendering services on behalf of the corporation, BCL § 1505(a) (domestic professional service corporation); § 1527 (foreign professional service corporation); *Ruggiero v Miles*, 125 AD3d 1216, 4 NYS3d 648 (3d Dept 2015); see *Wise v Greenwald*, 208 AD2d 1141, 617 NYS2d 591 (3d Dept 1994) (supervising dentist-shareholder may be held liable for malpractice by dentist-employee, who was not a shareholder in professional corporation). However, physicians who are employees, officers or shareholders of a professional corporation are not vicariously liable for the malpractice of other physician employees-officers-shareholders, *Yaniv v Taub*, 256 AD2d 273, 683 NYS2d 35 (1st Dept 1998); *Polokoff v Palmer*, 190 AD2d 897, 593 NYS2d 129 (3d Dept 1993); *Paciello v Patel*, 83 AD2d 73, 443 NYS2d 403 (2d Dept 1981). A doctor who is both an employee and supervisor of a professional services corporation is subject to liability for the acts of a fellow employee where, under the circumstances, there is an unreasonable risk of physical harm to others resulting from a risk that the doctor's direction or permission creates, *Yaniv v Taub*, *supra*. A doctor's participation in weekly group staff meetings of a professional corporation at which a patient's care was discussed does not, without more, give rise to a physician-patient relationship between the doctor attending the meetings and the patient discussed, *Sawh v Schoen*, 215 AD2d 291, 627 NYS2d 7 (1st Dept 1995).

A hospital is responsible for the malpractice of a physician or nurse in its employ, see PJI 2:151; *Kavanaugh by Gonzales v Nussbaum*, 71

NY2d 535, 528 NYS2d 8, 523 NE2d 284 (1988); or a professional whom it holds out as performing the service it offers, even though in fact he or she is an independent contractor, *Mduba v Benedictine Hospital*, 52 AD2d 450, 384 NYS2d 527 (3d Dept 1976); see *Felter v Mercy Community Hosp. of Port Jervis, N.Y.*, 244 AD2d 385, 664 NYS2d 321 (2d Dept 1997); *Felice v St. Agnes Hospital*, 65 AD2d 388, 411 NYS2d 901 (2d Dept 1978). Likewise, a party who founded a clinic, was one of its principals, interviewed, hired and paid the clinic's doctors and controlled all aspects of the clinic's administration may be held liable for the negligent acts of its physicians regardless of whether the physicians were independent contractors or employees of the clinic, *Brown v LaFontaine-Rish Medical Associates*, 33 AD3d 470, 822 NYS2d 527 (1st Dept 2006) (injured patient did not seek out any physician, but instead selected clinic, which assigned particular physicians to procedures). Thus, where a patient has come to a hospital emergency room seeking treatment from the hospital rather than from an individual physician, the hospital is liable for the negligent acts of a physician who provided emergency care, even though the physician was not a hospital employee, *Sessa v Peconic Bay Medical Center*, 200 AD3d 1085, 159 NYS3d 126 (2d Dept 2021); *St. Andrews v Scalia*, 51 AD3d 1260, 857 NYS2d 807 (3d Dept 2008); *Salvatore v Winthrop University Medical Center*, 36 AD3d 887, 829 NYS2d 183 (2d Dept 2007). The hospital's liability for the negligent acts of non-employee physicians in such situations is based on agency by estoppel principles and applies to acts of an independent physician where the physician was provided by the hospital or was otherwise acting on the hospital's behest or where plaintiff could reasonably believe that the physician was acting at the hospital's behest, *Malcolm v The Mount Vernon Hosp.*, 309 AD2d 704, 766 NYS2d 185 (1st Dept 2003); see *Sessa v Peconic Bay Medical Center*, *supra*; *Sarivola v Brookdale Hosp. and Medical Center*, 204 AD2d 245, 612 NYS2d 151 (1st Dept 1994). To impose liability on a hospital based on a physician's "apparent authority," there must be words or conduct by the hospital that give rise to the appearance that the doctor has authority to act on behalf of the hospital, *Pratt v Haber*, 105 AD3d 429, 963 NYS2d 32 (1st Dept 2013) (television "blurb" about physician and procedure insufficient to raise issue as to whether physician was hospital's agent). On a motion by a hospital for summary judgment, the hospital must come forward with evidence to rule out any inference that the negligent physician was its agent, *Malcolm v The Mount Vernon Hosp.*, *supra*; see *Sessa v Peconic Bay Medical Center*, 200 AD3d 1085, 159 NYS3d 126 (2d Dept 2021).

The facts that the physician had teaching and clinical responsibilities, was chosen from a number of cardiologists "on staff" and came to assist in plaintiff's care in response to a hospital employee's page preclude a grant of summary judgment in the hospital's favor, *Malcolm v The Mount Vernon Hosp.*, 309 AD2d 704, 766 NYS2d 185 (1st Dept 2003). A clinic or hospital is responsible for malpractice committed on patients who sought care from the institution rather than from any individual physician, *Hill v St. Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904, 490 NE2d 823 (1986) (citing PJI); *Sessa v Peconic Bay Medical*

Center, 200 AD3d 1085, 159 NYS3d 126 (2d Dept 2021); *Johnson v Jamaica Hosp. Medical Center*, 21 AD3d 881, 800 NYS2d 609 (2d Dept 2005); *Ryan v New York City Health and Hospitals Corp.*, 220 AD2d 734, 633 NYS2d 500 (2d Dept 1995); *Brown v LaFontaine-Rish Medical Associates*, 33 AD3d 470, 822 NYS2d 527 (1st Dept 2006); see *Santiago v Brandeis*, 309 AD2d 621, 766 NYS2d 25 (1st Dept 2003) (defendant hospital's assertion that it did not employ allegedly negligent physician not sufficient to justify summary judgment dismissing complaint where there was no evidence that plaintiff requested physician; fact questions were raised as to whether plaintiff reasonably believed defendant had provided physician and was acting as defendant's agent); *Culhane v Schorr*, 259 AD2d 511, 686 NYS2d 105 (2d Dept 1999) (although decedent was originally admitted through emergency room of hospital, there was no competent proof in record that decedent believed he was receiving care from hospital in general, as opposed to doctors specifically); *Gunther v Staten Island Hosp.*, 226 AD2d 427, 640 NYS2d 601 (2d Dept 1996), as is a department store which holds itself out as conducting a dentist's business, even though to do so is illegal, *Hannon v Siegel-Cooper Co.*, 167 NY 244, 60 NE 597 (1901). However, where a steamship company provides a physician whose use by a passenger is optional and over whom the company has no control, it is responsible only for the selection of a competent physician, *Allan v State S.S. Co.*, 132 NY 91, 30 NE 482 (1892); *Laubheim v De Koninglyke N.S. Co.*, 107 NY 228, 13 NE 781 (1887). The same rule governs a compensation carrier which provides a doctor for an injured employee, *Stone v Goodman*, 241 App Div 290, 271 NYS 500 (1st Dept 1934); see *Santiago v Archer*, 136 AD2d 690, 524 NYS2d 106 (2d Dept 1988) (as to liability of union health and welfare fund for malpractice of physicians at clinic that fund provided for union members).

A defendant that merely leases its premises to medical practitioners is not subject to liability for medical malpractice of the lessee doctors, *Slavik v Parkway Hosp.*, 242 AD2d 376, 661 NYS2d 274 (2d Dept 1997); *Hylton v Flushing Hosp. and Medical Center*, 218 AD2d 604, 630 NYS2d 748 (1st Dept 1995).

XIV. Liability of Employers Providing Medical Care

If a company maintains a medical facility exclusively for its employees, an action for malpractice arising out of treatment there is barred by workers' compensation, *Garcia v Iserson*, 33 NY2d 421, 353 NYS2d 955, 309 NE2d 420 (1974); *Marange v Slivinski*, 257 AD2d 427, 684 NYS2d 199 (1st Dept 1999); *Cronin v Perry*, 244 AD2d 448, 664 NYS2d 123 (2d Dept 1997). That the facility occasionally treats, on an emergency basis, other people authorized to be on the employer's grounds does not detract from the fact that the facility was essentially an exclusive employee clinic not open to the general public, *Woods v Dador*, 187 AD2d 648, 590 NYS2d 240 (2d Dept 1992); see *Feliciano Delgado v The New York Hotel Trades Council and Hotel Ass'n of New York City Health Center, Inc.*, 281 AD2d 312, 722 NYS2d 498 (1st Dept 2001); see also *Ruiz v Chase Manhattan Bank*, 211 AD2d 539, 621

NYS2d 345 (1st Dept 1995) (fellow-employee rule inapplicable to suit against pharmacist because pharmacist's services available to all persons working in building, not just those employed by plaintiff's employer). Further, the fact that a company-employed physician performed some of the treatment off the premises of the company is not a "distinction of relevance" in determining whether the co-employee rule barring recovery is applicable, *Golini v Nachtigall*, 38 NY2d 745, 381 NYS2d 45, 343 NE2d 762 (1975).

Workers' compensation is not a bar to a common-law action where the injuries which result from negligent treatment do not arise from the patient's employment, at least where the treatment was provided as part of the medical service available to the public and was not exclusively available to employees, *Firestein v Kingsbrook Jewish Medical Center*, 137 AD2d 34, 528 NYS2d 85 (2d Dept 1988) (hospital clerk injured at work and treated at employer-hospital where injuries were aggravated by negligence of another hospital employee); see *Litwak v Our Lady of Victory Hosp. of Lackawanna*, 238 AD2d 879, 660 NYS2d 912 (4th Dept 1997) (Workers' Compensation Law did not bar action of employee where employee was being treated as hospital patient, not as employee, and defendant doctor was not required as part of his employment with employer to treat employees off employer's premises or personally oversee employees' treatment by other doctors or hospitals); *Milashouskas v Mercy Hospital*, 64 AD2d 978, 408 NYS2d 808 (2d Dept 1978); *Stevens v Nassau*, 56 AD2d 866, 392 NYS2d 332 (2d Dept 1977). In any event, the applicability of the Workers' Compensation Law falls within the primary jurisdiction of the Workers' Compensation Board, *Botwinick v Ogden*, 59 NY2d 909, 466 NYS2d 291, 453 NE2d 520 (1983); see also Introductory Statement preceding PJI 2:215.

Recovery from a physician whose malpractice aggravated an employee's injury is not precluded by the employee's election to take workers' compensation and medical benefits, Workers' Compensation Law § 29(1); see *Becker v Huss Co., Inc.*, 43 NY2d 527, 402 NYS2d 980, 373 NE2d 1205 (1978); Annot: 28 ALR3d 1066.

XV. Malpractice Actions Against Governmental Entities

Where the State engages in a proprietary function, such as providing medical and psychiatric care, the State is held to the same standards as are applicable to private practitioners and institutions engaging in the same activity, *Schrempp v State*, 66 NY2d 289, 496 NYS2d 973, 487 NE2d 883 (1985); *D'Avolio v Prado*, 277 AD2d 877, 715 NYS2d 827 (4th Dept 2000); *Rattray v State*, 223 AD2d 356, 636 NYS2d 43 (1st Dept 1996).

When the defendant is a physician, intern or resident, dentist, podiatrist or optometrist rendering services to a person, without receiving compensation from such person, in a public institution maintained in whole or in part by a municipal corporation or rendering services in

the course of a home care service maintained by such public institution, a notice of claim must be served in compliance with General Municipal Law § 50-e before action can be maintained against either the municipal corporation or such individual defendant, GML § 50-d; *Derlicka v Leo*, 281 NY 266, 22 NE2d 367 (1939); see *Schiavone v Nassau*, 51 AD2d 980, 380 NYS2d 711 (2d Dept 1976), *aff'd*, 41 NY2d 844, 393 NYS2d 701, 362 NE2d 252 (1977). Similar requirements are imposed with respect to the New York City Health and Hospitals Corporation, see *Plummer ex rel. Heron v New York City Health and Hospitals Corp.*, 98 NY2d 263, 746 NYS2d 647, 774 NE2d 712 (2002); *Young v New York City Health & Hospitals Corp.*, 91 NY2d 291, 670 NYS2d 169, 693 NE2d 196 (1998); *Allende v New York City Health and Hospitals Corp.*, 90 NY2d 333, 660 NYS2d 695, 683 NE2d 317 (1997); Unconsolidated Laws of New York § 7401(2). The continuous treatment doctrine, if otherwise applicable to the facts of a case, applies to the time in which to file a notice of claim under General Municipal Law § 50-e, *Plummer ex rel. Heron v New York City Health and Hospitals Corp.*, *supra*; *Young v New York City Health & Hospitals Corp.*, *supra*; *Allende v New York City Health and Hospitals Corp.*, *supra*.

XVI. Liability of Health Insurers

The Employee Retirement Income Security Act (ERISA) does not preempt a plaintiff's medical malpractice, breach of contract and breach of fiduciary duty claims against a primary care physician who allegedly delayed in submitting a specialist's referral form for approval by a health maintenance organization governed by ERISA, *Nealy v U.S. Healthcare HMO*, 93 NY2d 209, 689 NYS2d 406, 711 NE2d 621 (1999). A medical expense insurer in whose plan medical groups participate is not liable for malpractice by one of these groups, *Mitts by Mitts v H.I.P. of Greater New York*, 104 AD2d 318, 478 NYS2d 910 (1st Dept 1984). However, if a union health and welfare fund provides a clinic for its members and holds itself out as a health care provider or controls the operation of the clinic, the fund may be held liable for malpractice committed by physicians at the clinic, *Welch v Scheinfeld*, 21 AD3d 802, 801 NYS2d 277 (1st Dept 2005); see *Santiago v Archer*, 136 AD2d 690, 524 NYS2d 106 (2d Dept 1988).

Public Health Law § 4410 explicitly provides that an HMO is not engaged in the practice of medicine. The Fourth Department has held, however, that nothing in the statute expressly bars an HMO from being held vicariously liable for the acts of its employees, *Wisholek v Douglas*, 280 AD2d 220, 722 NYS2d 316 (4th Dept 2001), *rev'd* on other grounds, 97 NY2d 740, 743 NYS2d 51, 769 NE2d 808 (2002); *Burg v Health Care Plan*, 281 AD2d 976, 722 NYS2d 843 (4th Dept 2001). In *Jones v U.S. Healthcare*, 282 AD2d 347, 723 NYS2d 478 (1st Dept 2001), the court held that an HMO could not be held vicariously liable for a doctor's and hospital's alleged malpractice where plaintiff's Group Master Contract, membership card and Member Handbook, clearly stated that doctors and hospitals participating in the HMO's healthcare program were independent contractors.

XVII. Bars to Malpractice Recovery

Since claims of medical malpractice and claims for health service providers' fees are inexorably intertwined, recovery by the doctor of a money judgment against the patient for services rendered bars a later action for malpractice by the patient for the same services, *Ahearn v Arvan*, 2 AD3d 469, 767 NYS2d 886 (2d Dept 2003); see *Blair v Bartlett*, 75 NY 150 (1878); *Harris v Stein*, 207 AD2d 382, 615 NYS2d 703 (2d Dept 1994) (default judgment); *Hunt v Godesky*, 189 AD2d 854, 592 NYS2d 781 (2d Dept 1993); *Kissimmee Memorial Hosp. v Wilson*, 188 AD2d 802, 591 NYS2d 239 (3d Dept 1992); but see *Kossover v Trattler*, 82 AD2d 610, 442 NYS2d 554 (2d Dept 1981) (concurring opinion questioning continued vitality of *Blair* in light of modern cases applying the doctrine of *res judicata*). However, an infant plaintiff, not in privity with her father and guardian, was not barred from commencing a malpractice action because of a prior determination against the father-guardian in an action to recover fees for the rendering of the same professional medical services, *Palacio by Palacio v Weissberg*, 244 AD2d 536, 664 NYS2d 814 (2d Dept 1997). Where a dentist was exonerated of all wrongdoing in a grievance filed by plaintiff with the Office of Professional Discipline of the New York State Education Department, the plaintiff was not collaterally estopped from prosecuting her civil action, *David v Biondo*, 92 NY2d 318, 680 NYS2d 450, 703 NE2d 261 (1998).

An exculpatory agreement between patient and physician made prior to the commission of an act of malpractice may be invalid or unenforceable if the public interest is affected or the agreement is not clear in its terms. Thus, *Creed v United Hosp.*, 190 AD2d 489, 600 NYS2d 151 (2d Dept 1993), and *Ash v New York University Dental Center*, 164 AD2d 366, 564 NYS2d 308 (1st Dept 1990), held unenforceable a covenant not to sue a dental clinic that was given by a prospective patient in advance of surgery in consideration of reduced rates.

The National Childhood Vaccine Injury Act of 1986, which provides a no-fault compensation program for "vaccine-related injury or death," 42 USC § 300aa-15(a), precludes civil actions in state or federal court for damages in excess of \$1,000 unless a petition has been filed for compensation under the no-fault program, *id.* § 300aa-11(a)(2)(A); see *Bruesewitz v Wyeth LLC*, 131 S Ct 1068 (2011). The preclusive effect of this provision extends to actions for failures to properly diagnose or treat conditions allegedly caused by vaccinations, *Cruzen ex rel. Vargas v Leary*, 55 AD3d 510, 867 NYS2d 49 (1st Dept 2008).

XVIII. Liability for Breaches of Confidentiality

Although New York does not recognize a common law right of privacy, *Juric v Bergstraesser*, 44 AD3d 1186, 844 NYS2d 465 (3d Dept 2007), a physician is liable in tort for breaching physician-patient confidentiality, *Chanko v American Broadcasting Companies Inc.*, 27 NY3d 46, 29 NYS3d 879, 49 NE3d 1171 (2016); see *MacDonald v Clinger*, 84 AD2d 482, 446 NYS2d 801 (4th Dept 1982); CPLR 4504;

Juric v Bergstraesser, *supra* (characterizing claim as one for breach of implied covenant of trust and confidence inherent in patient-physician relationship); *Anderson v Strong Memorial Hosp.*, 151 AD2d 1033, 542 NYS2d 96 (4th Dept 1989) (merely allowing media or member of public to be in waiting room where other persons in room can be observed does not amount to breach of confidentiality); see also *Doe v Roe*, 42 AD2d 559, 345 NYS2d 560 (1st Dept 1973), *aff'd*, 33 NY2d 902, 352 NYS2d 626, 307 NE2d 823 (1973); Note, *Breach of Confidence, An Emerging Tort*, 82 Col L Rev 426. The elements of a cause of action for breach of physician-patient confidentiality are: (1) the existence of a physician-patient relationship; (2) the physician's acquisition of information relating to the patient's treatment or diagnosis; (3) the disclosure of such confidential information to a person not connected with the patient's medical treatment, in a manner that allows the patient to be identified; (4) lack of consent for that disclosure; and (5) damages, *Chanko v American Broadcasting Companies Inc.*, *supra*.

A physician is not liable for disclosing patient records to a malpractice insurer when the physician reasonably believes that the patient will be making a claim against the physician, *Rea v Pardo*, 132 AD2d 442, 522 NYS2d 393 (4th Dept 1987). A physician may also be justified, under certain circumstances, in disclosing confidential medical information to a third party to protect that individual from danger posed by the patient, see *Juric v Bergstraesser*, 105 AD3d 1301, 963 NYS2d 755 (3d Dept 2013). A physician is also under a duty to refrain from providing false statements regarding a patient's medical condition to the patient's insurance company, which duty is part of the existing physician-patient relationship and the confidence and trust arising out of such relationship, *Aufrichtig v Lowell*, 85 NY2d 540, 626 NYS2d 743, 650 NE2d 401 (1995).

In *Arons v Jutkowitz*, 9 NY3d 393, 850 NYS2d 345, 880 NE2d 831 (2007), the Court of Appeals discussed the impact of the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) on the obligation of health care providers to preserve the confidentiality of their patients' information. The issue in *Arons* was whether a party's attorney may conduct an ex parte interview with the adverse party's treating physician when the adverse party has affirmatively placed his or her medical condition in issue. The *Arons* Court held that such informal discovery may be conducted, provided that an authorization conforming to 45 CFR 164.508 is executed by the patient, a court or administrative order has been issued, or the health care provider is responding to a validly issued subpoena, discovery request or other lawful process (with satisfactory assurance that the attorney seeking the interview has made reasonable efforts to ensure that the adverse party has been notified or has made reasonable efforts to secure a qualified protective order), *Arons v Jutkowitz*, *supra*, citing 45 CFR 164.512(e)(1)(i)-(ii). The *Arons* Court did not consider whether a health care provider may be held liable in tort for violating HIPAA's confidentiality provisions.

XIX. Collateral Source Rule

At common law, damages awards for personal injuries were not

reduced by the amount of payments made to the plaintiff from collateral sources such as wage replacement or medical-expense reimbursement plans, *Healy v Rennert*, 9 NY2d 202, 213 NYS2d 44, 173 NE2d 777 (1961). However, in 1975, the Legislature responded to a perceived “crisis” in the medical malpractice insurance industry by adopting former CPLR 4010, which permitted juries in medical malpractice cases to consider collateral-source payments, L 1975, ch 109; see *Oden v Chemung County Indus. Development Agency*, 87 NY2d 81, 637 NYS2d 670, 661 NE2d 142 (1995). In 1981, collateral-source set-offs became mandatory and the responsibility for calculating the set-offs was transferred from the jury to the court, L 1981, ch 269. The rules for collateral source set-offs are now embodied in CPLR 4545. CPLR 4545(a), which governs awards for past and future damages in medical, dental and podiatric malpractice actions, requires set-offs for collateral source payments that plaintiff has received or is reasonably certain to receive. For a more detailed discussion of the principles governing collateral-source reductions under CPLR 4545, see Comment to PJI 2:301.

XX. Punitive Damages

In the context of professional malpractice cases, the standard for an award of punitive damages is that a defendant manifest evil or malicious conduct beyond any breach of professional duty, *Dupree v Giugliano*, 20 NY3d 921, 958 NYS2d 312, 982 NE2d 74 (2012); *Gaines v Brydges*, 198 AD3d 1287, 154 NYS3d 340 (4th Dept 2021). Punitive damages may be recovered in a medical malpractice action where defendant’s conduct is so “intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence” to warrant such an award, *Graham v Columbia-Presbyterian Medical Center*, 185 AD2d 753, 588 NYS2d 2 (1st Dept 1992); see *Marsh v Arnot Ogden Medical Center*, 91 AD3d 1070, 937 NYS2d 383 (3d Dept 2012). Punitive damages may be appropriate in a medical malpractice action where the defendant abandoned the plaintiff when he or she was in need of emergency medical treatment, or willfully failed to disclose pertinent medical information to evade a malpractice claim, *id*; see *Abraham v Kosinski*, 251 AD2d 967, 674 NYS2d 557 (4th Dept 1998). Punitive damages may also be appropriate where the defendant’s conduct is wantonly dishonest or grossly indifferent to patient care, see *Schiffer v Speaker*, 36 AD3d 520, 828 NYS2d 363 (1st Dept 2007); see also *Williams v Halpern*, 25 AD3d 467, 808 NYS2d 68 (1st Dept 2006). Where defendant doctor’s conduct was not wantonly dishonest, grossly indifferent to patient care or malicious and/or reckless, an award of punitive damages is not appropriate, *Charell v Gonzalez*, 251 AD2d 72, 673 NYS2d 685 (1st Dept 1998); see *Gaines v Brydges*, *supra* (conservative treatment of abdominal skin condition not tantamount to abandonment of treatment); *Peltier v Wakhloo*, 20 AD3d 870, 798 NYS2d 277 (4th Dept 2005). As to punitive damages generally, see PJI 2:278.

XXI. Actions for Birth-Related Neurological Injuries

Article 29-D of the Public Health Law was enacted in 2011 and

established a medical indemnity fund, administered by an agency within the executive branch of state government, to pay health care costs of qualified infant-plaintiffs who have birth-related neurological injuries. The purpose of article 29-D is to reduce the medical malpractice insurance premiums of health care providers by shifting the responsibility of paying the future medical expenses of infants with birth-related neurological injuries from health care providers to the fund, Public Health Law § 2999-g. Thus, where article 29-D is applicable, the fund will pay for a plaintiff's "qualified [future] health care costs," Public Health Law § 2999-j(1), to the extent those costs will not be paid by a collateral source other than Medicaid or Medicare, Public Health Law § 2999-j(3). The defendant health care provider is relieved of the obligation to pay an award after trial (or that portion of a settlement) covering future medical expenses, see Public Health Law § 2999-j(1), (6), (13). While article 29-D may have a significant effect on an award for a plaintiff's future medical expenses, it has no direct effect on awards for pain and suffering or past medical expenses or the amount of the attorneys' fee to which plaintiff's counsel is entitled, Public Health Law § 2999-j(14). Article 29-D applies to all actions pending on and after April 1, 2011.

In an action in which a jury or court has made an award for future medical expenses arising out of a birth-related neurological injury, any party may apply to the court for a provision in the judgment that reflects that, in lieu of the award for future medical expenses and upon a determination by the administrator of the fund that plaintiff is a "qualified plaintiff," plaintiff's future medical expenses will be paid out of the fund, Public Health Law § 2999-j(6)(b). Public Health Law § 2999-h(4) defines a "qualified plaintiff" as every plaintiff or claimant who (a) has been found by a jury or court to have sustained a "birth-related neurological injury" as a result of alleged medical malpractice, or (b) has settled a lawsuit or claim therefor. Public Health Law § 2999-h(1), in turn, defines a "birth-related neurological injury" as (a) an injury to the brain or spinal cord of a live-born infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation or by other medical services provided or not provided during a delivery admission (b) that rendered the infant with a permanent and substantial motor impairment or with a developmental disability as defined by Mental Hygiene Law § 1.03. The court must grant the application if the court determines that the party making the application made a prima facie showing that plaintiff is a "qualified plaintiff," with the ultimate determination of whether a plaintiff qualifies reserved for the administrator of the fund. In an action arising out of a plaintiff's birth-related neurological injury that is settled, which settlement includes for the payment of plaintiff's future medical expenses, the settlement must contain a provision stating that if the administrator of the fund determines that plaintiff is a "qualified plaintiff" all payments for future medical expense will be made by the fund, Public Health Law § 2999-j(6)(a).

As noted above, the fund administrator determines if a plaintiff is

qualified. Generally, where the fund administrator determines that a plaintiff is qualified under article 29-D, the defendant is not obligated to pay that portion of the judgment or settlement allocated to future medical expenses. Once a plaintiff is qualified, the fund will pay for “qualified health care costs,” Public Health Law § 2999-h(3), i.e. future medical, hospital, surgical, nursing, dental, rehabilitation, custodial, durable medical equipment, home modifications, assistive technology, vehicle modifications, prescription and non-prescription medications, and other health care costs actually incurred for services rendered to and supplies utilized by plaintiff. The administrator, in accordance with article 29-D and its implementing regulations, determines which future health care costs are to be paid from the fund, Public Health Law § 2999-j(2), (8)(a). A qualified plaintiff is assured of receiving medical care or assistance that would, at a minimum, be authorized under the Medicaid program, *id.* The fund closes to new applicants if its liabilities reach 80% of its assets, Public Health Law § 2999-i(6)(a). In that event all judgments must be satisfied and all settlements paid as if the fund legislation had not been enacted, Public Health Law § 2999-i(6)(b).

All awards for damages other than future health care costs are to be paid in accordance with article 50-A of the CPLR. The plaintiff’s attorney fee is paid by the defendant as if the fund were not involved, that is on the entire sum awarded by the jury or the full amount of the settlement, with the fee portion allocated to non-fund damages deducted from the non-fund portion of the award in a proportional manner, Public Health Law § 2999-j(14). Because the determinations as to whether an individual is a “qualified plaintiff” and, if so, which costs are “qualified health care costs” are assigned to the fund administrator, there does not appear to be any reason to modify either the court’s charge or the verdict sheet in a case in which Public Health Law article 29-D may be implicated.

“Wrongful birth” claims would not appear to be affected by Public Health Law article 29-D. Under certain circumstances, a wrongful birth claim permits the parent of a child who was born with a congenital abnormality or defect to recover damages for the costs of the medical care and treatment of the child, see Comment to PJI 2:150. As discussed above, Public Health Law article 29-D only applies to an infant plaintiff who suffered a birth-related neurological injury, i.e. an injury to the brain or spinal cord caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation or by other medical services provided or not provided during a delivery admission, see Public Health Law § 2999-h(1). Thus, a child with a congenital abnormality or defect—the type of condition an infant must exhibit to give rise to a claim for wrongful birth—generally will not exhibit a “birth-related neurological injury” as that phrase is defined under Public Health Law article 29-D.

PJI 2:150A. Malpractice—Informed Consent

Before obtaining a patient’s consent to an

operation or invasive diagnostic procedure or the use of medication, a doctor has the duty to provide certain information concerning what the doctor proposes to do, the alternatives to that operation, procedure or medication and the reasonably foreseeable risks of such operation, procedure or medication. It is the doctor's duty to explain, in words that are understandable to the patient, all the facts that would be explained by a reasonable medical practitioner so that when the patient does, in fact, consent, that consent is given with an awareness of (1) the patient's existing physical condition; (2) the purposes and advantages of the operation, procedure or medication; (3) the reasonably foreseeable risks to the patient's health or life which the operation, procedure or medication may impose; (4) the risks involved to the patient if there is no operation, procedure or use of medication; and (5) the available alternatives and the risks and advantages of those alternatives. The first question on this issue that you will be called upon to answer is whether the defendant, before obtaining plaintiff's (decedent's) consent, provided appropriate information.

The question reads as follows:

(1) Did defendant before obtaining plaintiff's (decedent's) consent to the (operation, procedure, use of medication) provide appropriate information?

Plaintiff maintains that the answer to this question is "No," contending that *[set forth the specific risks and/or alternatives that plaintiff claims were not disclosed]*. Defendant maintains that the answer to the question is "Yes" and contends that (the information was, in fact, provided, or a reasonable medical practitioner would not provide such information to the patient in a case such as this).

If you answer "No" to the question, the next question you must decide is whether a reasonably

prudent person in the plaintiff's (decedent's) position would have decided not to undergo the operation or procedure or take the medication if given appropriate information concerning the risks and alternatives.

The question reads as follows:

(2) Would a reasonably prudent person in plaintiff's (decedent's) position at the time consent was given have decided not to undergo the [state procedure] [state where appropriate: take the medication] if given appropriate information?

Plaintiff maintains that the answer to this question is "Yes," contending that considering the nature of plaintiff's (decedent's) condition at the time and the risks involved in the (operation, procedure, use of medication) and the available alternatives, a reasonably prudent person would not have consented to the (operation, procedure, use of medication). Defendant maintains that the answer to this question is "No," contending that considering plaintiff's (decedent's) condition and the need for the (operation, procedure, use of medication) the omitted information would not have caused a reasonably prudent person to refuse to consent to the (operation, procedure, use of medication).

In answering this question it is important that you consider only plaintiff's (decedent's) condition at the time consent was given and the facts and circumstances that existed at that time and not events that occurred or knowledge that was obtained at a later time.

If you answer "Yes" to question two, the next and last question to be resolved on this issue is whether the (operation, procedure, medication) was a substantial factor in causing the injury to plaintiff (decedent).

The question reads as follows:

(3) Was the (operation, procedure, medication) a substantial factor in causing the injury to plaintiff (decedent)?

Comment

Caveat 1: Expert testimony is required to establish a prima facie case. CPLR 4401-a requires dismissal at the close of plaintiff's case "if the plaintiff has failed to adduce expert medical testimony in support of the alleged qualitative insufficiency of the consent," see *Alberti v St. John's Episcopal Hospital-Smithtown*, 116 AD2d 612, 497 NYS2d 701 (2d Dept 1986); *Lipsius v White*, 91 AD2d 271, 458 NYS2d 928 (2d Dept 1983). Thus, in *Gonzalez v Moscarella*, 142 AD2d 550, 530 NYS2d 218 (2d Dept 1988), the informed consent cause of action was dismissed where plaintiff's expert did not express any opinion as to the adequacy of the information provided to plaintiff by defendants, see *Evans v Holleran*, 198 AD2d 472, 604 NYS2d 958 (2d Dept 1993). Note that the deposition of one authorized to practice medicine may be offered by any party without a showing of unavailability or special circumstances, CPLR 3117(a)(4).

Caveat 2: Proximate cause must be charged unless the facts are undisputed, PHL § 2805-d(3); as to proximate cause see *infra* this Comment.

The charge assumes that there is no dispute as to the nature of the treatment to which plaintiff consented. If there is such a dispute, the jury should be instructed on that threshold issue.

Caveat 3: Lack of informed consent is a distinct cause of action from medical malpractice, *Figueroa-Burgos v Bieniewicz*, 135 AD3d 810, 23 NYS3d 369 (2d Dept 2016). Therefore, care must be taken to state the elements of the informed consent cause of action separately from those of causes of action based on other kinds of medical malpractice, see PJI 2:150. A special finding should be used for each cause of action submitted to the jury, see PJI 1:95 and PJI 1:26.

The charge is based on Public Health Law § 2805-d; see *Figueroa-Burgos v Bieniewicz*, 135 AD3d 810, 23 NYS3d 369 (2d Dept 2016); *Johnson v Jacobowitz*, 65 AD3d 610, 884 NYS2d 158 (2d Dept 2009); *Marchione v State*, 194 AD2d 851, 598 NYS2d 592 (3d Dept 1993); *Farkas v Saary*, 191 AD2d 178, 594 NYS2d 195 (1st Dept 1993); *Lipsius v White*, 91 AD2d 271, 458 NYS2d 928 (2d Dept 1983); *Troy v Long Island Jewish-Hillside Medical Center*, 86 AD2d 631, 446 NYS2d 347 (2d Dept 1982) (citing PJI).

The jury must return an itemized verdict if it awards damages, see PJI 2:151A(1) and PJI 2:151A(2). The use of special verdicts is imperative since informed consent cases often present multiple, plausible theories and special verdicts help jurors reach a decision and maintain a

record for appellate review, see *Lynn G. v Hugo*, 96 NY2d 306, 728 NYS2d 121, 752 NE2d 250 (2001); see generally PJI 1:26.

A special verdict form for use in conjunction with the pattern charge follows. Signature lines should be included after each question, see Comment, PJI 1:95. The complete special verdict form should be marked as a court exhibit.

Special Verdict Form PJI 2:150A SV.

(1) Did defendant before obtaining plaintiff's (decedent's) consent to the (operation, procedure, use of medication) provide appropriate information?

Yes ____ No ____

(2) Would a reasonably prudent person in plaintiff's (decedent's) position at the time consent was given have decided not to [*set forth as appropriate*: undergo the (*identify procedure*) or, where appropriate take the medication] if given appropriate information?

Yes ____ No ____

(3) Was the (operation, procedure, medication) a substantial factor in causing the injury to plaintiff (decedent)?

Yes ____ No ____

Under Public Health Law § 2805-d(1), "lack of informed consent" is defined as "the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation." Public Health Law § 2805-d(2) places causes of action for lack of informed consent within the category of medical, dental or podiatric malpractice claims, see *Karlin v IVF America, Inc.*, 93 NY2d 282, 690 NYS2d 495, 712 NE2d 662 (1999); *Messina v Matarasso*, 284 AD2d 32, 729 NYS2d 4 (1st Dept 2001). Consequently, such causes of action are governed by the two-and-a-half-year limitations period in CPLR 214-a, see *Rigie v Goldman*, 148 AD2d 23, 543 NYS2d 983 (2d Dept 1989). To be distinguished are cases in which defendant medical practitioner performed a procedure on plaintiff with no consent at all, *Messina v Matarasso*, *supra*; see *VanBrocklen v Erie County Medical Center*, 96 AD3d 1394, 949 NYS2d 300 (4th Dept

2012); *Wiesenthal v Weinberg*, 17 AD3d 270, 793 NYS2d 422 (1st Dept 2005); *Cerilli v Kezis*, 16 AD3d 363, 790 NYS2d 714 (2d Dept 2005), or the treatment went beyond the scope of the patient's consent, *Cross v Colen*, 6 AD3d 306, 775 NYS2d 307 (1st Dept 2004). Such situations are properly categorized as batteries and are subject to the one-year statute of limitations, *Messina v Matarasso*, supra; see CPLR 215.

Where a patient is treated in a hospital by a private physician, the duty to obtain the patient's informed consent rests with the private physician rather than the hospital, *Mirshah v Obedian*, 200 AD3d 868, 158 NYS3d 226 (2d Dept 2021); *Salandy v Bryk*, 55 AD3d 147, 864 NYS2d 46 (2d Dept 2008); *Sita v Long Island Jewish-Hillside Medical Center*, 22 AD3d 743, 803 NYS2d 112 (2d Dept 2005). Moreover, the mere witnessing of a consent by a hospital employee is a ministerial task that does not subject the hospital to liability, *Salandy v Bryk*, supra. Thus, a hospital cannot be held liable for a failure by the injured plaintiff's private physician to obtain the patient's informed consent unless the hospital either knew or should have known that the physician was acting without informed consent or had reason to suspect malpractice, *Mirshah v Obedian*, supra; *Salandy v Bryk*, supra; *Sita v Long Island Jewish-Hillside Medical Center*, supra; see also *Cerny v Williams*, 32 AD3d 881, 822 NYS2d 548 (2d Dept 2006) (hospital resident who performed procedures within scope of informed consent patient gave to her own attending physician had no obligation separately to obtain patient's informed consent); *Beard v Brunswick Hosp. Center, Inc.*, 220 AD2d 550, 632 NYS2d 805 (2d Dept 1995) (where primary surgeon adequately informed plaintiff of risks, assisting surgeon had no additional duty to inform plaintiff of risks).

The informed consent cause of action is limited to (1) those cases involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure involving invasion or disruption of the integrity of the body, PHL § 2805-d(2); see *Ellis v Eng*, 70 AD3d 887, 895 NYS2d 462 (2d Dept 2010), or (2) those cases involving participation of a human subject in medical research, PHL Article 24-A. Thus, a cause of action for lack of informed consent will not lie where the claimed injuries resulted from a failure to undertake a particular procedure or a decision to postpone a procedure, *Pinnock v Mercy Medical Center*, 180 AD3d 1088, 119 NYS3d 559 (2d Dept 2020); *Samer v Desai*, 179 AD3d 860, 116 NYS3d 377 (2d Dept 2020); *Ellis v Eng*, supra.

Where surgery is of an emergency nature, there is no cause of action based upon lack of informed consent, *Connelly v Warner*, 248 AD2d 941, 670 NYS2d 293 (4th Dept 1998), nor where no unconsented-to affirmative violation of the plaintiff's physical integrity is alleged, *Samer v Desai*, 179 AD3d 860, 116 NYS3d 377 (2d Dept 2020). For a case of the latter type the pattern charge must be modified, see PHL §§ 2441, 2442. Drawing one extra tube of blood during the course of a properly consented to blood test, even for the purpose of performing unauthorized testing upon it, does not constitute an affirmative violation of plaintiff's physical integrity where the test at least partially benefited

the plaintiff, *Hecht v Kaplan*, 221 AD2d 100, 645 NYS2d 51 (2d Dept 1996). Therefore, a plaintiff in such circumstances has no claim for lack of informed consent, *id.* In addition, a test performed only upon blood which has already been drawn from the patient during the course of standard medical practice does not constitute “human research” under Public Health Law § 2441(2), *id.*

The courts have not extended protection under Public Health Law § 2805-d to non-patient third parties, *Tenuto v Lederle Laboratories, Div. of American Cyanamid Co.*, 207 AD2d 541, 616 NYS2d 391 (2d Dept 1994), *rev'd on other grounds*, 90 NY2d 606, 665 NYS2d 17, 687 NE2d 1300 (1997). However, the informed consent claim has been extended to allow suit by an infant injured in utero because the defendant did not obtain the consent of the mother, *Hughson v St. Francis Hosp. of Port Jervis*, 92 AD2d 131, 459 NYS2d 814 (2d Dept 1983). New York has no statute singling out abortion from other medical procedures as requiring specific methods to assure that a woman's consent is informed, *Perez v Park Madison Professional Laboratories, Inc.*, 212 AD2d 271, 630 NYS2d 37 (1st Dept 1995). Therefore, Public Health Law § 2805-d does not require physicians to refer patients to counseling on alternatives to abortion or to provide such counseling to patients seeking elective abortions, *Rodriguez v Epstein*, 244 AD2d 202, 664 NYS2d 20 (1st Dept 1997).

To establish a cause of action for lack of informed consent, a plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances; (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed; and (3) that the lack of informed consent is a proximate cause of the injury, *Mirshah v Obedian*, 200 AD3d 868, 158 NYS3d 226 (2d Dept 2021); *Mathias v Capuano*, 153 AD3d 698, 60 NYS3d 327 (2d Dept 2017); *Figueroa-Burgos v Bieniewicz*, 135 AD3d 810, 23 NYS3d 369 (2d Dept 2016); *Chan v Toothsavers Dental Care, Inc.*, 125 AD3d 712, 4 NYS3d 59 (2d Dept 2015); *Tsimbler v Fell*, 123 AD3d 1009, 999 NYS2d 863 (2d Dept 2014); *Balzola v Giese*, 107 AD3d 587, 968 NYS2d 54 (1st Dept 2013).

The disclosure required is what “a reasonable medical practitioner under similar circumstances would have disclosed,” PHL § 2805-d(1), and must cover (1) the alternatives, (2) the reasonably foreseeable risks and (3) the benefits, see *DeVivo v Birnbaum*, 301 AD2d 622, 754 NYS2d 60 (2d Dept 2003); *Marchione v State*, 194 AD2d 851, 598 NYS2d 592 (3d Dept 1993) (risks so remote that reasonable physician would not have informed patient of them); see *Viera v Khasdan*, 185 AD3d 405, 126 NYS3d 462 (1st Dept 2020). The fact that plaintiff signed a consent form does not establish defendant's entitlement to dismissal as a matter of law where the form was generic and did not contain any details about the operation, its risks or the alternative treatments, *Parrilla v Sapphire*,

149 AD3d 856, 51 NYS3d 596 (2d Dept 2017); *Walker v Saint Vincent Catholic Medical Centers*, 114 AD3d 669, 979 NYS2d 697 (2d Dept 2014); see *Mathias v Capuano*, 153 AD3d 698, 60 NYS3d 327 (2d Dept 2017); *Schussheim v Barazani*, 136 AD3d 787, 24 NYS3d 756 (2d Dept 2016); *Chan v Toothsavers Dental Care, Inc.*, 125 AD3d 712, 4 NYS3d 59 (2d Dept 2015). Where a generic consent form merely listed an area of the body and a condition, without indicating the procedure to be performed, the defendant surgeon was not entitled to summary judgment, *Preciado v Ravins*, 190 AD3d 991, 136 NYS3d 792 (2d Dept 2021). On the other hand, a signed consent form is not necessarily required where the physician submits testimonial evidence that the physician obtained the patient's verbal consent to perform the procedure, *Hope A.L. v Unity Hospital of Rochester*, 173 AD3d 1713, 103 NYS3d 219 (4th Dept 2019); compare Public Health Law § 2805-d with § 2442. Disclosure of the qualifications of the individuals providing treatment is not required, *Johnson v Jacobowitz*, 65 AD3d 610, 884 NYS2d 158 (2d Dept 2009). Thus, a failure to disclose that defendant physician did not have the proper credentials to perform the procedure is not actionable as a violation of Public Health Law § 2805-d, *Johnson v Jacobowitz*, *supra*.

A *prima facie* case based on lack of informed consent is established by evidence that the physician did not inform the patient of the material risks involved, by evidence from which it can be reasonably inferred that a reasonably prudent patient would not have had the operation if the risks were known, and expert testimony as to the risks a reasonable medical practitioner under similar circumstances would have disclosed, *Alberti v St. John's Episcopal Hospital-Smithtown*, 116 AD2d 612, 497 NYS2d 701 (2d Dept 1986); see *Eppel v Fredericks*, 203 AD2d 152, 610 NYS2d 254 (1st Dept 1994); *Iazzetta v Vicenzi*, 200 AD2d 209, 613 NYS2d 750 (3d Dept 1994); *Evans v Holleran*, 198 AD2d 472, 604 NYS2d 958 (2d Dept 1993). The qualitative insufficiency of the patient's consent ordinarily must be demonstrated through expert medical testimony, *Johnson v Jacobowitz*, 65 AD3d 610, 884 NYS2d 158 (2d Dept 2009).

A doctor is entitled to rely on the informed consent given by his or her patient to others and need not again personally interview the patient as to this matter, *Perez v Park Madison Professional Laboratories, Inc.*, 212 AD2d 271, 630 NYS2d 37 (1st Dept 1995). Similarly, a doctor is entitled to rely upon information previously furnished to the patient by another physician in determining whether the patient received sufficient information to make an informed decision, *Klatsky v Lewis*, 268 AD2d 410, 702 NYS2d 319 (2d Dept 2000). However, such reliance comes with the risk that the doctor will be held liable for any deficiency in the information provided to the patient by those to whom this duty has been delegated, *id*; *Shkolnik v Hospital for Joint Diseases Orthopaedic Institute*, 211 AD2d 347, 627 NYS2d 353 (1st Dept 1995); see *Spinosa v Weinstein*, 168 AD2d 32, 571 NYS2d 747 (2d Dept 1991) (either prescribing physician or treating physician is obligated to obtain patient's informed consent). Thus, referring physician's receipt of an

informed consent may satisfy a treating physician's obligation to obtain informed consent where the treating physician failed to advise the patient of the risks, benefit and alternatives to the treatment, *Sangi-uolo v Leventhal*, 132 Misc2d 680, 505 NYS2d 507 (Sup 1986). Conversely, a referring physician may benefit from consent procured by the treating physician because the treating physician will be in a better position to give the patient more detailed information at a point in time closer to the performance of the medical procedure, *Shkolnik v Hospital for Joint Diseases Orthopaedic Institute*, supra.

Disclosure is not required if (a) the risk not disclosed is too commonly known to warrant disclosure; or (b) the patient assured the medical practitioner that he or she would undergo the treatment or procedure regardless of the risk involved, or that he or she did not want to be informed of the matters to which the patient would be entitled to be informed; or (c) consent by or on behalf of the patient was not reasonably possible; or (d) the medical practitioner, after considering all of the attendant facts and circumstances, used reasonable discretion as to the manner and extent to which such alternatives or risks were disclosed to the patient because the doctor reasonably believed that the manner and extent of such disclosure could reasonably be expected to adversely and substantially affect the patient's condition, PHL § 2805-d(4); see *Mirshah v Obedian*, 200 AD3d 868, 158 NYS3d 226 (2d Dept 2021) (summary judgment denied where practitioner failed to establish prima facie that patient assured him that he would undergo procedure regardless of risk involved, or that patient did not want to be informed of the matters to which he would be entitled to be informed). Those four matters are defenses which, it would appear, must be pleaded and proved by defendant, see CPLR 3018(b); Farrell, Civil Practice, 27 Syr L Rev 425, 431. In an appropriate case, the pattern charge must be amended to include the fact questions involved in one or more of those defenses. With respect to the last, based upon reasonable medical discretion, see, in addition to the statute, *Fiorentino v Wenger*, 19 NY2d 407, 280 NYS2d 373, 227 NE2d 296 (1967); *Canterbury v Spence*, 464 F2d 772 (DC Cir 1972); *Miceikis v Field*, 37 Ill App 3d 763, 347 NE2d 320 (1st Dist 1976); *Capron*, Informed Consent in Catastrophic Disease Research and Treatment, 123 Pa L Rev 340; *Smith*, Therapeutic Privilege to Withhold Specific Diagnosis from Patient Sick with Serious or Fatal Illness, 19 Tenn L Rev 349; Note: 60 Col L Rev 349; Annot: 79 ALR2d 1028, 1034. Where the defendant physician, called as a witness by plaintiff, testifies that he informed the patient's spouse of the risks and gave the patient only limited information because of the patient's condition, plaintiff, to avoid dismissal, must offer evidence that the patient's condition was other than what the physician claimed or that more information about risks and alternatives could have been disclosed to the patient notwithstanding his condition, *Tibodeau v Keeley*, 208 AD2d 610, 617 NYS2d 183 (2d Dept 1994).

Failure to advise the patient of his or her condition is actionable as malpractice, *Karlsons v Guerinot*, 57 AD2d 73, 394 NYS2d 933 (4th

Dept 1977). Informed consent need be obtained only in those cases where the procedure involves an invasion of the plaintiff's physical integrity, *Ford v Lee*, 203 AD3d 456, 164 NYS3d 592 (1st Dept 2022); *Lewis v Rutkovsky*, 153 AD3d 450, 58 NYS3d 391 (1st Dept 2017); *Karlsons v Guerinot*, 57 AD2d 73, 394 NYS2d 933 (4th Dept 1977); *Campea v Mitra*, 267 AD2d 190, 699 NYS2d 298 (2d Dept 1999); *Hecht v Kaplan*, 221 AD2d 100, 645 NYS2d 51 (2d Dept 1996) (drawing one extra tube of blood during course of otherwise properly consented to blood test, even for the purpose of performing unauthorized testing upon it, does not constitute affirmative violation of plaintiff's physical integrity where a test was used partially to benefit plaintiff). In addition, where plaintiff alleged that her dentist failed to treat her periodontal disease, she failed to state a cause of action for lack of informed consent because the wrong complained of did not arise out of some affirmative violation of plaintiff's physical integrity, *Iazzetta v Vicenzi*, 200 AD2d 209, 613 NYS2d 750 (3d Dept 1994); see *Campea v Mitra*, *supra*; *Schel v Roth*, 242 AD2d 697, 663 NYS2d 609 (2d Dept 1997). Since conduct alleged to be a sexual liaison between a psychiatrist and a patient was not treatment or diagnosis, the psychiatrist may not be held liable for failing to obtain the patient's "informed consent" to the sexual activity, *Noto v St. Vincent's Hosp. and Medical Center of New York*, 160 AD2d 656, 559 NYS2d 510 (1st Dept 1990); see *Koren v Weihs*, 190 AD2d 560, 593 NYS2d 222 (1st Dept 1993).

The manner of disclosure may present a fact issue for the jury. PHL § 2805-d(1) requires disclosure "in a manner permitting the patient to make a knowledgeable evaluation" which suggests that the explanation must be in terms understandable to the particular patient, that is—the plaintiff. The requirement of *Fogal v Genesee Hospital*, 41 AD2d 468, 344 NYS2d 552 (4th Dept 1973), that the jury find that the "information supplied was unreasonably inadequate" is no longer the law.

Evidence of an oral surgeon's routine practice in advising patients of the risks involved with surgery is admissible to support an inference that the practice was followed on the particular occasion in question, *Rigie v Goldman*, 148 AD2d 23, 543 NYS2d 983 (2d Dept 1989); see *Viera v Khasdan*, 185 AD3d 405, 126 NYS3d 462 (1st Dept 2020). For a charge and comment on circumstantial evidence of habit, see PJI 1:71. The weight to be given the evidence of habit, together with any evidence showing that warnings were not given, is for the jury, *Rigie v Goldman*, *supra*.

The test of whether the patient would have consented if appropriate information was given is, nevertheless, objective rather than subjective, *Marchione v State*, 194 AD2d 851, 598 NYS2d 592 (3d Dept 1993); *Dooley v Skodnek*, 138 AD2d 102, 529 NYS2d 569 (2d Dept 1988); see *Figueroa-Burgos v Bieniewicz*, 135 AD3d 810, 23 NYS3d 369 (2d Dept 2016). Section 2805-d(3) requires that it "be established that a reasonably prudent person would not have undergone the treatment or diagnosis if he had been fully informed," see *Guctas v Pessolano*, 132 AD3d 632, 17 NYS3d 749 (2d Dept 2015); *Motichka v Cody*, 279 AD2d 310,

720 NYS2d 9 (1st Dept 2001). Plaintiff's testimony as to what he or she would have done if informed is relevant but not determinative; the jury must balance the risks associated with undergoing the treatment against those associated with foregoing it, *Dooley v Skodnek*, 138 AD2d 102, 529 NYS2d 569 (2d Dept 1988); *Zelesnik v Jewish Chronic Disease Hospital*, 47 AD2d 199, 366 NYS2d 163 (2d Dept 1975). Expert testimony concerning what a reasonable person would have done is not necessary to maintain a malpractice claim premised upon lack of informed consent, *Hugh v Ofodile*, 87 AD3d 508, 929 NYS2d 122 (1st Dept 2011); *Andersen v Delaney*, 269 AD2d 193, 703 NYS2d 714 (1st Dept 2000); *Osorio v Brauner*, 242 AD2d 511, 662 NYS2d 488 (1st Dept 1997); see *James v Greenberg*, 57 AD3d 849, 870 NYS2d 100 (2d Dept 2008).

Proximate cause, as noted in Caveat 2 above, is an element of the action. Section 2805-d(3) requires that it be established "that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought," see *Iazzetta v Vicenzi*, 200 AD2d 209, 613 NYS2d 750 (3d Dept 1994). The wording of the statute is obscure since the injury or condition complained of will normally result not from the lack of informed consent but from negligence in the performance of the operation, treatment or procedure; lack of informed consent is only the "but for" cause of the injury or condition, see Comment to PJI 2:70. In the final analysis, therefore, the causation issue under the statute is whether the operation, treatment or procedure is a proximate cause of the injury or condition complained of, see *Figueroa-Burgos v Bieniewicz*, 135 AD3d 810, 23 NYS3d 369 (2d Dept 2016); *Evart v Park Ave. Chiropractics, P.C.*, 86 AD3d 442, 926 NYS2d 491 (1st Dept 2011). *Marchione v State*, 194 AD2d 851, 598 NYS2d 592 (3d Dept 1993); *Flores by Flores v Flushing Hosp. & Medical Center*, 109 AD2d 198, 490 NYS2d 770 (1st Dept 1985) (citing PJI); PJI 2:72 and Comment, and the pattern charge states the issue in those terms, see also PJI 2:70.

In *Lynn G. v Hugo*, 96 NY2d 306, 728 NYS2d 121, 752 NE2d 250 (2001), plaintiff claimed that she lacked capacity to consent to the cosmetic procedures performed upon her by defendant plastic surgeon because of a psychiatric disorder. The Court rejected this claim as a matter of law based on defendant's unrefuted submissions that plaintiff did not suffer from any major psychiatric disorders that would impair her ability to consent, *id*; see Public Health Law § 2805-d(3).

Public Health Law § 2503 requires the physician or nurse-midwife attending the birth of a child to inform the expectant mother, in advance of the birth, of the drugs to be used during pregnancy and at birth and of the possible effects of the drugs on child and mother.

A person who is "deceptively lured into" a course of professional treatment by consumer oriented misrepresentations may also be harmed by a doctor's failure to disclose information required by Public Health Law § 2805-d, *Karlin v IVF America, Inc.*, 93 NY2d 282, 690 NYS2d 495, 712 NE2d 662 (1999). The fact that a person may have a claim for

lack of informed consent does not preclude a separate claim on the ground that the deceptive acts or misleading advertising lured the person to the doctor's office in the first place, *id.* Therefore, providers of medical services are not exempt from General Business Law §§ 349 and 350, *id.* Additionally, the fact that a plaintiff has commenced General Business Law §§ 349 and 350 claims does not foreclose additional claims for lack of informed consent, *id.* For a discussion of the application of the statute of limitations in claims based on § 349 of the General Business Law, see *Gaidon v Guardian Life Ins. Co. of America*, 96 NY2d 201, 727 NYS2d 30, 750 NE2d 1078 (2001).

The National Childhood Vaccine Injury Act of 1986, which provides a no-fault compensation program for "vaccine-related injury or death," 42 USC § 300aa-15(a), precludes civil actions in state or federal court for damages in excess of \$1,000 unless a petition has been filed for compensation under the no-fault program, *id.* § 300aa-11(a)(2)(A); see *Bruesewitz v Wyeth LLC*, 131 SCt 1068 (2011). The preclusive effect of this provision extends to actions for alleged failures to obtain informed consent, *Crucen ex rel. Vargas v Leary*, 55 AD3d 510, 867 NYS2d 49 (1st Dept 2008).

As to the statute of limitations applicable to malpractice claims, see Introductory Statement, *supra*. As to itemized verdicts in malpractice cases, see PJI 2:151A(1) and PJI 2:151A(2); as to collateral source payments, see PJI 2:151B; as to fraudulent concealment of an act of malpractice, see PJI 2:151C. As to consent for mental health treatment for minors, see Mental Hygiene Law § 33.21.

Operating or administering medication by injection without any consent is battery, see *VanBrocklen v Erie County Medical Center*, 96 AD3d 1394, 949 NYS2d 300 (4th Dept 2012); *Wiesenthal v Weinberg*, 17 AD3d 270, 793 NYS2d 422 (1st Dept 2005); *Cerilli v Kezis*, 16 AD3d 363, 790 NYS2d 714 (2d Dept 2005); *Messina v Matarasso*, 284 AD2d 32, 729 NYS2d 4 (1st Dept 2001); see PJI 3:3, as is providing treatment or performing procedure beyond the scope of the patient's consent, *Young v Sethi*, 188 AD3d 1339, 134 NYS3d 571 (3d Dept 2020); *McCarthy v Shah*, 162 AD3d 1727, 80 NYS3d 778 (4th Dept 2018); *Cross v Colen*, 6 AD3d 306, 775 NYS2d 307 (1st Dept 2004). However, a cause of action against a hospital for medical malpractice was viable where the hospital's physician allegedly placed inconsistent forms, one consenting to a blood transfusion and one refusing a transfusion, in patient's surgical file without bringing the inconsistency to the surgeon's attention, *Salandy v Bryk*, 55 AD3d 147, 864 NYS2d 46 (2d Dept 2008).

PJI 2:151. Negligence—Hospital—General Hospital

The hospital is under a duty to use reasonable care in (hiring, supervising) its employees, including members of its medical staff, such as doctors, interns, residents, as well as non-physician person-

nel, such as nurses, technicians, and aides. Reasonable care means that degree of care customarily used by general hospitals in (hiring, supervising) their employees. Plaintiff claims that (he, she) was injured because the hospital failed to use reasonable care in that (*e.g. it failed to adequately staff, supervise the emergency room; it failed to properly supervise an intern, nurse*). [*Where applicable add:*] Plaintiff also contends that the hospital violated a state regulation, which provides that (*state terms of regulation*). The hospital denies plaintiff's claim(s) and maintains (*state the hospital's contention*).

If you find that the hospital's conduct in (*e.g.—staffing, supervising its employees*) was contrary to the standard of care customarily followed by general hospitals under the same circumstances, you will find that the hospital was negligent. If you find that the hospital's conduct was not contrary to that standard of care, you will find that the hospital was not negligent.

[*Where a regulation is involved, add:*] If you find that the hospital failed to comply with the regulation, you may consider the violation as some evidence of negligence on the part of the hospital, along with the other evidence in the case, provided further that the violation was a substantial factor in causing plaintiff's injury.

Comment

Caveat: The above charge is based on the negligence of a hospital. A claim against a hospital based on respondeat superior for the negligence of its medical personnel in treating a patient, see PJI 2:150, is governed by the two and one-half year statute of limitations for medical malpractice, as is a direct cause of action against a doctor or nurse, *Bleiler v Bodnar*, 65 NY2d 65, 489 NYS2d 885, 479 NE2d 230 (1985). A claim that the hospital failed to provide competent personnel or to promulgate appropriate emergency rules, which is generally the subject of this charge, sounds in negligence, and is subject to the three year limitations period in CPLR 214(5), rather than the shorter medical malpractice limitations period in CPLR 214-a, *id.*

Based on *N.X. v Cabrini Medical Center*, 97 NY2d 247, 739 NYS2d 348, 765 NE2d 844 (2002); *Fiorentino v Wenger*, 19 NY2d 407, 280

NYS2d 373, 227 NE2d 296 (1967); *Hirsh v State*, 8 NY2d 125, 202 NYS2d 296, 168 NE2d 372 (1960); *Robertson v Charles B. Towns Hospital*, 178 App Div 285, 165 NYS 17 (2d Dept 1917); 22 NYCRR, Parts 405, 700; see *Cohen v State*, 51 AD2d 494, 382 NYS2d 128 (3d Dept 1976), *aff'd*, 41 NY2d 1086, 396 NYS2d 363, 364 NE2d 1134 (1977); *De Falco v Long Island College Hospital*, 90 Misc2d 164, 393 NYS2d 859 (Sup 1977), *aff'd*, 62 AD2d 1180, 403 NYS2d 608 (2d Dept 1978); see generally, *Miller by Miller v Albany Medical Center Hosp.*, 95 AD2d 977, 464 NYS2d 297 (3d Dept 1983) (permitting assault on patient); Annot: 36 ALR3d 440; 41 CJS 349, Hospitals § 8(c)(3); 65 NYJur2d 433, Hospitals and Related Health Care Facilities §§ 31, 109; Annot: 31 ALR2d 1118 (defective furniture or appliances); 37 ALR2d 1284 (obstetrical cases); 70 ALR2d 377 (for injury to convalescing patient); 72 ALR2d 396 (for emergency ward cases); 96 ALR2d 1205 (for infection or contagion); 6 ALR3d 704 (validity of exemption from liability); 9 ALR3d 579 (re drugs and medicines); 9 ALR3d 1315 (*res ipsa loquitur*); 14 ALR3d 1254 (defective equipment); 17 ALR3d 796 (heart attack during unrelated procedure); 28 ALR3d 1364 (tetanus); 31 ALR3d 1114 (anesthetic injuries); 35 ALR3d 841 (refusal to admit); 36 ALR3d 1235 (bathroom or toilet facilities); 36 ALR3d 1358 (aspirin poisoning); 42 ALR3d 736 (improper diet or feeding); 45 ALR3d 731 (hypodermic injection); 12 ALR4th 57 (failure to supervise treatment by individual doctor); 20 ALR4th 136 (blood transfusion); 37 ALR4th 200 (for injury to patient who escapes); 51 ALR4th 235 (for negligence of physician or surgeon). The portion of the charge relating to the effect of violation of a regulation is adapted from PJI 2:29.

The pattern charge assumes that there is no issue of causal relationship between the hospital's conduct and the patient's injury. If, on the facts of a particular case, there is such an issue, the charge must be modified, see Comment to PJI 2:70; see also *Collins v New York Hospital*, 67 AD2d 872, 413 NYS2d 685 (1st Dept 1979), *mod on other grounds*, 49 NY2d 965, 428 NYS2d 885, 406 NE2d 743 (1980).

The pattern charge does not follow the community rule; instead, the charge refers more broadly to the standard of care followed in general hospitals. The traditional rule is that the determination of whether the hospital breached its duty to its patient is based on its compliance with the standard of care customarily exercised by hospitals in the community, see *Zellar v Tompkins Community Hosp., Inc.*, 124 AD2d 287, 508 NYS2d 84 (3d Dept 1986); *Miller by Miller v Albany Medical Center Hosp.*, 95 AD2d 977, 464 NYS2d 297 (3d Dept 1983); *Alaggia v North Shore University Hosp.*, 92 AD2d 532, 459 NYS2d 96 (2d Dept 1983). The community rule rests on the assumption that the quality of care may be greater in hospitals located in one "community" than in hospitals located in another "community." But whether "community" is considered in the context of a specific geographic area or in the context of similar localities, the general standard of care imposed upon hospitals within the defined community does not deviate depending upon the "nature or size" of the hospital, *Vandenburgh v Columbia Memorial Hospital*, 162 AD2d 880, 558 NYS2d 229 (3d Dept 1990) (error to charge jury that the

procedure when attending to a patient's need to use the bathroom depends upon the nature and size of the hospital). Most significantly, the advent of state regulations that impose a minimum standard of care upon all general hospitals undermines whatever remained of the rationale underlying the community standard.

Regulations adopted pursuant to the Public Health Law require that all general hospitals adhere to certain prescribed standards, see 10 NYCRR Part 405. Under the State Hospital Code (10 NYCRR, Part 700), rural hospitals, as defined therein, are "expected to develop appropriate linkages with hospitals providing a greater range of services and/or medical equipment," 10 NYCRR § 700.2(a)(21).

The standards mandated by state regulation address such matters as medical staff, nursing services, patients' rights, incident reporting, medical records, infection control, and surgical, anesthesia, laboratory, emergency and outpatient services. Among these regulations are provisions that: restrict the scheduled work week of interns to an average of not more than 80 hours per week; prohibit the scheduling of interns for working more than 24 consecutive hours; and require that the specific treatments and procedures that interns may perform be stated in writing, with the writing to specify which treatments or procedures may be performed under "general supervision" of a credentialed physician and those that may only be performed under the "direct visual supervision" of a credentialed physician, see 10 NYCRR § 405.4(f).

The charge incorporates the principle that violation of a regulation meant to avoid the condition or situation out of which plaintiff's claim arose may be considered by the jury as some evidence of negligence, see generally PJI 2:29 and Comment.

The liability of hospitals may arise in several ways.

First, the hospital is vicariously liable for the malpractice of its employees, under general principles of respondeat superior, see generally *Kavanaugh by Gonzales v Nussbaum*, 71 NY2d 535, 528 NYS2d 8, 523 NE2d 284 (1988); PJI 2:235. Where an employee-physician is a defendant in the action, and the claim against the hospital is based only on its vicarious liability for the conduct of the employee, it may not be necessary for the court to separately charge the jury as to the hospital's liability. Unless there is a factual issue upon which application of respondeat superior depends, the court may simply apply the jury's finding concerning the physician to the hospital.

Second, the hospital is directly liable for breach of the duties that it, as an institution, owes to its patients. The hospital's liability may sound in malpractice or in negligence. For example, failure to provide competent personnel or to promulgate appropriate emergency room rules is negligence, not malpractice, *Bleiler v Bodnar*, 65 NY2d 65, 489

NYS2d 885, 479 NE2d 230 (1985). As to the distinction between ordinary negligence and malpractice, see generally *id*; *Payette v Rockefeller University*, 220 AD2d 69, 643 NYS2d 79 (1st Dept 1996); *Borrillo v Beekman Downtown Hosp.*, 146 AD2d 734, 537 NYS2d 219 (2d Dept 1989); *Coursen v New York Hospital-Cornell Medical Center*, 114 AD2d 254, 499 NYS2d 52 (1st Dept 1986); *Miller by Miller v Albany Medical Center Hosp.*, 95 AD2d 977, 464 NYS2d 297 (3d Dept 1983).

The Hospital's Duty of Reasonable Care

The duty of reasonable care owed by a hospital extends to a wide variety of activities, including: (a) the selection and maintenance of equipment and facilities furnished for a patient's use, *Holtfoth v Rochester General Hospital*, 304 NY 27, 105 NE2d 610 (1952); see *McCormack v Mount Sinai Hospital*, 85 AD2d 596, 444 NYS2d 702 (2d Dept 1981) (simple negligence not to have a wheelchair available at patient's discharge); see also *Kinch v Adams*, 46 AD2d 467, 363 NYS2d 119 (3d Dept 1975), *aff'd*, 38 NY2d 792, 381 NYS2d 869, 345 NE2d 341 (1975); (b) the use of equipment, *Bing v Thunig*, 2 NY2d 656, 163 NYS2d 3, 143 NE2d 3 (1957); *Dillon v Rockaway Beach Hospital & Dispensary*, 284 NY 176, 30 NE2d 373 (1940); *Phillips v Buffalo General Hospital*, 239 NY 188, 146 NE 199 (1924); *Fogal v Genesee Hospital*, 41 AD2d 468, 344 NYS2d 552 (4th Dept 1973); *Davidson v Hillcrest General Hospital*, 40 AD2d 693, 336 NYS2d 296 (2d Dept 1972) (administration of blood transfusion); (c) the failure to use available equipment, *Ranelli v Society of N.Y. Hospital*, 269 App Div 906, 56 NYS2d 481 (2d Dept 1945), *aff'd*, 295 NY 850, 67 NE2d 257 (1946); (d) the review of the qualifications of physicians having staff privileges, *Megrelishvili v Our Lady of Mercy Medical Center*, 291 AD2d 18, 739 NYS2d 2 (1st Dept 2002); *Raschel v Rish*, 110 AD2d 1067, 488 NYS2d 923 (4th Dept 1985); (e) the administration of blood tests, *Pollicina v Misericordia Hosp. Medical Center*, 158 AD2d 194, 557 NYS2d 902 (1st Dept 1990); (f) the transfusion of blood, *Sapienza v Erie*, 270 AD2d 907, 705 NYS2d 455 (4th Dept 2000); (g) the carrying out of orders left by the patient's physician, *Collins v New York Hospital*, 49 NY2d 965, 428 NYS2d 885, 406 NE2d 743 (1980); *Toth v Community Hospital at Glen Cove*, 22 NY2d 255, 292 NYS2d 440, 239 NE2d 368 (1968); *Garziona v Vassar Bros. Hospital*, 36 AD2d 390, 320 NYS2d 830 (1st Dept 1971), *aff'd*, 30 NY2d 857, 335 NYS2d 293, 286 NE2d 731 (1972); *Kless v Paul T.S. Lee, M.D., P.C.*, 19 AD3d 1083, 796 NYS2d 502 (4th Dept 2005); *Killeen v Reinhardt*, 71 AD2d 851, 419 NYS2d 175 (2d Dept 1979) (no liability for following physician's instructions unless those instructions clearly contradict normal practice); *Striano v Deepdale General Hospital*, 54 AD2d 730, 387 NYS2d 678 (2d Dept 1976) (nurse acting contrary to physician's orders); *Pivar v Manhattan General, Inc.*, 279 App Div 522, 110 NYS2d 786 (1st Dept 1952); (h) preventing incompetent patient from using or possessing a potentially dangerous instrumentality, *Gunnarson v State*, 95 AD2d 797, 463 NYS2d 853 (2d Dept 1983) (cigarette lighter); (i) safeguarding welfare of patients from harm inflicted by others, *N.X. v Cabrini Medical Center*, 97 NY2d 247, 739 NYS2d 348, 765 NE2d 844 (2002) (failure to protect patient from unauthorized act of doctor not

charged with patient's care); (j) providing reasonable security to patients, *Rice v St. Luke's Roosevelt Hosp. Center*, 293 AD2d 258, 739 NYS2d 384 (1st Dept 2002); and (k) exercising reasonable care to avoid unnecessary harm to the patient, *Reardon v Presbyterian Hosp. in City of New York*, 292 AD2d 235, 739 NYS2d 65 (1st Dept 2002) (properly help patient alight from examination table); *Edson v Community General Hosp. of Greater Syracuse*, 289 AD2d 973, 737 NYS2d 707 (4th Dept 2001) (prevent weak and disoriented patient from falling out of bed); *Fields v Sisters of Charity Hosp.*, 275 AD2d 1004, 714 NYS2d 176 (4th Dept 2000) (provide safe and adequate examining table); see *Rodriguez v 1201 Realty LLC*, 10 AD3d 253, 781 NYS2d 328 (1st Dept 2004) (supervise and provide adequate seating in triage waiting area); *Dispenzieri v Hillside Psychiatric Hosp.*, 283 AD2d 389, 724 NYS2d 203 (2d Dept 2001) (guard plaintiff and prevent repeated suicide attempt).

The duty of reasonable care owed by a hospital is measured by the patient's infirmities known to or reasonably foreseeable by hospital officials and employees, *Hnat v Nyack Hospital*, 33 NY2d 985, 353 NYS2d 741, 309 NE2d 139 (1974); *Mulberg v State*, 35 AD2d 856, 315 NYS2d 176 (3d Dept 1970), *aff'd*, 29 NY2d 916, 329 NYS2d 97, 279 NE2d 854 (1972); *Martuscello v Jensen*, 134 AD3d 4, 18 NYS3d 463 (3d Dept 2015). The duty of the hospital to safeguard a patient is measured by the capacity of the patient to provide for his or her own safety, *N.X. v Cabrini Medical Center*, 97 NY2d 247, 739 NYS2d 348, 765 NE2d 844 (2002) (failure to protect patient from unauthorized act of doctor not charged with patient's care); *Coursen v New York Hospital-Cornell Medical Center*, 114 AD2d 254, 499 NYS2d 52 (1st Dept 1986) (negligence for attendant not to accompany ambulatory post-surgical patient to bathroom); *Horton v Niagara Falls Memorial Medical Center*, 51 AD2d 152, 380 NYS2d 116 (4th Dept 1976); *Zophy v State*, 27 AD2d 414, 279 NYS2d 918 (4th Dept 1967), *aff'd*, 22 NY2d 921, 295 NYS2d 50, 242 NE2d 86 (1968). For a charge and comment on the common law standard of care where plaintiff is under a disability, see PJI 2:11. The hospital is liable only if its failure to safeguard the patient is a proximate cause of the injury, *Torres v New York*, 44 NY2d 976, 408 NYS2d 330, 380 NE2d 161 (1978). Moreover, it may be held liable for failure to provide experienced personnel, id, or to monitor the patient's condition during the period following the administration of a drug having known side effects requiring post-administration observation, *Brown v State*, 56 AD2d 672, 391 NYS2d 204 (3d Dept 1977), *aff'd*, 44 NY2d 1006, 408 NYS2d 502, 380 NE2d 328 (1978).

The hospital's duty extends to taking reasonable precautions to protect a patient against taking his or her own life, *Huntley v State*, 62 NY2d 134, 476 NYS2d 99, 464 NE2d 467 (1984); *Hirsh v State*, 8 NY2d 125, 127, 202 NYS2d 296, 168 NE2d 372 (1960); *Cohen v State*, 51 AD2d 494, 382 NYS2d 128 (3d Dept 1976), *aff'd*, 41 NY2d 1086, 396 NYS2d 363, 364 NE2d 1134 (1977); *Centeno v New York*, 48 AD2d 812, 369 NYS2d 710 (1st Dept 1975), *aff'd*, 40 NY2d 932, 389 NYS2d 837, 358 NE2d 520 (1976); *Collins v State*, 23 AD2d 898, 258 NYS2d 938 (3d Dept 1965), *aff'd*, 17 NY2d 542, 268 NYS2d 314, 215 NE2d 500 (1966);

Annot: 60 ALR3d 880. However, liability is dependent upon notice of self-destructive or suicidal tendencies, *Huntley v State*, supra; *Burke v State*, 61 AD2d 1084, 403 NYS2d 361 (3d Dept 1978); *Mochen v State*, 57 AD2d 719, 396 NYS2d 113 (4th Dept 1977); Annot: 11 ALR2d 751, 775. Notice of such tendencies does not make the hospital the insurer of the patient's activities 24 hours per day, *Mochen v State*, supra.

The hospital has a duty to exercise reasonable care and diligence to safeguard a patient from harm inflicted by others, measured by the capacity of the patient to provide for his or her own safety, *N.X. v Cabrini Medical Center*, 97 NY2d 247, 739 NYS2d 348, 765 NE2d 844 (2002); *Sandra M. v St. Luke's Roosevelt Hosp. Center*, 33 AD3d 875, 823 NYS2d 463 (2d Dept 2006); *Freeman v St. Clare's Hosp. & Health Center*, 156 AD2d 300, 548 NYS2d 686 (1st Dept 1989) (patient in multiple restraints in unsupervised emergency room was victim of rape attempt by another patient); *Clinton v New York*, 140 AD2d 404, 528 NYS2d 108 (2d Dept 1988) (patient stabbed with hospital suture scissors by another patient); see *Morris v Lenox Hill Hosp.*, 232 AD2d 184, 647 NYS2d 753 (1st Dept 1996), aff'd, 90 NY2d 953, 665 NYS2d 399, 688 NE2d 255 (1997) (patients injured from poisoning of intravenous fluid by unknown person); *Borrillo v Beekman Downtown Hosp.*, 146 AD2d 734, 537 NYS2d 219 (2d Dept 1989) (patient assaulted by another patient while walking in hospital corridor). This "sliding scale of duty" is limited, however, and does not render a hospital an insurer of patient safety or require it to keep each patient under constant surveillance, *N.X. v Cabrini Medical Center*, supra. The scope of a hospital's duty is circumscribed by those risks that are reasonably foreseeable, *id.* Observations and information known to or readily perceivable by hospital staff indicating that there is a risk of harm to a patient can be sufficient to trigger a hospital's duty to protect the patient, *id.* However, a hospital sued in its capacity as caretaker, as distinguished from its capacity as a wrongdoer's employer, is not necessarily responsible for knowing or foreseeing matters that an employer could be expected to know or foresee, *Sandra M. v St. Luke's Roosevelt Hosp. Center*, supra.

The general rule is that a hospital is not liable for the actions of a private physician attending his or her private patient, *Mirshah v Obedian*, 200 AD3d 868, 158 NYS3d 226 (2d Dept 2021); *Tsocanos v Zaidman*, 180 AD3d 841, 118 NYS3d 219 (2d Dept 2020); *Martinez v La Porta*, 50 AD3d 976, 857 NYS2d 194 (2d Dept 2008); *Cirella v Central General Hosp.*, 217 AD2d 680, 630 NYS2d 93 (2d Dept 1995); *Somoza v St. Vincent's Hosp. and Medical Center of New York*, 192 AD2d 429, 596 NYS2d 789 (1st Dept 1993). A hospital is not liable when its professional staff follows the orders of private physicians selected by the patient, *Toth v Community Hospital at Glen Cove*, 22 NY2d 255, 292 NYS2d 440, 239 NE2d 368 (1968); *Tsocanos v Zaidman*, supra; *Pollicina v Misericordia Hosp. Medical Center*, 158 AD2d 194, 557 NYS2d 902 (1st Dept 1990); see *Rodrigo v Brookdale Hosp.*, 194 AD2d 774, 599 NYS2d 626 (2d Dept 1993). The hospital is entitled to rely on the patient's private physician as to a decision medical in nature, such as whether bed rails should be used, *Garziona v Vassar Bros. Hospital*, 36

AD2d 390, 320 NYS2d 830 (1st Dept 1971), *aff'd*, 30 NY2d 857, 335 NYS2d 293, 286 NE2d 731 (1972). Absent a direction from the private physician or notice that the patient's condition was such as to require action on its part, the hospital is not liable for failure to make or carry out such medical decision, see *Pollicina v Misericordia Hosp. Medical Center*, 158 AD2d 194, 557 NYS2d 902 (1st Dept 1990); *Myers v Hospital Ass'n of City of Schenectady*, 45 AD2d 780, 356 NYS2d 720 (3d Dept 1974); *Gamell v Mount Sinai Hospital*, 34 AD2d 981, 312 NYS2d 629 (2d Dept 1970); *Schachter v Doctors Hospital*, 34 AD2d 760, 310 NYS2d 457 (1st Dept 1970); *Mossman v Albany Medical Center Hospital*, 34 AD2d 263, 311 NYS2d 131 (3d Dept 1970); see also *Ulma v Yonkers General Hospital*, 53 AD2d 626, 384 NYS2d 201 (2d Dept 1976); *Horton v Niagara Falls Memorial Medical Center*, 51 AD2d 152, 380 NYS2d 116 (4th Dept 1976); but see *Alaggia v North Shore University Hosp.*, 92 AD2d 532, 459 NYS2d 96 (2d Dept 1983) (citing PJI).

A hospital is not required to pass upon the efficacy of treatment prescribed by a doctor not in its employ, *Snelson v Margaretville Hospital*, 49 AD2d 991, 374 NYS2d 579 (3d Dept 1975), and it has no duty to ascertain whether a surgeon has disclosed the dangers of an operation to the patient in the absence of facts bringing home to the hospital that the patient is unaware of the danger, that the procedure is not medically indicated, or that the surgeon had previously failed to obtain informed consent of a patient, *Fiorentino v Wenger*, 19 NY2d 407, 280 NYS2d 373, 227 NE2d 296 (1967); *Sita v Long Island Jewish-Hillside Medical Center*, 22 AD3d 743, 803 NYS2d 112 (2d Dept 2005); *Cirella v Central General Hosp.*, 217 AD2d 680, 630 NYS2d 93 (2d Dept 1995); *Raschel v Rish*, 110 AD2d 1067, 488 NYS2d 923 (4th Dept 1985); see *Bailey v Owens*, 17 AD3d 222, 793 NYS2d 40 (1st Dept 2005). Furthermore, the fact that an employee of a hospital undertook the ministerial task of recording the plaintiff's consent neither relieved the plaintiff's private physicians from their obligation to obtain an informed consent nor placed that obligation upon the hospital, *Cirella v Central General Hosp.*, *supra*.

An exception to the general principle of non-liability for the conduct of a private physician exists "where the hospital staff knows that the doctor's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders," *Toth v Community Hospital at Glen Cove*, 22 NY2d 255, 292 NYS2d 440, 239 NE2d 368 (1968); *Mirshah v Obedian*, 200 AD3d 868, 158 NYS3d 226 (2d Dept 2021); *Warney v Haddad*, 237 AD2d 123, 654 NYS2d 138 (1st Dept 1997); *Somoza v St. Vincent's Hosp. and Medical Center of New York*, 192 AD2d 429, 596 NYS2d 789 (1st Dept 1993); see also *Fiorentino v Wenger*, 19 NY2d 407, 280 NYS2d 373, 227 NE2d 296 (1967); *Christopher v St. Vincent's Hosp. and Medical Center*, 121 AD2d 303, 504 NYS2d 102 (1st Dept 1986); see *Martinez v La Porta*, 50 AD3d 976, 857 NYS2d 194 (2d Dept 2008).

A hospital may be liable to one assaulted by a former mental patient who was discharged because of the negligent evaluation of the patient's

readiness for release, *Januszko v State*, 47 NY2d 774, 417 NYS2d 462, 391 NE2d 297 (1979); *Homere v State*, 48 AD2d 422, 370 NYS2d 246 (3d Dept 1975). Because psychiatry is not an exact science, liability may not be imposed where the decision was made in accordance with accepted practice standards in the exercise of professional judgment, *Schrempf v State*, 66 NY2d 289, 496 NYS2d 973, 487 NE2d 883 (1985); accord, *Killeen v State*, 66 NY2d 850, 498 NYS2d 358, 489 NE2d 245 (1985). A hospital has also been held liable for a patient's suicide where it was reasonably foreseeable that decedent would become suicidal without further treatment and the doctor who examined decedent had departed from accepted psychiatric standards by not making a more timely out-patient psychiatric appointment and by failing to communicate to the patient or her husband the significance or importance of keeping an out-patient appointment, *Smith v New York City Health and Hospitals Corp.*, 211 AD2d 483, 621 NYS2d 319 (1st Dept 1995). It should be noted, however, that the court stated that the theory of liability was submitted to the jury without objection, *id.* In *D'Avolio v Prado*, 277 AD2d 877, 715 NYS2d 827 (4th Dept 2000), the court reinstated a claim against municipal defendants, which provided mental health services, for failing to arrange for a suicidal patient's removal from the premises and ultimate restraint in a medical facility. The court observed that such a course of action could not be taken without an assessment of the patient's health, which apparently had not been performed.

In providing medical and psychiatric care, the State is held to the same standards applicable to private practitioners and institutions engaging in the same activity, *Schrempf v State*, 66 NY2d 289, 496 NYS2d 973, 487 NE2d 883 (1985); *D'Avolio v Prado*, 277 AD2d 877, 715 NYS2d 827 (4th Dept 2000); *Ratray v State*, 223 AD2d 356, 636 NYS2d 43 (1st Dept 1996). A person injured by governmental negligence in a proprietary activity may recover without having to establish the existence of a special relationship, *id.*

The Hospital's Liability for Acts of Employees

Hospitals are liable for the medical malpractice of employee physicians and nurses, *Kavanaugh by Gonzales v Nussbaum*, 71 NY2d 535, 528 NYS2d 8, 523 NE2d 284 (1988); see Annot: 14 ALR3d 873. But a hospital is not liable for the alleged failure of a nurse to take actions which are beyond the scope of nursing practice, *Sledziewski v Cioffi*, 137 AD2d 186, 528 NYS2d 913 (3d Dept 1988) (nurses' alleged failure to react to plaintiff's symptoms by ordering diagnostic testing). In a respondeat superior case, the hospital is relieved of liability when the doctor is exonerated, *Gamell v Mount Sinai Hospital*, 34 AD2d 981, 312 NYS2d 629 (2d Dept 1970).

Where a patient seeks medical care from a hospital or clinic, rather than from an individual physician, the institution is liable for the malpractice of a physician who was apparently but not actually an institution employee, *Hill v St. Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904,

490 NE2d 823 (1986); *Sessa v Peconic Bay Medical Center*, 200 AD3d 1085, 159 NYS3d 126 (2d Dept 2021); *Brink v Muller*, 86 AD3d 894, 927 NYS2d 719 (3d Dept 2011); *Johnson v Jamaica Hosp. Medical Center*, 21 AD3d 881, 800 NYS2d 609 (2d Dept 2005); *Ryan v New York City Health and Hospitals Corp.*, 220 AD2d 734, 633 NYS2d 500 (2d Dept 1995); see *Friedland v Vassar Bros. Medical Center*, 119 AD3d 1183, 990 NYS2d 673 (3d Dept 2014); *Culhane v Schorr*, 259 AD2d 511, 686 NYS2d 105 (2d Dept 1999) (although decedent was originally admitted through emergency room of hospital, there was no competent proof in record that decedent believed he was receiving care from hospital in general, as opposed to doctors specifically); *Gunther v Staten Island Hosp.*, 226 AD2d 427, 640 NYS2d 601 (2d Dept 1996). Therefore, the hospital may be held vicariously liable for the acts of a physician who was an independent contractor where the patient presents himself to the hospital emergency room for treatment and the hospital determines how and by whom the patient will be treated, *Lewis v Manis*, 266 AD2d 844, 697 NYS2d 428 (4th Dept 1999); see *Pinnock v Mercy Medical Center*, 180 AD3d 1088, 119 NYS3d 559 (2d Dept 2020) (hospital potentially liable for alleged malpractice of emergency room physician); *Friedland v Vassar Bros. Medical Center*, *supra* (hospital potentially vicariously liable for malpractice of non-employees; even though physician from patient's primary care group participated in treatment of patient, physician did not order or perform tests or otherwise assume responsibility for care); *St. Andrews v Scalia*, 51 AD3d 1260, 857 NYS2d 807 (3d Dept 2008) (issue of fact as to whether patient, who went to emergency room for post-operative treatment, sought treatment from hospital or only from non-employee surgeon who had assisted in original surgery); *Salvatore v Winthrop University Medical Center*, 36 AD3d 887, 829 NYS2d 183 (2d Dept 2007) (where patient sought treatment from hospital emergency room rather than from individual physician, hospital vicariously liable for physician's negligent acts, even though physician not hospital employee). However, the same principle is inapplicable where the patient went to the emergency room but responsibility for his or her ongoing care was immediately assumed by his or her own treating physician, *Thurman v United Health Services Hospitals, Inc.*, 39 AD3d 934, 833 NYS2d 702 (3d Dept 2007).

The hospital is responsible for the malpractice of its employee-doctors and of its independent contractor-doctors whom the hospital holds out as performing a service it offers, *Mduba v Benedictine Hospital*, 52 AD2d 450, 384 NYS2d 527 (3d Dept 1976) (doctor retained "on a contract basis, and not as an employee" to supervise emergency room); see *Felter v Mercy Community Hosp. of Port Jervis, N.Y.*, 244 AD2d 385, 664 NYS2d 321 (2d Dept 1997) (defendant doctor working as emergency room physician pursuant to agreement between hospital and third party defendant, who was to provide full time emergency physician services in hospital's emergency room); *Noble v Porter*, 188 AD2d 1066, 591 NYS2d 669 (4th Dept 1992); *Rivera v Bronx-Lebanon Hospital Center*, 70 AD2d 794, 417 NYS2d 79 (1st Dept 1979) (extent of control exercised by hospital over assignment of physician determines whether the hospital is liable for malpractice of that physician); *Felice v St.*

Agnes Hospital, 65 AD2d 388, 411 NYS2d 901 (2d Dept 1978) (extent of hospital's control over use of its facilities may allow recovery against it for the malpractice of private physicians enjoying hospital privileges).

But the hospital is not liable for the malpractice of a physician, having hospital privileges, who was not a hospital employee and who had acted as plaintiff's treating physician, *Welch v Scheinfeld*, 21 AD3d 802, 801 NYS2d 277 (1st Dept 2005); *Georges v Swift*, 194 AD2d 517, 598 NYS2d 545 (2d Dept 1993), *Campbell v Emma Laing Stevens Hosp.*, 118 AD2d 988, 499 NYS2d 993 (3d Dept 1986); see *Rodrigo v Brookdale Hosp.*, 194 AD2d 774, 599 NYS2d 626 (2d Dept 1993). Nor is the hospital liable for the malpractice of an affiliated physician to whom it referred the patient, where the physician was not an employee or agent of the hospital and had no proprietary interest in the hospital, *Ford v Burns*, 132 AD2d 595, 517 NYS2d 568 (2d Dept 1987).

The hospital's liability depends upon whether it had "control in fact" over the conduct of the physician or, if it did not have such control, upon principles of apparent or ostensible agency, which may present factual issues for the jury, *Tart v New York Bronx Pediatric Medicine, P.C.*, 116 AD3d 515, 984 NYS2d 19 (1st Dept 2014) (hospital vicariously liable for conduct of physician assigned to NICU for particular shift regardless of physician's employment status); *Welch v Scheinfeld*, 21 AD3d 802, 801 NYS2d 277 (1st Dept 2005); *Noble v Porter*, 188 AD2d 1066, 591 NYS2d 669 (4th Dept 1992); *Facklam v Rosner*, 145 AD2d 955, 148 AD2d 1013, 536 NYS2d 326 (4th Dept 1988); *Casucci v Kenmore Mercy Hosp.*, 144 AD2d 910, 534 NYS2d 606 (4th Dept 1988); see *Hill v St. Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904, 490 NE2d 823 (1986); *Shafraan v St. Vincent's Hosp. and Medical Center*, 264 AD2d 553, 694 NYS2d 642 (1st Dept 1999); *Lockhart v Grace*, 189 AD2d 656, 592 NYS2d 328 (1st Dept 1993) (physicians' conclusory statements that they were acting independently of the hospital do not serve conclusively to establish the degree of control actually exercised over them by the hospital). Thus, a hospital is not liable for the malpractice of the chief of its department of obstetrics and gynecology where plaintiff was a private patient, where the physician was not employed or compensated by the hospital, and the hospital exercised no control over the physician's private practice, *Sledziewski v Cioffi*, 137 AD2d 186, 528 NYS2d 913 (3d Dept 1988); see *Mertsaris v 73rd Corp.*, 105 AD2d 67, 482 NYS2d 792 (2d Dept 1984). An independent physician's use of a hospital's stationery or of consent forms with the hospital's logo is not, without more, sufficient to establish that the physician was held out as a hospital employee under apparent or ostensible agency principles, *Thurman v United Health Services Hospitals, Inc.*, 39 AD3d 934, 833 NYS2d 702 (3d Dept 2007); *King v Mitchell*, 31 AD3d 958, 819 NYS2d 169 (3d Dept 2006). Further, where an independent physician's name is presented to the patient on hospital forms, the hospital is not obliged to affirmatively disclaim the physician as an employee in order to avoid the creation of an ostensible agency relationship, *Thurman v United Health Services Hospitals, Inc.*, *supra*; *King v Mitchell*, *supra*. That principle applies even when the physician was affiliated with the hospital and reviewed a

CAT scan that had been ordered by plaintiff's decedent's own physician while decedent was an in-patient at the hospital, *Thurman v United Health Services Hospitals, Inc.*, *supra*. However, a question of fact was raised as to a hospital's liability for the alleged malpractice of an independent anesthesiologist group where the hospital's contract with the group required it to use only group physicians, the group physicians were prohibited from working elsewhere without the hospitals' consent, pre-anesthesia testing took place at the hospital, all of the forms used by the anesthesiologists bore the hospital's logo and patients were not informed that the anesthesiologists were not hospital employees, *Dragotta v Southampton Hosp.*, 39 AD3d 697, 833 NYS2d 638 (2d Dept 2007).

Liability may not be imposed upon a hospital for the acts of a physician who is an independent contractor on a theory of "enterprise liability," see *Facklam v Rosner*, 145 AD2d 955, 148 AD2d 1013, 536 NYS2d 326 (4th Dept 1988); see also *Hymowitz v Eli Lilly and Co.*, 73 NY2d 487, 541 NYS2d 941, 539 NE2d 1069 (1989); *Kavanaugh by Gonzales v Nussbaum*, 71 NY2d 535, 528 NYS2d 8, 523 NE2d 284 (1988).

Although a hospital is not responsible for malpractice by a private physician with staff privileges, see *Megrelishvili v Our Lady of Mercy Medical Center*, 291 AD2d 18, 739 NYS2d 2 (1st Dept 2002); *Noble v Porter*, 188 AD2d 1066, 591 NYS2d 669 (4th Dept 1992), it may be held liable for failure to develop and adhere to reasonable procedures for reviewing a physician's qualifications, *Megrelishvili v Our Lady of Mercy Medical Center*, *supra* (physician unable to obtain requisite malpractice insurance); *Raschel v Rish*, 110 AD2d 1067, 488 NYS2d 923 (4th Dept 1985) (physician had been sued for malpractice on three prior occasions); see *Sledziewski v Cioffi*, 137 AD2d 186, 528 NYS2d 913 (3d Dept 1988).

Although a hospital or medical corporation may be vicariously liable for the wrongful acts of its employees, liability attaches only if the acts were committed in furtherance of and within the scope of the employment, *Doe v Guthrie Clinic, Ltd.*, 22 NY3d 480, 982 NYS2d 431, 5 NE3d 578 (2014); *N.X. v Cabrini Medical Center*, 97 NY2d 247, 739 NYS2d 348, 765 NE2d 844 (2002). The Court of Appeals has declined to impose strict liability based on "heightened duty" on such institutions for their employees' misconduct, *Doe v Guthrie Clinic, Ltd.*, *supra*; see *N.X. v Cabrini Medical Center*, *supra*. Thus, in *N.X. v Cabrini Medical Center*, *supra*, the Court refused to impose vicarious liability on a hospital for an employee's sexual assault on a sedated patient, see *Koren v Weihs*, 190 AD2d 560, 593 NYS2d 222 (1st Dept 1993) (hospital not liable for conduct of one of its physicians in having sexual relations with patient after patient's discharge); *Noto v St. Vincent's Hosp. and Medical Center of New York*, 160 AD2d 656, 559 NYS2d 510 (1st Dept 1990) (same). Similarly, the Court held that a medical corporation was not liable under a breach-of-fiduciary-duty theory for a nurse's unauthorized disclosure of a patient's confidential medical information for

personal reasons having nothing to do with the nurse's employment duties, *Doe v Guthrie Clinic, Ltd.*, supra (rejecting *Doe v Community Health Plan-Kaiser Corp.*, 268 AD2d 183, 709 NYS2d 215 (3d Dept 2000), to the extent it is inconsistent). However, in the proper circumstances, a hospital or medical corporation may be held liable in tort for negligent hiring, negligent supervision, failing to establish adequate policies and procedures to safeguard confidential patient information or failing to train employees to properly discharge their duties under such policies and procedures, *Doe v Guthrie Clinic, Ltd.*, supra; see Comment, *infra*, for a discussion of a hospital's liability for negligent hiring.

Hospital's Liability for Negligent Hiring

A cause of action against a hospital for negligent hiring requires the hospital to answer for the tort of an employee whom the employer either hired or retained with knowledge of the employee's propensity for the sort of behavior that caused the injured party's harm, *Sandra M. v St. Luke's Roosevelt Hosp. Center*, 33 AD3d 875, 823 NYS2d 463 (2d Dept 2006); see *Kirkman by Kirkman v Astoria General Hosp.*, 204 AD2d 401, 611 NYS2d 615 (2d Dept 1994). Because the claim is predicated on the employer's having placed the employee in a position to cause foreseeable harm, it does not require any particular relationship between the plaintiff and the defendant hospital, *Sandra M. v St. Luke's Roosevelt Hosp. Center*, supra.

Where the wrongdoer-employee was placed at the hospital through a temporary employment agency, the hospital is responsible only for its own knowledge of the employee's background and is not responsible for knowledge that only the employment agency had, *Sandra M. v St. Luke's Roosevelt Hosp. Center*, 33 AD3d 875, 823 NYS2d 463 (2d Dept 2006). The hospital has no duty independently to screen employees recommended by the agency, even where the hospital's contract with the agency gives the hospital the discretionary right to accept or reject referred employees, *id.* The hospital is entitled to rely on the temporary employment agency to perform its hiring function for certain positions, at least as long as the agency supplies workers who exhibit no inappropriate behavior or propensities, *Sandra M. v St. Luke's Roosevelt Hosp. Center*, supra. Moreover, a hospital that has utilized the services of a temporary employment agency cannot be held liable for negligently supervising or instructing the employment agency, which is an independent contractor, since the agency's business of hiring temporary staff members, is collateral to the hospital's main function, *Sandra M. v St. Luke's Roosevelt Hosp. Center*, supra.

Special nurses are the patient's employees, and the hospital is not liable for their acts, *Brown v St. Vincent's Hospital*, 222 App Div 402, 226 NYS 317 (3d Dept 1928); see *Dillon v Rockaway Beach Hospital & Dispensary*, 284 NY 176, 30 NE2d 373 (1940), but the fact that a patient has a special nurse will not excuse a hospital's failure to perform an act that an orderly should have performed, *Pivar v Manhattan General, Inc.*, 279 App Div 522, 110 NYS2d 786 (1st Dept 1952).

Emergency Medical Treatment

The Emergency Medical Treatment and Active Labor Act (42 USC § 1395dd) of 1986 (EMTALA) is designed to prevent “patient dumping” by hospitals based on a patient’s financial condition or lack of health insurance, *Lear v Genesee Memorial Hosp.*, 254 AD2d 707, 678 NYS2d 228 (4th Dept 1998); *DiGicommo v St. Joseph’s Hosp. and Health Center*, 182 AD2d 1106, 582 NYS2d 887 (4th Dept 1992). EMTALA does not protect a patient from improper diagnosis or treatment, but rather creates a new cause of action, generally unavailable under state tort law, for a failure to treat, *Lear v Genesee Memorial Hosp.*, *supra*. Therefore, civil actions under EMTALA are limited to those in which plaintiff’s personal injury is a direct result of noncompliance with the statute—denial of treatment for economic reasons—and damages are limited to those allowed by state law, *DiGicommo v St. Joseph’s Hosp. and Health Center*, *supra* (Act does not give rise to liability for negligent infliction of emotional distress where no such liability would exist under state law). Under EMTALA, when an individual seeks treatment at an emergency room, a hospital must provide an appropriate medical screening examination to determine if an emergency medical condition exists and, if it does, the hospital must stabilize the condition and generally cannot transfer the patient until the medical condition has stabilized, 42 USC § 1395dd(a), (b), (c); see *Cygan v Kaleida Health*, 51 AD3d 1373, 857 NYS2d 869 (4th Dept 2008); *Lear v Genesee Memorial Hosp.*, *supra*. The stabilization requirement is intended to regulate the hospital’s care of the patient only in the immediate aftermath of the act of admitting the patient for emergency treatment, *Lear v Genesee Memorial Hosp.*, *supra* (no violation of EMTALA where decedent was appropriately screened at emergency department and was discharged by his private attending physician six days after admission). A hospital or any physician that negligently violates EMTALA is subject to a civil monetary penalty that is assessed in an administrative proceeding, 42 USC § 1395dd(d)(1)(A), (B). In addition, an individual who suffers personal harm may maintain a civil action against the participating hospital, 42 USC § 1395dd(d)(2)(A), but not against a physician, however, EMTALA does not permit a cause of action for damages against a private physician, *Cygan v Kaleida Health*, 51 AD3d 1373, 857 NYS2d 869 (4th Dept 2008); *Lidge v Niagara Falls Memorial Medical Center*, 17 AD3d 1033, 794 NYS2d 190 (4th Dept 2005); *Almond v Massena*, 237 AD2d 94, 667 NYS2d 475 (3d Dept 1998).

Once an emergency-room patient has been discharged to a physician’s care, the patient’s emergency room physician has no duty to follow up on the results of every test performed while the patient was in the emergency room, *Dombroski v Samaritan Hosp.*, 47 AD3d 80, 846 NYS2d 430 (3d Dept 2007). A contrary rule would be inconsistent with the limited purpose of an emergency room, i.e., to provide temporary, short-term care, and would therefore be detrimental to the effectiveness of the service, *id.* Thus, there was no liability for the emergency-room physician’s failure to follow up on a patient’s elevated glucose level, which was revealed by a test he had ordered. In concluding that the

emergency room physician could not be held liable, the Dombrowski court stressed that the he had noted the condition on of patient's chart before discharging him to the inpatient attending physician, there were a number of possible non-serious explanations for the condition, a urinalysis had not yet been performed, there was no immediate threat to the patient, and the condition was in no way related to the trauma for which the patient had sought emergency room treatment.

General Considerations as to Hospital Liability

The liability of the hospital for malpractice by its employees may be established by circumstantial evidence, see *Pollicina v Misericordia Hosp. Medical Center*, 158 AD2d 194, 557 NYS2d 902 (1st Dept 1990); see also PJI 1:70. There can be concurrent control for purposes of the application of *res ipsa loquitur*, *Fogal v Genesee Hospital*, 41 AD2d 468, 344 NYS2d 552 (4th Dept 1973) (patient injured by device supplied by hospital and used by surgeon); *Matlick v Long Island Jewish Hospital*, 25 AD2d 538, 267 NYS2d 631 (2d Dept 1966) (patient's neck injured while she was being moved by anesthesiologists and hospital employees). Ad hoc employment cannot result from joint control since the hospital employee "must pass out of the direction and control of the former [hospital] into that of the latter [physician]," *Cannon v Fargo*, 222 NY 321, 328, 118 NE 796 (1918). As to ad hoc employees, see PJI 2:238.

Emergency medical treatment must be provided by a general hospital without advance payment or inquiry as to payment, Public Health Law § 2805-b. It has been held that no action for damages arises out of the withholding of services in violation of this statute, the sole remedy being a suit for an injunction under Public Health Law § 2801-c, *Quijije v Lutheran Medical Center*, 92 AD2d 935, 460 NYS2d 600 (2d Dept 1983) (holding, in addition, that the mother may not recover for emotional injury arising out of having to watch her baby suffer and die because of the alleged denial of timely medical treatment); see *Cygan v Kaleida Health*, 51 AD3d 1373, 857 NYS2d 869 (4th Dept 2008).

A hospital that knowingly permits one not licensed as a physician to use its facilities while treating a patient is liable to the patient for the injuries caused by the negligence of that person, *Fiorentino v Wenger*, 19 NY2d 407, 280 NYS2d 373, 227 NE2d 296 (1967); *Hendrickson v Hodkin*, 276 NY 252, 11 NE2d 899 (1937). It will also incur liability if it permits a licensed person to commit an act of malpractice with its knowledge or under circumstances putting it on notice of a wrongful act, *Fiorentino v Wenger*, *supra*. However, a hospital is not negligent in permitting a licensed physician to practice in a specialized area without obtaining board certification, *Thomas v Solon*, 121 AD2d 165, 502 NYS2d 475 (1st Dept 1986).

A volunteer ambulance service and its members are immune from liability for injury imposed in rendering medical assistance in an emergency, except injury resulting from gross negligence or arising out of the operation of motor vehicles, Public Health Law § 3021.

A hospital may be liable for breach of contract with a patient, PJI 4:35. However, an agreement between patient and hospital made prior to the commission of an act of malpractice may be invalid, especially if the public interest is affected, or where there is not a clear understanding. Thus, *Ash v New York University Dental Center*, 164 AD2d 366, 564 NYS2d 308 (1st Dept 1990), held that a covenant not to sue a dental clinic which was given by a prospective patient in advance of surgery in consideration of reduced rates was unenforceable. The court ruled that, while a clinic may properly refuse to perform certain procedures or provide fewer amenities, it may not by agreement negate the minimum standards of professional care imposed by law.

Every hospital has a duty to maintain a coordinated program for the identification and prevention of medical, dental, and podiatric malpractice, Public Health Law § 2805-j; see *Logue v Velez*, 92 NY2d 13, 677 NYS2d 6, 699 NE2d 365 (1998). Hospital programs must include at least the following components: (a) a quality assurance committee responsible for reviewing and improving the services rendered in the hospital and for coordinating the hospital's medical, dental, and podiatric malpractice prevention program; (b) a sanction procedure for the periodic review of the credentials, physical and mental capacity, and competence of the medical, dental, and podiatric staff; (c) periodic review of the credentials, physical and mental capacity, and competence of all persons employed or associated with the hospital; (d) a procedure for the prompt resolution of grievances by patients or their representatives stemming from occurrences that may result in claims of medical, dental, or podiatric malpractice; (e) the maintenance and continuous collection of the hospital's experience with "negative health care outcomes," incidents injurious to patients, patient grievances, professional liability premiums, settlements, and awards; (f) the maintenance of relevant information gathered through the program in the personnel or credential files of each individual physician, dentist, and podiatrist; (g) educational programs dealing with patient safety, injury prevention, staff responsibility to report professional misconduct and causes of malpractice claims for staff personnel engaged in patient care activities; and (h) continuing education programs for medical, dental, and podiatric staff in their areas of specialty. Nursing home facilities do not come within the definition of the term "general hospital" set forth in Public Health Law § 2801(10) and thus are not required to collect and maintain information pursuant to Public Health Law §§ 2805-j and 2805-l, *Matter of Subpoena Duces Tecum to Jane Doe, Esq.*, 293 AD2d 231, 742 NYS2d 465 (4th Dept 2002), *aff'd as mod on other grounds*, 99 NY2d 434, 757 NYS2d 507, 787 NE2d 618 (2003). Therefore, documents generated by the quality assurance committee of a nursing home are not afforded the privilege set forth in Public Health Law § 2805-m, *id.* Education Law Section 6527(3) applies to nursing home facilities, *id.*

A failure to comply with a hospital's own rules or with a health code regulation is some evidence of negligence, *Haber v Cross County Hospital*, 37 NY2d 888, 378 NYS2d 369, 340 NE2d 734 (1975); *Kadyszewski v Ellis Hosp. Ass'n*, 192 AD2d 765, 595 NYS2d 841 (3d Dept 1993);

Mertsaris v 73rd Corp., 105 AD2d 67, 482 NYS2d 792 (2d Dept 1984); see *Liguori v Yerger*, 197 AD3d 1108, 153 NYS3d 474 (2d Dept 2021) (hospital's policy regarding flow rate of CT scan contrast media through hand IV). Evidence of loss of accreditation after the hospital malpractice, even if related to the malpractice, is inadmissible, *Deutsch v Doctors Hospital, Inc.*, 26 AD2d 520, 270 NYS2d 766 (1st Dept 1966).

Education Law § 6527(3) exempts certain records from the discovery provisions of Article 31 of the CPLR, see *Matter of Subpoena Duces Tecum to Jane Doe, Esq.*, 293 AD2d 231, 742 NYS2d 465 (4th Dept 2002), *aff'd as mod on other grounds*, 99 NY2d 434, 757 NYS2d 507, 787 NE2d 618 (2003) (privilege extends only to disclosure sought pursuant to CPLR Article 31). Education Law § 6527(3) exempts three categories of documents from disclosure: (1) records relating to medical review and quality assurance functions; (2) records reflecting “participation in a medical and dental malpractice prevention program”; and (3) reports required by the Department of Health pursuant to Public Health Law § 2805-l, including incident reports prepared pursuant to Mental Hygiene Law § 29.29, *Katherine F. ex rel. Perez v State*, 94 NY2d 200, 702 NYS2d 231, 723 NE2d 1016 (1999). Incident reports are defined as “reports of accidents and injuries affecting patient health and welfare,” Mental Hygiene Law § 29.29. Included in such reports are any allegations of “violent behavior exhibited by either patients or employees,” Mental Hygiene Law § 29.29(1)(ii), see *Connell v Erie County Medical Center Corporation*, 200 AD3d 1709, 155 NYS3d 885 (4th Dept 2021) (quality assurance report detailing attack of patient by another patient and two other incidents concerning the same attacker was exempt from disclosure). A charge of sexual abuse based on an employee's conduct constitutes an incident report, *Katherine F. ex rel. Perez v State*, *supra*. Therefore, Education Law § 6527(3) and Mental Hygiene Law § 29.29 exempt from disclosure incident reports generated in response to allegations of sexual abuse by a hospital employee, *id.* Incident reports that are not generated in accordance with Mental Hygiene Law § 29.29, which applies to psychiatric hospitals, are not exempt from disclosure unless they were generated by a quality assurance review process, *Newman v Mount Sinai Medical Center, Inc.*, 205 AD3d 548, 169 NYS3d 262 (1st Dept 2022).

Proceedings and records of a hospital committee that reviewed the qualifications of a physician with regard to the granting and retaining of staff privileges are privileged from disclosure, Education Law § 6527(3); *Katherine F. ex rel. Perez v State*, 94 NY2d 200, 702 NYS2d 231, 723 NE2d 1016 (1999); *Logue v Velez*, 92 NY2d 13, 677 NYS2d 6, 699 NE2d 365 (1998); *Zion v New York Hosp.*, 183 AD2d 386, 590 NYS2d 188 (1st Dept 1992) (statute applies to record of the Joint Commission on the Accreditation of Hospitals when conducting an accreditation survey and making recommendations as to patient care and administration); *Lilly v Turecki*, 112 AD2d 788, 492 NYS2d 286 (4th Dept 1985). A doctor's initial and renewal applications for surgery privileges at a hospital fall squarely within the materials made confidential by Education Law § 6527(3) where such applications were required as

part of a process to insure the capability of an attending physician to perform the procedures for which privileges were to be granted, *Logue v Velez*, 92 NY2d 13, 677 NYS2d 6, 699 NE2d 365 (1998). The legislative policy of providing confidentiality to encourage peer review outweighs the need of plaintiffs for access to the materials, *Logue v Velez*, *supra*; *Lilly v Turecki*, *supra*.

Documents generated in an investigation of suicide under Mental Hygiene Law § 29.29 are privileged from disclosure. In addition, documents generated in connection with an investigation of an incident affecting patient health and welfare are privileged from disclosure, Education Law § 6527(3); *Smith v State*, 181 AD2d 227, 585 NYS2d 838 (3d Dept 1992). Where there is an issue as to whether documents are exempt from disclosure under Education Law § 6527(3), the court may need to conduct an in camera review, *Newman v Mount Sinai Medical Center, Inc.*, 205 AD3d 548, 169 NYS3d 262 (1st Dept 2022) (directing defendant to prepare privilege log identifying materials claimed to be protected by quality assurance privilege and submission of documents for in camera review); *Sonsini v Memorial Hosp. for Cancer and Diseases*, 262 AD2d 185, 693 NYS2d 17 (1st Dept 1999).

The privilege afforded by the statute protects only reports prepared in accordance with the statutory procedures. A physician's credentialing file generated in connection with a quality assurance review function pursuant to Education law § 6527(3) or a malpractice prevention program pursuant to Public Health Law article 28 is privileged from disclosure (*Jousma v Kolli*, 149 AD3d 1520, 54 NYS3d 787 (4th Dept 2017)). However, a report of an informal investigation unrelated to proceedings to insure quality medical care is not privileged under Education Law § 6527(3), *Zion v New York Hosp.*, 184 AD2d 441, 585 NYS2d 393 (1st Dept 1992); see also *Sonsini v Memorial Hosp. for Cancer and Diseases*, 262 AD2d 185, 693 NYS2d 17 (1st Dept 1999) (routine records and logs relating to maintenance of mammography equipment are not protected as "quality assurance" materials under the statute).

The statute does not protect statements made by a physician in attendance at a quality assurance review who is a party to an action or proceeding the subject matter of which was reviewed at such meeting, Education Law § 6527(3); *Siegel v Snyder*, 202 AD3d 125, 161 NYS3d 159 (2d Dept 2021); see *Newman v Mount Sinai Medical Center, Inc.*, 205 AD3d 548, 169 NYS3d 262 (1st Dept 2022); *D'Angelis v Buffalo General Hosp.*, 2 AD3d 1477, 770 NYS2d 553 (4th Dept 2003); *Bryant ex rel. Bryant v Bui*, 265 AD2d 848, 695 NYS2d 790 (4th Dept 1999); *Lakshmanan v North Shore University Hosp.*, 202 AD2d 398, 610, 610 NYS2d 528 (2d Dept 1994). However, the statute does protect statements made to quality assurance committees by non-party physicians, *D'Angelis v Buffalo General Hosp.*, *supra*; see *Siegel v Snyder*, *supra* (holding that party asserting privilege bears burden of demonstrating that any statement claimed to be privileged was made by nonparty). The purpose of this provision is to permit discovery of statements given

by a physician or other health professional in the course of hospital's review of the facts and circumstances of an earlier incident that had given rise to a malpractice action, *Logue v Velez*, 92 NY2d 13, 677 NYS2d 6, 699 NE2d 365 (1998); *Siegel v Snyder*, supra; see *Swartzenberg v Trivedi*, 189 AD2d 151, 594 NYS2d 927 (4th Dept 1993). Applications that are submitted before the alleged malpractice claim do not fall within this provision, *Logue v Velez*, supra. A letter written by defendant physician to a medical quality assurance review committee concerning the care rendered to plaintiff's decedent is the functional equivalent of a statement and is thus not immune from disclosure under Education Law § 6527(3), *Swartzenberg v Trivedi*, supra. A quality assurance evaluation report, however, is not discoverable and a party is not required to answer questions concerning whether she reviewed such an evaluation, *Bryant ex rel. Bryant v Bui*, supra.

Residential Health Care Facilities

See PJI 2:151D for a charge and commentary on the liability of residential healthcare facilities pursuant to Public Health Law § 2801-d.

PJI 2:151A(1). Malpractice—Medical, Dental and Podiatric Malpractice—Damages—Itemized Verdict (Applicable in actions commenced before July 26, 2003)

If you decide for the plaintiff on the question of liability, you may include in your verdict an award for past and future pain and suffering. That award should include the amount, if any, for the injuries suffered and for future pain and suffering. If you award damages for future pain and suffering, that amount will be in one lump sum for the entire future period. In addition, you will state the number of years for which the award is made.

Based upon the evidence you may also include an award for each of the following items, separately divided into amounts intended to compensate the plaintiff for damages incurred to date and amounts intended to compensate the plaintiff for damages to be incurred in the future: [*State items which apply: (medical, dental, podiatric expenses, loss of earnings, impairment of earning ability, custodial care, rehabilitation services)*]. If you award amounts for damages that the plaintiff will incur in the future, you must state the period of years for which those amounts are intended to

provide compensation and the amount you fix must represent the full amount awarded to the plaintiff for that item of damages for that future period without reduction to present value. If you award damages for future [state items which apply: (medical, dental, podiatric expenses, loss of earnings, impairment of earning ability, custodial care, rehabilitation services)], that amount will be in one lump sum for the entire future period. In addition, you will state the number of years for which the award is made. Your verdict will include answers to the following questions which I will give you in writing:

Special Verdict Form PJI 2:151A(1) SV-I. Medical, Dental and Podiatric Malpractice—Damages—Itemized Verdict (for use in medical, dental or podiatric malpractice cases instituted before July 26, 2003)

If your verdict on liability is in favor of the plaintiff, answer the following:

(1) State separately the amount, if any, awarded for the following items of damages up to the date of your verdict:

- | | |
|------------------------------------|--------------|
| (a) Medical expenses: | \$ _____ |
| (b) Dental expenses: | \$ _____ |
| (c) Loss of earnings: | \$ _____ |
| (d) Impairment of earning ability: | \$ _____ |
| (e) Custodial care: | \$ _____ |
| (f) Rehabilitation services: | \$ _____ |
| (g) Pain and suffering: | \$ _____ |
|
Total: |
\$ _____ |

If you decide not to make an award as to any of the above items, you will insert the word “none” as to that item.

At least five jurors must agree on the answer to this question.

(2) State separately the amount awarded, if any, for the following items of damages from the date of your verdict to be incurred in the future:

- | | | |
|---------------|--|-----------------|
| (a) | Medical expenses: | \$ _____ |
| (b) | Dental expenses: | \$ _____ |
| (c) | Loss of earnings: | \$ _____ |
| (d) | Impairment of earning ability: | \$ _____ |
| (e) | Custodial care: | \$ _____ |
| (f) | Rehabilitation services: | \$ _____ |
| (g) | Pain and suffering, <u>including</u> the permanent effect of the injury, from the time of verdict for the time that plaintiff could be expected to live: | \$ _____ |
| Total: | | \$ _____ |

If you decide not to make an award as to any of the above items, you will insert the word “none” as to that item.

At least five jurors must agree on the answer to this question.

(3) If you have made any award for amounts intended to compensate the plaintiff for damages to be incurred in the future, then for each item for which an award is made, state the period of years over which such amounts are intended to provide compensation.

- | | | |
|-----|--|-------------|
| (a) | Medical expenses: | _____ years |
| (b) | Dental expenses: | _____ years |
| (c) | Loss of earnings: | _____ years |
| (d) | Impairment of earning ability: | _____ years |
| (e) | Custodial care: | _____ years |
| (f) | Rehabilitation services: | _____ years |
| (g) | Pain and suffering, including the future effect of the injury: | _____ years |

If you decide not to make an award as to any of the above items, you will insert the word “none” as to that item.

At least five jurors must agree on the answer to this question.

PJI 2:151A(2). Malpractice—Medical, Dental and Podiatric Malpractice—Damages—Itemized Verdict (Applicable in actions other than wrongful death actions commenced on or after July 26, 2003)

If you decide for the plaintiff on the question of liability, you may include in your verdict an

award for past and future pain and suffering. That award should include the amount, if any, for the injuries suffered and for future pain and suffering. If you award damages for future pain and suffering, that amount will be in one lump sum for the entire future period. In addition, you will state the number of years for which the award is made.

Based upon the evidence you may also include an award for each of the following items, separately divided into amounts intended to compensate the plaintiff for damages incurred to date and amounts intended to compensate the plaintiff for damages to be incurred in the future: [*state items which apply*: (medical, dental, podiatric expenses, loss of earnings, impairment of earning ability, custodial care, rehabilitation services)]. If you award amounts for damages in the future for [*state items which apply*: (medical, dental, podiatric expenses, loss of earnings, impairment of earning ability, custodial care, rehabilitation services)], you must state the date when each item of damage is to commence, the amount per year in current dollars that you are awarding, the growth rate applicable for the period of years for that item of damages and whether the loss or item of damage is permanent. [*Add where appropriate*: (You must also decide whether any of the plaintiff's needs for which these items of damages have been awarded will change and, if so, you must state the date when the change will begin and the amount that should be awarded for that item after that date.)] Your verdict will include answers to the following questions, which I will give to you. The findings you make will be used by me to calculate the future damages that are payable to the plaintiff over time.

Special Verdict Form PJI 2:151A(2) SV-II. Medical, Dental and Podiatric Malpractice—Damages—Itemized Verdict (for use in medical, dental or podiatric malpractice cases instituted on or after July 26, 2003)

If your verdict on liability is in favor of the plaintiff, answer the following:

- (1) State separately the amount awarded, if any, for the following

items of damages, from the time of occurrence up to the date of your verdict:

- (a) Medical, Dental, Podiatric expenses: \$ _____
- (b) Medical equipment: \$ _____
- (c) Custodial care: \$ _____
- (d) Rehabilitation services: \$ _____
- (e) Loss of earnings: \$ _____
- (f) Impairment of earning ability: \$ _____
- (g) Pain and suffering: \$ _____

If you decide not to make an award as to any of the above items, you will insert the word “none” as to that item.

At least five jurors must agree on the answer to this question.

- (2) State the amount awarded, if any, for:

future pain and suffering: \$ _____

- (a) State the number of years the future pain and suffering will continue _____

If you decide not to make an award as to any of the above items, you will insert the word “none” as to that item.

At least five jurors must agree on the answer to this question.

- (3) For each item of economic damages, if any, you find will be incurred in the future state the following:

- (a) Medical, dental, podiatric expenses:

- (i) the annual amount in current dollars: \$ _____
- (ii) the number of years during which such expenses will be incurred: _____
- (iii) the growth rate during those years: _____

- (b) Loss of earnings:

- (i) the annual amount in current dollars: \$_____
- (ii) the number of years during which such expenses will be incurred: _____
- (iii) the growth rate during those years: _____

(c) Impairment of earning ability:

- (i) the annual amount in current dollars: \$_____
- (ii) the number of years during which the impairment will continue: _____
- (iii) the growth rate during those years: _____

(d) Custodial care:

- (i) the annual amount in current dollars: \$_____
- (ii) the number of years during which custodial care will be required: _____
- (iii) the growth rate during those years: _____

(e) Rehabilitation services:

- (i) the annual amount in current dollars: \$_____
- (ii) the number of years during which those services will be required: _____
- (iii) the growth rate during those years: _____

If you decide not to make an award as to any of the above items, you will insert the word "none" as to that item.

At least five jurors must agree on the answer to this question.

[Where there is evidence that an item of future damages is to commence at some point in the future rather than at the time of the verdict, as in the case of an infant whose loss of earnings will commence at some future date, a question should be submitted to reflect that evidence. For example:]

(4) Loss of earnings:

- (i) the date of commencement of loss of earnings: _____
- (ii) the annual amount in current dollars: \$_____
- (iii) the growth rate applicable to the period of years from the present date to the date on which the loss will commence: _____
- (iv) the number of years the loss will continue: _____
- (v) the inflation or growth rate during those years: _____

[Where there is evidence that an item of future damages is permanent for the life of the plaintiff, the questions should contain a sub-part asking the jury if the item of damage is permanent. For example, if the evidence indicates that the plaintiff will require custodial care for the rest of his or her life, the question should read as follows:]

(5) Custodial care:

- (i) the annual amount in current dollars: \$_____
- (ii) the number of years during which custodial care will be required: _____
- (iii) the growth rate during those years: _____
- (iv) is this item of damage permanent for the life of the plaintiff? Yes_____ No_____

[Where there is evidence that an item of future damages will change at some date in the future, separate from the issue of the growth rate, the issue of whether a change will occur should be submitted to the jury. If the jury finds that a change will occur, that change must be submitted to the jury as a separate item of damages commencing at the time of change. For example, if the evidence indicates that the need for rehabilitation services will change when the plaintiff reaches the age of 60 and will then continue for the rest of the plaintiff's life, those additional questions must be submitted as follows:]

(6) Rehabilitation services to age 60:

- (i) the annual amount in current dollars: \$_____
- (ii) the number of years those services will be required: _____

(iii) the growth rate during those years: _____

(7) Rehabilitation services from age 60:

- (i) will the plaintiff's need for rehabilitation services change? Yes_____ No_____
- (ii) the annual amount in current dollars: \$_____
- (iii) the number of years those services will be required: _____
- (iv) the growth rate during those years: _____
- (v) is this item of damage permanent for the life of the plaintiff? Yes_____ No_____

Comment

Caveat 1: PJI 2:151A(1) is to be used in actions commenced before July 26, 2003. PJI 2:151A(2) is required by an amendment to CPLR 4111(d) that became effective on July 26, 2003, L 2003, ch 86, § 1, and applies to actions commenced on or after that date. It should be noted that the amendment's special itemization requirements for awards of future economic loss are not applicable to wrongful death actions based on medical, dental or podiatric malpractice.

Caveat 2: The foregoing charges, and the special verdict forms following them, cover the items of damage specifically listed in CPLR 4111(d) and others as well. The listing is for illustration purposes and must be reviewed and edited prior to use in particular cases. As discussed in the following Comment, the court must take care to omit items which are duplicative or which are not supported by evidence, see *Taylor v Henderson*, 175 AD2d 590, 573 NYS2d 793 (4th Dept 1991) (in action subject to CPLR 4111(f), error to include both future loss of earnings and future impairment of earning ability as items of damage without distinguishing between the two items). Special verdicts are mandatory in medical malpractice cases (verdict sheet must itemize each discrete theory of departure), *Steidel v Nassau*, 182 AD2d 809, 582 NYS2d 805 (2d Dept 1992).

CPLR 4111(d) requires that the verdict in a medical or dental malpractice action must specify the items of general and special damages upon which the award is based and the amount assigned each item, "including but not limited to medical expenses, dental expenses, loss of earnings, impairment of earning ability and pain and suffering." In addition, each item must be further divided into: (a) amounts intended to compensate for damages incurred prior to verdict; and (b) amounts intended to compensate for future damages. Where an award is made for future damages, the jury must specify the period of years over which

such amounts are intended to provide compensation. The jury may not make a reduction for present value and, therefore, evidence of present value should not be received.

In addition, in medical, dental and podiatric malpractice actions commenced on or after July 26, 2003 (other than those for wrongful death), CPLR 4111(d) now requires the jury to set forth, with respect to each item of future economic or pecuniary loss, the annual amount of the award in current dollars, the date of commencement of the item of damage, the period of years for which the compensation is applicable, the growth rate for that period of years and whether the loss or damage is permanent. In this class of actions, the court is required to instruct the jury that its findings with respect to future economic damages will be used by the court to determine the future damages that are payable to plaintiff over time.

For the enumerated actions commenced on or after July 26, 2003, CPLR 4111(d) states that where plaintiff's needs will change in the future for particular items, the change must be submitted to the jury as a separate item of damage commencing at the time of the change. Although the statute is silent on the issue, it would seem that where the question of a future change is a matter of dispute, that threshold question must itself be submitted to the jury.

The purpose of the itemization requirements is to facilitate reduction of the award(s) to account for collateral source payments and to provide the court with the factual information needed to enter a judgment under CPLR Article 50-A, entitled "Periodic Payment of Judgments in Medical and Dental Malpractice Actions." In a non-jury trial, CPLR 4213(b) imposes similar requirements upon the court.

CPLR 4213(b), which applies in non-jury trials, imposes on the court some of the same itemization requirements. However, the statute does not require the same degree of detail with respect to the court's itemized award for future economic loss.

CPLR 4111(d) refers to "loss of earnings" and "impairment of earning ability" as separate items of damage. Except in the most unusual circumstances, there is little, if any, distinction between the two items and, therefore, it is error to identify both as separate items of past damages or to identify both as separate items of future damages, see *Taylor v Henderson*, 175 AD2d 590, 573 NYS2d 793 (4th Dept 1991).

Although custodial care and rehabilitation services are not mentioned in CPLR 4111(d), they constitute special damages and should be specified in the interrogatories submitted under the statute. Pursuant to the provisions of CPLR 4545(a), the court must reduce the amounts awarded for "the cost of medical care, dental care, podiatric care, custodial care or rehabilitation services, loss of earnings or other economic loss, either past or future, by the amounts of collateral source payments for these damages, less the projected future costs to the

plaintiff of maintaining the collateral source benefits.” It is apparent, therefore, that custodial care and rehabilitation services require specification in the CPLR 4111(d) interrogatory. For further discussion of collateral source payments, see PJI 2:151B.

It is apparent that the Legislature used the term “pain and suffering” in CPLR 4111(d) and (f) to encompass all items of general damages, see *McDougald v Garber*, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 (1989); *Lamot v Gondek*, 163 AD2d 678, 558 NYS2d 284 (3d Dept 1990). An award for future pain and suffering is inclusive of damages for the permanent effect of the injury, measured from the date of verdict to the date plaintiff could be expected to live, *Booth v J.C. Penney Co., Inc.*, 169 AD2d 663, 565 NYS2d 77 (1st Dept 1991). It is improper to permit the jury to award damages for shock and fright as a category of damages separate from past pain and suffering, *Eaton v Comprehensive Care America, Inc.*, 233 AD2d 875, 649 NYS2d 293 (4th Dept 1996). To avoid confusion and duplication, the interrogatory as to past damages should be restricted to the time from the occurrence to the date of verdict, with the interrogatory as to future pain and suffering being addressed to the time from verdict to the end of plaintiff’s life expectancy, *Booth v J.C. Penney Co., Inc.*, *supra*.

The pattern charge is to be used with the appropriate general instructions as to damages, see PJI 2:277–2:325. Although CPLR 4111(d) requires the use of special verdicts, where a party objects to the use of such a verdict and it is not used, the objecting party may not successfully contend that the absence of a special verdict warrants a new trial, *Lucente v Nassau*, 106 AD2d 433, 482 NYS2d 528 (2d Dept 1984). Further, since the failure to use a special verdict will deprive the trial court of the information needed to enter a judgment under CPLR Article 50-A, an objection to the use of a special verdict may result in the waiver of the provisions of that Article.

Special verdict forms for use in conjunction with PJI 2:151A(1) 2:151A(2) are set forth after those charges. In preparing the special verdict form for use, the court should omit items which would be duplicative of other items or which are not supported by evidence. Signature lines should be included after each question, see Comment, PJI 1:95. The completed special verdict form should be marked as a Court exhibit.

**PJI 2:151B. Malpractice—Medical, Dental and Podiatric
Malpractice—Income Taxation of Lost
Earnings**

Plaintiff seeks to recover the earnings that (he, she) claims were lost as a result of the injuries and to recover for what (he, she) claims is a reduction in the ability to earn money in the future. In determining the amount, if any, plaintiff may re-

cover for lost earnings and for impaired earning ability, you must not deduct from the award any sum on account of federal, state, or local income taxes. I will decide whether any reduction on account of income taxes should be made.

Comment

CPLR 4546 provides that in all medical, dental and podiatric malpractice actions, evidence is admissible to establish the federal, state and local personal income taxes which plaintiff would have been obligated by law to pay. Such evidence should be received by the court outside the presence of the jury only after the jury has returned its verdict, and only if the verdict shows that the jury has made an award for lost past or future earnings covered by the statute, see CPLR 4546(1).

The court must reduce any award for lost earnings or impairment of earning ability by the amount of federal, state and local personal income taxes which the court finds with “reasonable certainty” that plaintiff would have been obligated by law to pay, CPLR 4546(3). The court is required to instruct the jury not to make any reductions on account of income tax and that the question of such reductions is a matter for the court to decide, see CPLR 4546(2).

The court must make a determination as to the amount of tax that plaintiff would have been required by law to pay, see CPLR 4546(3). Thus, the court must be concerned with the amount of plaintiff’s legal liability, as distinguished from plaintiff’s ability to make actual payments. It seems that, particularly with respect to calculations of what income taxes plaintiff would have been required to pay in the future, expert testimony is admissible, see PJI 1:90. The court is required to make its findings as to the amount of income taxes “with reasonable certainty.”

Care must be taken to distinguish medical and dental malpractice actions from wrongful death actions which are grounded in medical and dental malpractice. In wrongful death actions based on medical or dental malpractice, the evidence as to the amount of income taxes the decedent would have been obligated to pay is to be heard by the jury, EPTL 5-4.3(c)(i). Moreover, the jury is required only to “consider” the amount of income taxes; a reduction is not mandatory, see EPTL 5-4.3(c)(ii). Similar requirements are imposed upon the court in the event that the wrongful death action is tried without a jury, EPTL 5-4.3(c)(iii). However, the income tax issue should not be given to the jury unless evidence has been introduced which would support a finding as to the amount of decedent’s hypothetical tax liability. Where the tax issue is given to the jury in wrongful death actions subject to EPTL 5-4.3, the following charge is suggested:

PJI 2:151B.1

During the trial evidence has been received as to the amount of federal, state and local income taxes AB, the decedent, would have been legally required to pay on the income AB would have received had AB survived. If you find that it is reasonably certain that AB would have paid a given amount in income taxes, you must consider that amount in deciding how much money would have been available to AB for the support of (his, her) family had AB survived. If you conclude that you cannot make any finding with reasonable certainty as to the amount of AB's tax liability, do not consider the issue of income taxation any further.

The above charge should be given after the jury has been instructed with respect to recoverable damages in wrongful death actions, see PJI 2:320. In the special verdict, the jury should be asked whether it has reduced the award for lost earnings on account of income taxes and, if so, the amount of such reduction, see PJI 1:26.

A complication is presented by cases in which the decedent, as the result of an act of medical or dental malpractice, incurred a loss of earnings as a result of incapacitation prior to death. In such situations, the decedent's personal representative may pursue, in a single litigation, causes of action for medical or dental malpractice for recovery of lost earnings incurred by decedent prior to death, see EPTL 11-3.2, 11-3.3, and a wrongful death action. Where both survival and wrongful death claims are asserted, the jury should be carefully instructed as to which claims the jury must and must not consider taxes. The following pattern charge is suggested:

PJI 2:151B.2

Plaintiff seeks recovery for the loss of earnings that AB, the decedent, incurred prior to (his, her) death, as well as for the monetary losses to be sustained as a result of AB's death.

In deciding the amount, if any, plaintiff may recover for earnings that AB lost before (his, her) death, you must not deduct from the award any sums on account of federal, state and local income taxes. The law requires me to decide whether any such reduction is warranted.

The law requires you to consider income taxation with respect to any award that you may make for the monetary losses sustained as the result of AB's death. This is the reason why during the trial evidence was received as to the amount of federal, state and local income taxes AB would have been legally required to pay on the income AB would have received had (he, she) not died. If you find that it is reasonably certain that AB would have been required to pay a given amount in income taxes on the income that (he, she) would have earned if (he, she) had survived, then you must consider that amount of income taxes in determining how much money would have been available to AB for the support of (his, her) family. If you conclude that you cannot make any finding with reasonable certainty as to the amount of decedent's tax liability, then do not consider the issue of income taxation any further.

The provisions of CPLR 4546 and EPTL 5-4.3 apply where the conduct complained of is medical or dental malpractice; CPLR 4546 also applies to podiatric malpractice. Neither statute applies where the wrongful conduct constitutes other negligence, whether defendants include medical or dental personnel or others. As to the distinction between malpractice and negligence, see *Bleiler v Bodnar*, 65 NY2d 65, 489 NYS2d 885, 479 NE2d 230 (1985); *Payette v Rockefeller University*, 220 AD2d 69, 643 NYS2d 79 (1st Dept 1996); *Rice v Vandenebossche*, 185 AD2d 336, 586 NYS2d 303 (2d Dept 1992); PJI 2:150. The jury should be charged as to income tax principles applicable to the different claims. This problem could be mitigated if the trial is bifurcated since the court will be able to limit its instructions on damage questions in light of the liability verdict. However, a split trial may not entirely avoid the problem since it is possible that the jury might find for plaintiff on both malpractice and negligence claims. Since plaintiff would be entitled to only a single recovery, that recovery would be subject to CPLR 4546 and/or EPTL 5-4.3 and therefore the Court should apply the statutory income tax principles.

**PJI 2:151C. Malpractice—Medical Malpractice—
Fraudulent Concealment of Act of
Malpractice**

Plaintiff seeks to recover damages which he claims he sustained as a result of Dr. AB's intentional concealment of his own malpractice.

A doctor who commits an act of malpractice is

not legally obligated to disclose the malpractice to his patient. However, the law does not permit a doctor to commit a fraud by which he conceals his own malpractice if the concealment causes the patient to sustain further injury.

A doctor commits a fraud if he knowingly makes a false statement of fact to the patient with the intention of deceiving him, and the patient justifiably believes and relies on the false statement and suffers injury as a result.

In order to recover on this claim of fraud, plaintiff has the burden of proving, by a fair preponderance of the credible evidence, that Dr. AB committed malpractice when he [*State alleged malpractice, such as:*] (severed the nerve in plaintiff's shoulder).

In addition, plaintiff has the burden of establishing, by clear and convincing evidence:

First, that Dr. AB knew or should have known that he had committed malpractice;

Second, that Dr. AB thereafter told plaintiff [*State alleged misrepresentation(s), such as:*] (that the pain was unrelated to the surgery; that a course of physical therapy would alleviate the discomfort);

Third, that the statement was false;

Fourth, that Dr. AB made the statement with intent to conceal his malpractice from plaintiff;

Fifth, that plaintiff believed and reasonably relied upon Dr. AB's statement and was induced by it to [*State action taken or omitted, such as:*] (forego seeking other treatment; undergo useless physical therapy); and

Sixth, that because he acted on this statement, plaintiff was deprived of the opportunity for (cure, correction, alleviation) of the condition caused by the malpractice of Dr. AB.

The statement claimed to have been made by Dr. AB must have been a statement of fact rather than an expression of opinion as to (the nature of the condition; the proper course of treatment). An error of professional judgment does not amount to fraud.

In order for plaintiff to recover you must find that at the time the claimed statement was made, Dr. AB knew it to be false, or that he pretended to know that it was true when he did not know whether it was true or false.

If you find that the condition caused by Dr. AB's claimed malpractice could not have been cured, corrected or alleviated, then plaintiff suffered no injury as the result of Dr. AB's claimed false statements.

If plaintiff has failed to prove any one of the elements I have mentioned then he is not entitled to recover on this claim of fraud. However, if you find that plaintiff has met his burden of proof on each of these elements, then he is entitled to an award of damages which will fully and fairly compensate him for such additional injury (and other damages, if any) suffered as the result of Dr. AB's fraud.

Comment

Based on *Simcusi v Saeli*, 44 NY2d 442, 406 NYS2d 259, 377 NE2d 713 (1978); *Harkin v Culleton*, 156 AD2d 19, 554 NYS2d 478 (1st Dept 1990); PJI 3:20 (re: fraud); see *Owen v Mackinnon*, 6 AD3d 684, 775 NYS2d 565 (2d Dept 2004); *Howe v Ampil*, 185 AD2d 520, 585 NYS2d 869 (3d Dept 1992); *Coopersmith v Gold*, 172 AD2d 982, 568 NYS2d 250 (3d Dept 1991). *Simcusi* holds that the intentional concealment of an act of malpractice by the defendant doctor gives rise to a cause of action independent of a claim for malpractice, provided the plaintiff can prove:

1. defendant knew or had reason to know of his malpractice and the consequent injury to the patient;
2. defendant thereafter made a knowingly false, material factual misrepresentation to the patient with respect to the subject matter of the malpractice and the therapy appropriate to its cure, on which the patient justifiably relied;

3. The elements of the tort of deceit, see PJI 3:20, which must be established by clear and convincing evidence. For a charge on “clear and convincing” evidence, see PJI 1:64; see also CPLR 3016(b); *Lanzi v Brooks*, 43 NY2d 778, 402 NYS2d 384, 373 NE2d 278 (1977) (holding that CPLR 3016(b) “requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of” insofar as it is possible to do so);

4. damages, provided that the condition caused by the malpractice could have been corrected or alleviated. If there is no available efficacious cure from which the plaintiff was diverted by deceit, plaintiff has not been damaged, see *Ross v Community General Hosp. of Sullivan County*, 150 AD2d 838, 541 NYS2d 246 (3d Dept 1989) (though defendants may have concealed their earlier malpractice in failing to diagnose decedent’s cancerous condition, decedent was aware of the condition and receiving treatment at the time of defendant’s concealment; thus such failure to disclose did not deprive decedent of opportunity for cure); see also *LaBrake v Enzien*, 167 AD2d 709, 562 NYS2d 1009 (3d Dept 1990) (no fraud claim against attorney for concealment of malpractice where damages for fraud were the same as the damages for the malpractice).

A special verdict, as to which, see PJI 1:26, seems particularly appropriate in this type of case in light of the series of dependent findings that must be made by the jury.

Although this charge and comment is grouped under the general heading of medical malpractice, it appears clear that the claim for damages for fraud in concealing of the act of malpractice is an “action based upon fraud,” see CPLR 213(8), and therefore not governed by special rules as to pleading and statute of limitations applicable to true medical malpractice actions; see *Kramer v New York*, 157 AD2d 404, 556 NYS2d 287 (1st Dept 1990) (where fraudulent acts by physician employed by a municipal hospital are separate from, and occur after, the claimed malpractice, plaintiff’s cause of action against the physician based on fraud held not subject to notice of claim provisions of the General Municipal Law).

PJI 2:151D. Residential Health Care Facilities—Public Health Law § 2801-d

Public Health Law § 2801-d permits the patient of a residential health care facility to recover for any injury suffered as the result of a deprivation of a right or benefit that has been established by the terms of any (contract, state or federal statute, code, rule, or regulation) established for his or her well-being. In this case, AB contends that CD deprived (him, her) of certain specified rights or benefits and that AB suffered injury as a result of (that, those) deprivation(s).

The rights or benefits that AB claims (he, she) was deprived of are set forth in [describe the relevant contracts, statutes, codes, rules, or regulations]. I will now read these provisions to you: [state the relevant text of each applicable contractual term, statute, code, rule, and/or regulation].

To prevail on this Public Health Law claim, AB has the burden to establish, by a preponderance of the evidence, that CD deprived (him, her) of at least one of the rights or benefits I just described for you, and that AB suffered injury as a result of (that, those) deprivation(s). If you find that AB did not establish, by a preponderance of the evidence, that CD deprived (him, her) of any of the rights or benefits I described for you, or that AB did not suffer an injury as a result of (that, those) deprivation(s), then you will find for CD on this claim. If you find that AB did establish, by a preponderance of the evidence, that CD deprived AB of at least one of the rights or benefits I described for you, and that AB suffered injury as a result of (that, those) deprivation(s), [where CD has asserted the affirmative defense that it exercised all care reasonably necessary to prevent and limit AB's deprivation and injury: then you will find for AB on that issue] [where no affirmative defense is asserted: then you will find for AB on that claim].

[Add the following where CD has asserted the affirmative defense that it exercised all care reasonably necessary to prevent and limit the deprivation(s) and injury(ies) AB has established: Next, you must consider whether CD has established a defense to AB's claim by demonstrating that it exercised all care reasonably necessary to prevent and limit the deprivation(s) and injury(ies). CD has the burden to establish, by a preponderance of the evidence, that it exercised all care reasonably necessary to prevent and limit the deprivation(s) and injury(ies). If you find that CD did establish, by a preponderance of the evidence, that it exercised all care reasonably necessary to prevent and limit the deprivation(s) and injury(ies), then you will find for CD on this

defense. However, if you find that CD did not establish, by a preponderance of the evidence, that it exercised all care reasonably necessary to prevent and limit the deprivation(s) and injury(ies), then you will find for AB on this claim.]

Comment

Caveat 1: In the absence of any appellate case law specifically addressing the nature of the element of causation, the charge tracks the precise language of Public Health Law § 2801-d, directing the jury to find whether AB suffered injury “as a result of” the deprivation of a right or benefit. Some reported cases have assumed, without deciding, that causation is akin to proximate cause or substantial factor, see *Nieves v Clove Lakes Health Care and Rehabilitation, Inc.*, 179 AD3d 938, 118 NYS3d 113 (2d Dept 2020); *Gold v Park Ave. Extended Care Center Corp.*, 90 AD3d 833, 834, 935 NYS2d 597 (2d Dept 2011); *Polanco v Kings Harbor Health Servs., LLC*, 61 Misc 3d 1216(A), 110 NYS3d 899 (Sup Ct, Bronx County 2018); *Eskenazi v Long Beach Med. Ctr.*, 2017 NY Slip Op 31287(U) (Sup Ct, NY County 2017).

Caveat 2: In light of the developing caselaw on the nature and measure of damages under the statute, the charge does not include a specific instruction on damages, compare *Hauser v Fort Hudson Nursing Center, Inc.*, 202 AD3d 45, 161 NYS3d 374 (3d Dept 2021) with *Smith v Northern Manhattan Nursing Home, Inc.*, 195 AD3d 508, 145 NYS3d 347 (1st Dept 2021).

Based on Public Health Law § 2801-d; *Cornell v Monroe*, 158 AD3d 1151, 70 NYS3d 646 (4th Dept 2018); *Novick v South Nassau Communities Hosp.*, 136 AD3d 999, 1001, 26 NYS3d 182 (2d Dept 2016); *Zeides v Hebrew Home for the Aged at Riverdale, Inc.*, 300 AD2d 178, 753 NYS2d 450 (1st Dept 2002).

A. In General

Public Health Law § 2801-d provides the patient of a residential health care facility with a cause of action for injuries suffered as a result of the deprivation of certain rights or benefits. Liability is not based on a deviation from accepted standards of medical practice or a breach of a duty of care, see *Schwartz v Partridge*, 179 AD3d 963, 117 NYS3d 300 (2d Dept 2020); *Cornell v Monroe*, 158 AD3d 1151, 70 NYS3d 646 (4th Dept 2018); *Novick v South Nassau Communities Hosp.*, 136 AD3d 999, 1001, 26 NYS3d 182 (2d Dept 2016); *Zeides v Hebrew Home for the Aged at Riverdale, Inc.*, 300 AD2d 178, 753 NYS2d 450 (1st Dept 2002). Rather, liability under the statute contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule, *Schwartz v Partridge*, *supra*; *Cornell v Monroe*, *supra*; *Zeides v Hebrew Home for the Aged at Riverdale, Inc.*, *supra*. Specifically, the “rights and benefits” protected by the statute are

defined as “any right or benefit created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation,” Public Health Law § 2801-d(1). A facility is excused from compliance with any such rule or regulation only where it has been expressly authorized to do so by the appropriate governmental authority, Public Health Law § 2801-d(1). It is an affirmative defense that the facility “exercised all care reasonably necessary to prevent and limit the deprivation and injury for which liability is asserted,” Public Health Law § 2801-d(1).

A “residential health care facility” means “a nursing home or a facility providing health-related service,” Public Health Law § 2801(3); see *Cunningham v Mary Agnes Manor Management, L.L.C.*, 188 AD3d 1560, 136 NYS3d 584 (4th Dept 2020) (allegations that defendants provided “health-related services,” including specialized dementia care, dietary supervision, hygiene and on-site medical and psychological care was sufficient to overcome defendants’ claim to be assisted living facility not subject to Public Health Law § 2801-d); see also *Broderick v Amber Court Assisted Living*, 200 AD3d 840, 155 NYS3d 340 (2d Dept 2021) (allegations that facility provided health-related services including management of medications, assistance with dressing and eating, and visits by nursing staff and physicians insufficient to state claim that assisted living facility was de facto residential health care facility).

Among the rights and benefits that may form the basis of a Public Health Law § 2801-d cause of action are those enumerated in Public Health Law § 2803-c, which requires all nursing homes and facilities providing health-related services to adopt, make public, and distribute to patients a “statement of the rights and responsibilities of the patients who are receiving care in such facilities,” Public Health Law § 2803-c (2), (4). Such a statement of rights and responsibilities shall include, among other things, protections for rights of privacy, private communications, civil and religious liberties, financial care, basic mental health care, courteous treatment, freedom from mental and physical abuse, and other rights specifically enumerated in Public Health Law § 2803-c(3); see 10 NYCRR 415.12.

A patient’s claim that a nursing home violated 10 NYCRR 415.12(c)(1) and (i)(2) by failing to prevent pressure sores and failing to maintain adequate nutrition states a cognizable cause of action under Public Health Law §§ 2801-d and 2803-c(3)(e), *Zeides v Hebrew Home for the Aged at Riverdale, Inc.*, 300 AD2d 178, 753 NYS2d 450 (1st Dept 2002); see *Pichardo v St. Barnabas Nursing Home, Inc.*, 134 AD3d 421, 21 NYS3d 42 (1st Dept 2015) (issue of fact as to defendant’s alleged failure to prevent and to halt progression of pressure ulcers).

Since a Public Health Law § 2801-d cause of action is separate and distinct from causes of action predicated upon negligence or malpractice, a plaintiff is entitled to assert a Public Health Law § 2801-d cause of action in addition to any traditional tort cause of action, *Kash v Jewish Home and Infirmary of Rochester, N.Y., Inc.*, 61 AD3d 146, 873

NYS2d 819 (4th Dept 2009) (rejecting holding in *Doe v Westfall Health Care Center, Inc.*, 303 AD2d 102, 755 NYS2d 769 (4th Dept 2002)); *Leclaire v Fort Hudson Nursing Home, Inc.*, 52 AD3d 1101, 861 NYS2d 436 (3d Dept 2008); see *Sullivan v Our Lady of Consolation Geriatric Care Center*, 60 AD3d 663, 875 NYS2d 116 (2d Dept 2009) (negligence and Public Health Law § 2801-d claims should both have been submitted to jury, since causes of action are separate, distinct and involve different considerations).

A patient or his or her legal representative may not waive, either orally or in writing, the right to commence an action pursuant to Public Health Law § 2801-d, or the right to a jury trial in such action, Public Health Law § 2801-d(7), (8). Nevertheless, an arbitration clause in an applicable agreement with be enforced where the defendant residential healthcare facility is engaged in interstate commerce, *Minogue v Malhan*, 178 AD3d 447, 114 NYS3d 62 (1st Dept 2019); *Friedman v Hebrew Home for the Aged at Riverdale*, 131 AD3d 421, 13 NYS3d 896 (1st Dept 2015).

Class actions are expressly permitted under the statute, Public Health Law § 2801-d(4); see *Fleming v Barnwell Nursing Home and Health Facilities, Inc.*, 309 AD2d 1132, 766 NYS2d 241 (3d Dept 2003) (granting class certification in action claiming patients received inadequate heat and inedible food).

Since the cause of action is based on a liability created by statute rather than malpractice, its timeliness is governed by a three-year statute of limitations, CPLR 214(2); see *Moore v St. James Health Care Center, LLC*, 141 AD3d 701, 35 NYS3d 464 (2d Dept 2016); *Leclaire v Fort Hudson Nursing Home, Inc.*, 52 AD3d 1101, 861 NYS2d 436 (3d Dept 2008); *Zeides v Hebrew Home for the Aged at Riverdale, Inc.*, 300 AD2d 178, 753 NYS2d 450 (1st Dept 2002).

B. Damages

A successful plaintiff is entitled to an award of compensatory damages, which shall in no event be less than twenty-five percent of the daily per-patient rate of payment established for the residential health care facility pursuant to Public Health Law § 2807 or, in the case of a facility not having such an established rate, the average daily total charges per patient for said facility, for each day that such injury exists, Public Health Law § 2801-d(2). For purposes of Public Health Law § 2801-d, “‘injury’ shall include, but not be limited to, physical harm to a patient; emotional harm to a patient; death of a patient; and financial loss to a patient,” Public Health Law § 2801-d(1). The Third Department holds that portion of the statute providing for minimum daily damages calculated for each day that the patient was deprived of a right or benefit applies only to non-death injuries, which can be calculated for each day that the patient was deprived of a right or benefit, *Hauser v Fort Hudson Nursing Center, Inc.*, 202 AD3d 45, 161 NYS3d 374 (3d Dept 2021).

However, where the plaintiff's claimed injury is death, that minimum does not apply, *Hauser v Fort Hudson Nursing Center, Inc.*, 202 AD3d 45, 161 NYS3d 374 (3d Dept 2021). Where the claimed injury is death, compensatory damages shall be assessed in an amount sufficient to compensate the patient for the loss of life, *id.* In recognizing that Public Health Law § 2801-d(2) permits recovery of compensatory damages for the injury of death, the Third Department analogized such loss-of-life damages to loss-of-life damages recoverable in federal court for civil rights violations under 42 USC § 1983, *id.* In those federal cases cited in *Hauser*, loss-of-life damages were permitted not only to compensate victims for the loss of enjoyment of life but to deter unconstitutional conduct of government officials that results in death, see *Collado v New York*, 396 F Supp 3d 265 (SDNY 2019); *Banks ex rel. Banks v Yokemick*, 177 F Supp 2d 239 (SDNY 2001); *Roman v Richmond*, 570 F Supp 1554 (NDCal 1983) (characterizing loss-of-life damages as deterrent damages). In *Collado v New York*, *supra*, the jury was instructed, among other things, that the plaintiff may recover damages on behalf of the decedent “in such sum as you find will fairly and justly compensate him for his loss of enjoyment of life he would have lived”, and that such damages were independent of, and may be in addition to, damages awarded for decedent's pain and suffering experienced before death.

The First Department has stated that language in Public Health Law § 2801-d(4), providing that the remedies contained therein “are in addition to and cumulative with” other remedies, authorizes separate causes of action but not a separate category of damages, *Smith v Northern Manhattan Nursing Home, Inc.*, 195 AD3d 508, 145 NYS3d 347 (1st Dept 2021). Thus, in the First Department, a plaintiff asserting pain and suffering resulting from a violation of Public Health Law § 2801-d cause of action must prove that the patient experienced some level of cognitive awareness following the injury, *Smith v Northern Manhattan Nursing Home, Inc.*, *supra*. Where there is a disputed issue about the level of plaintiff's awareness, the court must instruct the jury that conscious pain and suffering means pain and suffering of which there was some level of awareness by plaintiff or decedent, see *Smith v Northern Manhattan Nursing Home, Inc.*, *supra*; see PJI 2:280.

In contrast to the First Department's approach, in *Hauser v Fort Hudson Nursing Center, Inc.*, 202 AD3d 45, 161 NYS3d 374 (3d Dept 2021), the Third Department held that a damages award for pain and suffering for violation of Public Health Law § 2801-d does not require proof that a decedent experienced some cognitive awareness following injury. Both the First and Third Department recognize that double recovery is not permitted for a single injury, even if a patient can prove separate causes of action that result in the same injury, *id.*; *Smith v Northern Manhattan Nursing Home, Inc.*, 195 AD3d 508, 145 NYS3d 347 (1st Dept 2021).

C. Punitive Damages

Where the deprivation of a right or benefit is found to have been

willful or in reckless disregard of the lawful rights of the patient, punitive damages may be awarded, Public Health Law § 2801-d(2); *Hairston v Liberty Behavioral Management Corp.*, 138 AD3d 467, 29 NYS3d 310 (1st Dept 2016) (jury could reasonably find that defendant's failure to provide for decedent's safety at time when he was disoriented and hallucinating warrants award of punitive damages); see *Valensi v Park Avenue Operating Co., LLC*, 169 AD3d 960, 94 NYS3d 311 (2d Dept 2019) (punitive damages not warranted where 84-year old decedent was assessed as high risk for falls and various fall prevention interventions were implemented by facility).

Although Public Health Law § 2801-d(2) authorizes the imposition of punitive damages, the statute does not constitute an express waiver of sovereign immunity, *Cornell v Monroe*, 187 AD3d 1566, 132 NYS3d 213 (4th Dept 2020). Accordingly, punitive damages are unavailable in a Public Health Law § 2801-d action against the state or its political subdivisions including municipalities, *id.*

D. Attorney's Fees

The statute authorizes the court in its discretion to award attorney's fees to a successful plaintiff, Public Health Law § 2801-d(6); *Kash v Jewish Home and Infirmary of Rochester, N.Y., Inc.*, 61 AD3d 146, 873 NYS2d 819 (4th Dept 2009).

E. Other Remedies

In addition to seeking damages, a patient asserting a Public Health Law § 2801-d cause of action may also seek "any other type of relief, including injunctive and declaratory relief, permitted by law," Public Health Law § 2801-d(3).

F. Retaliatory Discrimination

It is unlawful to discriminate against a patient or patient's representative for bringing an action pursuant to Public Health Law § 2801-d, or for testifying or giving other evidence for purposes of such action, Public Health Law § 2801-d(10)(a). A patient subjected to such discrimination may file a complaint with the Commissioner of the Department of Public Health, who has the power to conduct an investigation, hold a hearing if the complaint is deemed meritorious, and "grant whatever relief is necessary and appropriate to remedy the violation, including, but not limited to readmittance of patients wrongfully discharged," Public Health Law § 2801-d(10)(b). Administrative action taken by the Commissioner of the Department of Public Health does not preclude "any private civil action brought by an injured party," Public Health Law § 2801-d(10)(d).

G. Nursing Home Record-keeping and Privileges

Nursing home facilities do not come within the definition of the term "general hospital" set forth in Public Health Law § 2801(10) and

thus are not required to collect and maintain information pursuant to Public Health Law §§ 2805-j and 2805-l, *Matter of Subpoena Duces Tecum to Jane Doe, Esq.*, 293 AD2d 231, 742 NYS2d 465 (4th Dept 2002), *aff'd as mod on other grounds*, 99 NY2d 434, 757 NYS2d 507, 787 NE2d 618 (2003). Thus, documents generated by the quality assurance committee of a nursing home are not afforded the privilege set forth in Public Health Law § 2805-m, *Matter of Subpoena Duces Tecum to Jane Doe, Esq.*, *supra*. However, Education Law § 6527(3), which shields certain medical review committees for actions taken within the scope of their functions, applies to nursing home facilities, *id*. For a discussion of the privilege afforded to documents under the Federal Nursing Home Reform Act, 42 USC § 1396 *et seq.*, see *Matter of Subpoena Duces Tecum to Jane Doe, Esq.*, *supra*.

PJI 2:152. Malpractice—Attorney

This is a claim for legal malpractice. Legal malpractice is negligence by an attorney.

As you have heard, the plaintiff AB claims that (he, she, it) retained the defendant CD to represent (him, her, it) in [state matter for which CD was retained] and that CD performed that representation in a negligent manner in that [state AB's claims]. CD claims [state CD's contentions].

An attorney who undertakes to represent a client is expected to exercise a reasonable degree of skill and be familiar with the applicable rules of practice and the settled principles of law and is expected to exercise reasonable care in representing the client. Reasonable care means that degree of care commonly exercised by an ordinary member of the legal profession. However, an attorney is not a guarantor of a favorable result and (he, she) is not liable simply because the client did not achieve the best possible result or the result the client sought. [State where appropriate: Similarly, if an attorney explains to the client the nature of the risks involved in a certain course of action and the client elects to follow that course, the attorney is not responsible for the consequences as long as the attorney pursued the course using a reasonable degree of skill and care.] [State where appropriate: Additionally, as long as an attorney acts in a manner that is reasonable and consistent

with the law as it existed at the time of the representation, (he, she) is not liable for failing to advise the client or take action based on a novel or questionable legal theory pertaining to the case.]

To establish CD's liability for malpractice, AB must prove, by a preponderance of the evidence, that, in representing AB in [*state matter in issue*] CD failed to exercise that degree of care, skill and diligence commonly exercised by a member of the legal profession in that [*set forth bases of claimed malpractice*]. In determining the degree of skill commonly used by an ordinary member of the legal profession in CD's situation, you should consider all of the evidence you have heard [*state where appropriate: including the testimony of the expert witnesses*]. Once you have determined the degree of skill commonly used by an ordinary member of the legal profession in CD's situation, you should go on to decide whether CD departed from that standard in [*state acts and omissions alleged to constitute defendant's malpractice*]. AB has the burden to prove, by a preponderance of the evidence, that CD did not, in fact, exercise that degree of skill, care and diligence commonly used by an ordinary member of the legal profession in the situation.

If you decide that AB has not met this burden of proof, then you will find that CD was not negligent and will proceed no further. On the other hand, if you decide that AB has proven that CD did not exercise the required degree of skill, care and diligence, you will find that CD was negligent and you must go on to consider whether AB has proven, by a preponderance of the evidence, that (he, she, it) sustained losses as a result of CD's negligence, that is, but for CD's negligence, AB would not have [*state as appropriate: lost the case, sustained a loss*].

[Where the alleged negligence arose in the context of representation in litigation and an issue is raised as to whether the unfavorable result would not have occurred but for defendant attorney's malpractice, add the

following: In deciding whether AB has proven that (he, she, it) would not have lost the case if CD had not been negligent, you must, in effect, decide a lawsuit within a lawsuit; that is, for AB to hold CD liable in this action, AB must prove, by a preponderance of the evidence presented in this case, that (he, she, it) would have been successful in (his, her, its) lawsuit with EF [identify AB's adversary in the underlying action] if CD had not [state claimed acts and omissions alleged to constitute defendant's malpractice]. I am now going to give you the law you must consider in deciding whether AB would have succeeded in the lawsuit between (him, her, it) and EF. [Insert rules that would govern burden of proof and substantive law in the action with EF].

If you find that AB has proven, by a preponderance of the evidence, that (he, she, it) would not have (lost the case, sustained loss) if CD had not been negligent, you will find for AB [add where appropriate: and report your findings to the court].

[Where there is an issue of the comparative fault of plaintiff and defendant, an appropriate charge and special verdict question should be given, see PJI 2:36, et seq.].

Comment

Caveat: The charge incorporates the principle that a plaintiff alleging legal malpractice must prove that, “but for” defendant attorney’s negligence, plaintiff would have obtained a more favorable result in the underlying litigation or would not have sustained the claimed loss in the underlying transaction, *Waggoner v Caruso*, 14 NY3d 874, 903 NYS2d 333, 929 NE2d 396 (2010); *Leder v Spiegel*, 9 NY3d 836, 840 NYS2d 888, 872 NE2d 1194 (2007), cert den sub nom. *Spiegel v Rowland*, 552 US 1257, 128 SCt 1696 (2008); *AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 834 NYS2d 705, 866 NE2d 1033 (2007); *Rudolf v Shayne*, *Dachs*, *Stanisci*, *Corker & Sauer*, 8 NY3d 438, 835 NYS2d 534, 867 NE2d 385 (2007); *Davis v Klein*, 88 NY2d 1008, 648 NYS2d 871, 671 NE2d 1268 (1996); *Carmel v Lunney*, 70 NY2d 169, 518 NYS2d 605, 511 NE2d 1126 (1987); *Vooth v McEachen*, 181 NY 28, 73 NE 488 (1905); *Mid-Hudson Valley Federal Credit Union v Quartararo & Lois, PLLC*, 155 AD3d 1218, 64 NYS3d 389 (3d Dept 2017), *aff’d*, 31 NY3d 1090, 78 NYS3d 703, 103 NE3d 774 (2018); *Cosmetics Plus Group, Ltd. v Traub*, 105 AD3d 134, 960 NYS2d 388 (1st Dept 2013) (citing PJI); *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman &*

Dicker, 56 AD3d 1, 865 NYS2d 14 (1st Dept 2008); Becovic v Poisson & Hackett, 49 AD3d 435, 854 NYS2d 63 (1st Dept 2008); Levine v Lacher & Lovell-Taylor, 256 AD2d 147, 681 NYS2d 503 (1st Dept 1998). It should be noted, however, that in Barnett v Schwartz, 47 AD3d 197, 848 NYS2d 663 (2d Dept 2007), the Second Department held that the “but for” causation standard does not require a greater or more direct degree of causation than the “proximate cause” standard set forth in PJI 2:70 and, further, that the standard does not require a showing that defendant’s malpractice was the sole proximate cause rather than a substantial cause of plaintiff’s loss. For a further discussion of the various courts’ treatment of the causation issue, see Comment, V. Causation and VI. Client’s Actions Affecting Attorney’s Malpractice Liability.

Based on Darby & Darby, P.C. v VSI Intern., Inc., 95 NY2d 308, 716 NYS2d 378, 739 NE2d 744 (2000); Prudential Ins. Co. of America v Dewey Ballantine, Bushby, Palmer & Wood, 170 AD2d 108, 573 NYS2d 981 (1st Dept 1991), *aff’d*, 80 NY2d 377, 590 NYS2d 831, 605 NE2d 318 (1992); Cicorelli v Capobianco, 89 AD2d 842, 453 NYS2d 21 (2d Dept 1982), *aff’d* for reasons in AD opinion, 59 NY2d 626, 463 NYS2d 195, 449 NE2d 1273 (1983); Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo, 259 AD2d 282, 686 NYS2d 404 (1st Dept 1999); Caiati v Kimel Funding Corp., 154 AD2d 639, 546 NYS2d 877 (2d Dept 1989); Fidler v Sullivan, 93 AD2d 964, 463 NYS2d 279 (3d Dept 1983).

I. In General

An action for legal malpractice requires proof of three essential elements: (1) the attorney’s failure to exercise that degree of care, skill and diligence commonly possessed by a member of the legal profession; (2) causation; and (3) actual damages, Prudential Ins. Co. of America v Dewey Ballantine, Bushby, Palmer & Wood, 170 AD2d 108, 573 NYS2d 981 (1st Dept 1991), *aff’d*, 80 NY2d 377, 590 NYS2d 831, 605 NE2d 318 (1992); McGlynn v Burns & Harris, 170 AD3d 1162, 94 NYS3d 884 (2d Dept 2019); Maroulis v Friedman, 153 AD3d 1250, 60 NYS3d 468 (2d Dept 2017); Gray v Wallman & Kramer, 184 AD2d 409, 585 NYS2d 46 (1st Dept 1992); see Dombrowski v Bulson, 19 NY3d 347, 948 NYS2d 208, 971 NE2d 338 (2012); McCoy v Feinman, 99 NY2d 295, 755 NYS2d 693, 785 NE2d 714 (2002); Arnav Industries, Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 727 NYS2d 688, 751 NE2d 936 (2001) (ovrld on other grounds, Oakes v Patel, 20 NY3d 633, 965 NYS2d 752, 988 NE2d 488 (2013)); Mid-Hudson Valley Federal Credit Union v Quartararo & Lois, PLLC, 155 AD3d 1218, 64 NYS3d 389 (3d Dept 2017), *aff’d*, 31 NY3d 1090, 78 NYS3d 703, 103 NE3d 774 (2018). Additionally, plaintiff must ordinarily establish the existence of an attorney-client relationship, Moran v Hurst, 32 AD3d 909, 822 NYS2d 564 (2d Dept 2006); Volpe v Canfield, 237 AD2d 282, 654 NYS2d 160 (2d Dept 1997); C.K. Industries Corp. v C.M. Industries Corp., 213 AD2d 846, 623 NYS2d 410 (3d Dept 1995); see Rigby v David Share Associates, 8 AD3d 1006, 778 NYS2d 578 (4th Dept 2004). Each of these elements is discussed in detail below.

II. Attorney-Client Relationship

A. In General

An attorney-client relationship may arise by words and actions of the parties, *Moran v Hurst*, 32 AD3d 909, 822 NYS2d 564 (2d Dept 2006); *C.K. Industries Corp. v C.M. Industries Corp.*, 213 AD2d 846, 623 NYS2d 410 (3d Dept 1995). Where there is an explicit undertaking to perform a specific task, an attorney-client relationship is established, *Wei Cheng Chang v Pi*, 288 AD2d 378, 733 NYS2d 471 (2d Dept 2001); *Volpe v Canfield*, 237 AD2d 282, 654 NYS2d 160 (2d Dept 1997); *Sucese v Kirsch*, 199 AD2d 718, 606 NYS2d 60 (3d Dept 1993). Since the death of a client automatically terminates the attorney-client relationship, an attorney who represented the decedent in an action commenced before death has neither the obligation nor the authority to probate decedent's will or have decedent's representative substituted in the action, *Velasquez v Katz*, 42 AD3d 566, 840 NYS2d 410 (2d Dept 2007); see *Davis v Cohen & Gresser, LLP*, 160 AD3d 484, 74 NYS3d 534 (1st Dept 2018).

An individual's unilateral beliefs and actions, standing alone, do not make him or her a client, *Moran v Hurst*, 32 AD3d 909, 822 NYS2d 564 (2d Dept 2006); *Hansen v Caffry*, 280 AD2d 704, 720 NYS2d 258 (3d Dept 2001); *Solondz v Barash*, 225 AD2d 996, 639 NYS2d 561 (3d Dept 1996); *Jane Street Co. v Rosenberg & Estis, P.C.*, 192 AD2d 451, 597 NYS2d 17 (1st Dept 1993). The existence of an attorney-client relationship does not depend on a formal retainer or the payment of a fee, *Ripa v Petrosyants*, 203 AD3d 770, 164 NYS3d 168 (2d Dept 2022); *Moran v Hurst*, supra; *Hansen v Caffry*, supra; *Jane Street Co. v Rosenberg & Estis, P.C.*, supra; see also *Priest v Hennessy*, 51 NY2d 62, 431 NYS2d 511, 409 NE2d 983 (1980) (payment of fee by third party does not create attorney-client relationship between attorney and payor).

An attorney-client relationship may exist where an attorney was involved in the drafting, preparation and execution of a separation agreement, even though the attorney did not negotiate its terms or provide advice to the plaintiff, *Shanley v Welch*, 31 AD3d 1127, 818 NYS2d 878 (4th Dept 2006); see also *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972, 638 NE2d 511 (1994) (plaintiffs pleaded enough to infer existence of attorney-client relationship where defendant attorneys had drafted agreement between their client and plaintiffs in which client agreed to pay portion of lawsuit proceeds to plaintiffs). An attorney's representation of a corporation does not alone establish the existence of an attorney-client relationship with the corporation's shareholders, *Rechberger v Scolaro, Shulman, Cohen, Fetter & Burstein, P.C.*, 45 AD3d 1453, 848 NYS2d 459 (4th Dept 2007). A parent ordinarily lacks standing to bring a malpractice action on behalf of his or her child against a court-appointed law guardian/attorney for the child, *Bluntt v O'Connor*, 291 AD2d 106, 737 NYS2d 471 (4th Dept 2002); see *Andrewski v Devine*, 280 AD2d 992, 720 NYS2d 423 (4th Dept 2001) (parent cannot sue her own attorney for malpractice on behalf of her children

because no attorney-client relationship exists between children and attorney representing mother); but see *Mars v Mars*, 19 AD3d 195, 797 NYS2d 49 (1st Dept 2005) (legal malpractice of law guardian/attorney for child may be raised by parent as affirmative defense in fee application). An attorney's representation of a criminal defendant does not establish an attorney-client relationship with the client's spouse, *Arnold v Devane*, 123 AD3d 1202, 998 NYS2d 509 (3d Dept 2014). Thus, the spouse cannot maintain a derivative cause of action against the attorney in the client's legal malpractice action, *id.*

B. Attorney's Liability to Third Persons

In the absence of fraud, collusion, malicious acts or other special circumstances, the malpractice liability of an attorney ordinarily does not extend to third persons with whom there is no privity, *C.K. Industries Corp. v C.M. Industries Corp.*, 213 AD2d 846, 623 NYS2d 410 (3d Dept 1995); see *Weiss v Manfredi*, 83 NY2d 974, 616 NYS2d 325, 639 NE2d 1122 (1994) (no privity between law firm retained to represent plaintiff in wrongful death action and plaintiff's minor children); *Harder v Arthur F. McGinn, Jr., P.C.*, 89 AD2d 732, 454 NYS2d 42 (3d Dept 1982), *aff'd*, 58 NY2d 663, 458 NYS2d 542, 444 NE2d 1006 (1982) (no privity between attorney and former wife of client); *Innovative Risk Management, Inc. v Morris Duffy Alonso & Faley*, 204 AD3d 518, 164 NYS3d 814 (1st Dept 2022) (no privity between third-party insurance administrator who provided defense and indemnification to insured and law firm retained by insurer); *Federal Ins. Co. v North American Specialty Ins. Co.*, 47 AD3d 52, 847 NYS2d 7 (1st Dept 2007) (counsel retained by insurer to represent insured has attorney-client relationship only with insured, not with primary or excess insurers); *Griffin v Anslow*, 17 AD3d 889, 793 NYS2d 615 (3d Dept 2005) (no privity between attorney hired by corporation and individual shareholders); *Estate of Schneider v Finmann*, 15 NY3d 306, 907 NYS2d 119, 933 NE2d 718 (2010) (no privity between beneficiaries of estate and estate attorney absent fraud or other circumstances); *Rovello v Klein*, 304 AD2d 638, 757 NYS2d 496 (2d Dept 2003) (same). However, courts have found that attorneys owed duties of care to individuals not in direct privity where the relationship was sufficiently close as to approach privity, *Estate of Schenider v Finmann*, *supra* (personal representative of estate was in privity with attorney providing estate planning services to decedent); *Cherry v Mallery*, 280 AD2d 860, 721 NYS2d 144 (3d Dept 2001) (counsel retained by county treasurer as the public administrator of decedent's estate was in privity with treasurer's successor in office); see *Kurtzman v Bergstol*, 40 AD3d 588, 835 NYS2d 644 (2d Dept 2007) (attorney for limited liability company had fiduciary duty to individual member; attorney's duty breached when attorney placed personal interest above plaintiff member's interest); *Town Line Plaza Associates v Contemporary Properties, Ltd.*, 223 AD2d 420, 636 NYS2d 57 (1st Dept 1996) (attorney retained by one general partner had relationship sufficiently approaching privity with other general partner where attorney knew that latter's personal liability would be accelerated by filing bankruptcy petition).

An attorney may also be held liable to third persons where there has been fraud, collusion or a malicious or tortious act, *Harder v Arthur F. McGinn, Jr.*, P.C., 89 AD2d 732, 454 NYS2d 42 (3d Dept 1982), *aff'd*, 58 NY2d 663, 458 NYS2d 542, 444 NE2d 1006 (1982); *Griffin v Anslow*, 17 AD3d 889, 793 NYS2d 615 (3d Dept 2005); *Rovello v Klein*, 304 AD2d 638, 757 NYS2d 496 (2d Dept 2003); *C.K. Industries Corp. v C.M. Industries Corp.*, 213 AD2d 846, 623 NYS2d 410 (3d Dept 1995); *Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 AD2d 384, 590 NYS2d 201 (1st Dept 1992); see *Mr. San, LLC v Zucker & Kwestel, LLP*, 112 AD3d 796, 977 NYS2d 328 (2d Dept 2013) (“fraud, collusion, malicious acts or other special circumstances” sufficiently pleaded); *Aranki v Goldman & Associates, LLP*, 34 AD3d 510, 825 NYS2d 97 (2d Dept 2006) (same). As to attorney’s potential liability for negligent misrepresentations made to third parties, see *Prudential Ins. Co. of America v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 590 NYS2d 831, 605 NE2d 318 (1992); see also PJI 3:21 and Comment.

III. Scope of Attorney’s Duty

The scope of an attorney’s duty to a client is ordinarily a question of law for the court, *Thompson v Seligman*, 53 AD3d 1019, 863 NYS2d 285 (3d Dept 2008). The duty of an attorney may be limited by the nature and scope of the retainer agreement or written letter of engagement that was given to the client pursuant to 22 NYCRR 1215.1 or 1400.3 (applicable in matrimonial actions). Under 22 NYCRR 1215.1(b) and (c), letters of engagement and retainer agreements must explain the scope of the legal services to be performed. Where a written retainer agreement plainly indicates the specific purpose of the representation, an attorney will generally not be held liable in malpractice for failing to explore legal issues outside the scope of the agreement, *AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 834 NYS2d 705, 866 NE2d 1033 (2007). Thus a law firm whose retainer agreement stated that it was being retained to litigate the amount of a corporation’s tax liability could not be held liable for failing to advise the client that it might not be the entity that is primarily liable for the tax debt, *id.* A client suing for legal malpractice has no burden to plead in the first instance that the alleged malpractice fell within the agreed scope of the representation, *Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 827 NYS2d 231 (2d Dept 2006).

An attorney’s failure to comply with 22 NYCRR 1215.1 does not preclude the attorney from recovering a fee for his or her services in a non-matrimonial matter, *Egnotovich v Katten Muchin Zavis & Roseman LLP*, 55 AD3d 462, 866 NYS2d 156 (1st Dept 2008); *Nicoll & Davis LLP v Ainetchi*, 52 AD3d 412, 859 NYS2d 368 (1st Dept 2008); *Chase v Bowen*, 49 AD3d 1350, 853 NYS2d 819 (4th Dept 2008); *Mintz & Gold, LLP v Hart*, 48 AD3d 526, 849 NYS2d 912 (2d Dept 2008); *Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54, 833 NYS2d 566 (2d Dept 2007); but see *Sherman v Sherman*, 34 AD3d 670, 824 NYS2d 656 (2d Dept 2006) (attorney providing representation in matrimonial action cannot recover fee where he or she failed to comply with retainer-agreement require-

ments under 22 NYCRR 1400.3); *Ackerman v Gebbia-Ackerman*, 19 AD3d 519, 796 NYS2d 528 (2d Dept 2005) (same); *Pillai v Pillai*, 15 AD3d 466, 790 NYS2d 181 (2d Dept 2005) (same).

IV. Standard of Care

A. In General

An attorney does not, except by express agreement, guarantee results, *Weinberg v Needleman*, 226 App Div 3, 234 NYS 49 (1st Dept 1929), *aff'd*, 252 NY 622, 170 NE 167 (1930); *Harriman v Baird*, 6 App Div 518, 39 NYS 592 (1st Dept 1896), *aff'd*, 158 NY 691, 53 NE 1126 (1899); see *Bua v Purcell & Ingrao, P.C.*, 99 AD3d 843, 952 NYS2d 592 (2d Dept 2012); *Saveca v Reilly*, 111 AD2d 493, 488 NYS2d 876 (3d Dept 1985) (action against attorney for breach of contract may be maintained when attorney has failed to give promised performance or failed to discharge explicitly undertaken task). Nor is an attorney expected to be infallible or free from “honest mistake[s] of judgment where the proper course is open to reasonable doubt,” *Bernstein v Oppenheim & Co., P.C.*, 160 AD2d 428, 554 NYS2d 487 (1st Dept 1990); see *Lewis v Desmond*, 187 AD2d 797, 589 NYS2d 678 (3d Dept 1992); *Gray v Wallman & Kramer*, 184 AD2d 409, 585 NYS2d 46 (1st Dept 1992). The selection of one among several reasonable courses of action does not constitute malpractice, *Rosner v Paley*, 65 NY2d 736, 492 NYS2d 13, 481 NE2d 553 (1985); *Boye v Rubin & Bailin, LLP*, 152 AD3d 1, 56 NYS3d 57 (1st Dept 2017); *Lewis v Desmond*, 187 AD2d 797, 589 NYS2d 678 (3d Dept 1992); *Zarin v Reid & Priest*, 184 AD2d 385, 585 NYS2d 379 (1st Dept 1992); *Bernstein v Oppenheim & Co., P.C.*, *supra*; see *Bua v Purcell & Ingrao, P.C.*, *supra* (citing PJI). If the law is in doubt and not well settled, an attorney’s error is one of judgment for which the attorney may not be held responsible, *AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 834 NYS2d 705, 866 NE2d 1033 (2007); *Parksville Mobile Modular, Inc. v Fabricant*, 73 AD2d 595, 422 NYS2d 710 (2d Dept 1979). An exception exists with respect to an attorney’s advice relating to marketable title, *Byrnes v Palmer*, 18 App Div 1, 45 NYS 479 (2d Dept 1897), *aff'd*, 160 NY 699, 55 NE 1093 (1899); see *Trimboli v Kinkel*, 226 NY 147, 123 NE 205 (1919).

To sustain a cause of action for legal malpractice, a party must show that an attorney failed to exercise “the ordinary reasonable skill and knowledge” commonly possessed by a member of the legal profession, *Darby & Darby, P.C. v VSI Intern., Inc.*, 95 NY2d 308, 716 NYS2d 378, 739 NE2d 744 (2000); *Maroulis v Friedman*, 153 AD3d 1250, 60 NYS3d 468 (2d Dept 2017); see *Arnav Industries, Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 727 NYS2d 688, 751 NE2d 936 (2001) (ovrld on other grounds, *Oakes v Patel*, 20 NY3d 633, 965 NYS2d 752, 988 NE2d 488 (2013)); *Mid-Hudson Valley Federal Credit Union v Quartararo & Lois, PLLC*, 155 AD3d 1218, 64 NYS3d 389 (3d Dept 2017); *Byrnes v Palmer*, 18 App Div 1, 45 NYS 479 (2d Dept 1897), *aff'd*, 160 NY 699, 55 NE 1093 (1899) (noting difference in expectations for attorneys engaged in examining title and

those engaged in litigation, which sometimes involves taking chances); *Deitz v Kelleher & Flink*, 232 AD2d 943, 649 NYS2d 85 (3d Dept 1996); see also *Bua v Purcell & Ingrao, P.C.*, 99 AD3d 843, 952 NYS2d 592 (2d Dept 2012) (standard to which defendant-attorney's conduct is to be compared is not that of the most highly skilled attorney, nor is it that of the average member of the legal profession, but that of an attorney who is competent and qualified). Whether an attorney's advice was consistent with ordinary reasonable skill and knowledge is determined by the state of the law as it existed at the time the advice was given, *Terio v Spodek*, 25 AD3d 781, 809 NYS2d 145 (2d Dept 2006).

Rarely do New York cases make reference to the locality in which the attorney practices in describing the standard of conduct; rather, such cases typically refer to the legal profession as a whole, *Arnav Industries, Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 727 NYS2d 688, 751 NE2d 936 (2001) (ovrld on other grounds, *Oakes v Patel*, 20 NY3d 633, 965 NYS2d 752, 988 NE2d 488 (2013)); *Darby & Darby, P.C. v VSI Intern., Inc.*, 95 NY2d 308, 716 NYS2d 378, 739 NE2d 744 (2000); *Marquez v J. Ross Development*, 162 AD2d 1011, 557 NYS2d 802 (4th Dept 1990); *Saveca v Reilly*, 111 AD2d 493, 488 NYS2d 876 (3d Dept 1985). The Second Department has stated that, generally, the locality rule does not apply to the work of legal professions, *Doviak v Finkelstein & Partners, LLP*, 137 AD3d 843, 27 NYS3d 164 (2d Dept 2016). Thus, the pattern charge does not incorporate a locality rule and speaks only of an "ordinary member of the legal profession," see *Greene v Payne, Wood and Littlejohn*, 197 AD2d 664, 602 NYS2d 883 (2d Dept 1993). For similar reasons, the charge does not make reference to specialization, see *Bassim v Halliday*, 234 AD2d 628, 650 NYS2d 467 (3d Dept 1996) (declining to hold law firm to higher standard of care based on claimed expertise in specialized area); but see *Restatement of the Law, The Law Governing Lawyers*, § 52, comment d.

For a discussion of the appropriate legal standard for evaluating an appointed law guardian/attorney for the child representation, see *Bluntt v O'Connor*, 291 AD2d 106, 737 NYS2d 471 (4th Dept 2002). In *Bluntt*, the court stated that an appointed law guardian/attorney for the child providing representation in a custody or visitation dispute involving a child under three years of age has absolute quasi-judicial immunity for acts within the scope of his or her appointment, see *Mosher-Simons v Allegany*, 99 NY2d 214, 753 NYS2d 444, 783 NE2d 509 (2002) (extending full judicial immunity "to those whose actions are an integral part of the judicial process," but only where claims arise from performance of specific, judicially directed functions).

B. Effect of Disciplinary and Ethical Rules

The New York Rules of Profession Conduct Code have provisions bearing on malpractice by an attorney. For example, a lawyer may not seek, by contract or other means, to limit prospectively the lawyer's individual liability to a client for malpractice, Rule 1.8(h)(1) (effective

April 1, 2009) (formerly DR 6-102(A)). Further, a lawyer may not settle a claim for legal malpractice with an unrepresented client or former client without first advising that client in writing that independent representation is appropriate in connection with any such settlement, Rule 1.8(h)(2) (formerly DR 6-102(A)); see *Mergler v Crystal Properties Associates, Ltd.*, 179 AD2d 177, 583 NYS2d 229 (1st Dept 1992). Similarly, a law firm may not prospectively evade its professional responsibilities by inserting contractual limitations on its ethical duties in the retainer agreement, *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 865 NYS2d 14 (1st Dept 2008). Thus, a provision in a retainer agreement permitting the law firm to accept employment “of similar or other character” did not provide a defense to a claim to recover damages allegedly arising from a law firm’s alleged divided loyalty to another client, *id.* However, a law firm may simultaneously represent the competing interests of two opposing clients if the clients consent after full disclosure of the dual representation and its consequences, *id.*

Canon 6 states that a lawyer “should represent a client competently,” and Rule 1.1(b) of the New York Rules of Professional Conduct (formerly DR 6-101(A)) states that “[a] lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it,” see *Reibman v Senie*, 302 AD2d 290, 756 NYS2d 164 (1st Dept 2003) (citing PJI). Consistent with these principles, an attorney “not competent to skillfully and properly perform the work . . . should not undertake the service” and may be held liable in damages for negligent performance of such service, *Degen v Steinbrink*, 202 App Div 477, 195 NYS 810 (1st Dept 1922), *aff’d*, 236 NY 669, 142 NE 328 (1923).

Although they may be relevant, the Disciplinary Rules (superseded by the New York Rules of Professional Conduct, effective April 1, 2009) and former Ethical Considerations do not create duties that can give rise to a malpractice cause of action that would otherwise not exist at common law, *Shapiro v McNeill*, 92 NY2d 91, 677 NYS2d 48, 699 NE2d 407 (1998); *Guiles v Simser*, 35 AD3d 1054, 826 NYS2d 484 (3d Dept 2006) (attorney’s sexual encounters with plaintiff-client, while unethical, not malpractice absent showing of negligence in legal representation and resulting loss); see New York Rules of Professional Conduct, Preamble: A Lawyer’s Responsibility, ¶ 12. Thus, a conflict of interest constituting a violation of the New York Rules of Professional Conduct (formerly Code of Professional Responsibility) does not by itself support a malpractice cause of action, *Kimm v Chang*, 38 AD3d 481, 833 NYS2d 429 (1st Dept 2007). However, a malpractice cause of action was held to lie where defendant attorney represented both sides of a transaction and allegedly withheld critical information from plaintiff client, *Sitar v Sitar*, 50 AD3d 667, 854 NYS2d 536 (2d Dept 2008), and where the law firm’s divided loyalties impaired its professional judgment and caused it to recommend that the client, an insurer, provide coverage even though the insurance policies had expired, *Ulico Cas. Co. v Wilson, Elser,*

Moskowitz, Edelman & Dicker, 56 AD3d 1, 865 NYS2d 14 (1st Dept 2008).

C. Specific Duties of Care

An attorney may be held liable in malpractice for ignorance of the rules of practice, failure to comply with conditions precedent to suit, neglect to prosecute an action or failure to conduct adequate research, *Mortenson v Shea*, 62 AD3d 414, 880 NYS2d 229 (1st Dept 2009). Consistent with their continuing obligation to remain competent, attorneys should familiarize themselves with current legal developments so that they can make informed judgments and effectively counsel their clients, *Darby & Darby, P.C. v VSI Intern., Inc.*, 95 NY2d 308, 716 NYS2d 378, 739 NE2d 744 (2000); see former EC 6-2; see also *Reibman v Senie*, 302 AD2d 290, 756 NYS2d 164 (1st Dept 2003). Similarly, an attorney is obligated to know the law relating to the matter for which the attorney is representing the client and it is the attorney's duty, if he or she is not familiar with the relevant law, to inform him- or herself with that law, *Wo Yee Hing Realty, Corp. v Stern*, 99 AD3d 58, 949 NYS2d 50 (1st Dept 2012). A New York attorney who undertakes to prepare papers for filing in another jurisdiction must become informed on the law of that jurisdiction, *Degen v Steinbrink*, 202 App Div 477, 195 NYS 810 (1st Dept 1922), *aff'd*, 236 NY 669, 142 NE 328 (1923); *Hart v Carro*, *Spanbock, Kaster & Cuiffo*, 211 AD2d 617, 620 NYS2d 847 (2d Dept 1995). Likewise, an attorney from another state who undertakes to provide legal services in connection with a New York claim has a duty to advise the client about the New York statute of limitations and the need to retain New York counsel to commence a timely action, *Mortenson v Shea*, *supra*. Additionally an attorney may be liable for ignorance of the rules of practice in effect at the time of the representation, *Kenney v Zimmerman*, 185 AD2d 690, 586 NYS2d 80 (4th Dept 1992) (failure to comply with well established disclosure rules); see *Siegel v Kranis*, 29 AD2d 477, 288 NYS2d 831 (2d Dept 1968).

D. Specific Instances in Which Attorney Liable or Potentially Liable for Malpractice

Courts have found that an attorney's conduct constituted malpractice as a matter of law where the attorney, instructed by a client to give notice of cancellation of a contract, failed to give written notice within the time prescribed, *Logalbo v Plishkin, Rubano & Baum*, 163 AD2d 511, 558 NYS2d 185 (2d Dept 1990), where the attorney failed to commence an action against an insurer within the two-year period prescribed in the insurance contract, *Bergin v Grace*, 39 AD3d 1017, 833 NYS2d 729 (3d Dept 2007), where the attorney failed to commence a lien foreclosure action or to seek a court order extending a lien, *Deitz v Kelleher & Flink*, 232 AD2d 943, 649 NYS2d 85 (3d Dept 1996), where the attorney recommended settlement for an amount far in excess of a limitation of liability set by an Appellate Division decision released prior to the settlement, *Gottlieb v Karlsson*, 295 AD2d 158, 744 NYS2d 118 (1st Dept 2002), where an attorney compromised client's claims

against a surety by preparing unfavorable stipulations of settlement, the attorney may be liable for legal malpractice, *Phoenix Erectors, LLC v Fogarty*, 90 AD3d 468, 935 NYS2d 288 (1st Dept 2011), where the attorney failed to properly file a UCC financing statement to perfect the client's security interest, *Lory v Parsoff*, 296 AD2d 535, 745 NYS2d 218 (2d Dept 2002); see *Dempster v Liotti*, 86 AD3d 169, 924 NYS2d 484 (2d Dept 2011) (inexcusable failure to timely file opposition papers and notice of appeal "clearly falls below the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession"); *Williams v Kublick*, 302 AD2d 961, 754 NYS2d 804 (4th Dept 2003) (defendant law firm negligent as a matter of law in failing to serve proper pleadings in timely manner; issue of causation to be determined by trier of fact), and where an attorney failed to obtain workers' compensation carrier's consent or judicial approval to settle a third-party action as required by Workers' Compensation Law § 29(5), *Northrop v Thorsen*, 46 AD3d 780, 848 NYS2d 304 (2d Dept 2007). As a matter of law, the failure to preserve a notice of pendency on behalf of a client is not a reasonable course of action where such notice is necessary to defeat a subsequent purchase, *DaSilva v Suozzi, English, Cianciulli & Peirez, P.C.*, 233 AD2d 172, 649 NYS2d 680 (1st Dept 1996). Likewise, absent special circumstances, a failure to commence an action in a timely manner is malpractice as a matter of law, *Wilk v Lewis & Lewis, P.C.*, 75 AD3d 1063, 905 NYS2d 410 (4th Dept 2010). Although a law firm, following accepted practice, was entitled to rely on its client's representations and had no general duty to review the underlying appraisals to determine whether the commercial mortgage loans that the client sought to securitize were qualified for certain federal tax benefits, the law firm could be held liable for failing to make further inquiry when the facts and circumstances known to the law firm raised "red flags" about the transaction's eligibility for such benefits, *Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 115 AD3d 228, 980 NYS2d 95 (1st Dept 2014).

In *Arnav Industries, Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 727 NYS2d 688, 751 NE2d 936 (2001) (ovrld on other grounds, *Oakes v Patel*, 20 NY3d 633, 965 NYS2d 752, 988 NE2d 488 (2013)), the Court held that defendant law firm was potentially liable for malpractice where plaintiffs alleged that they retained the firm to prepare a stipulation of settlement and that the firm negligently prepared the stipulation by erroneously stating the amount of the judgment of default to be entered. An attorney may be liable for failure to comply with a notice requirement as a condition precedent to sue, or for neglect to prosecute an action, see *Wilk v Lewis & Lewis, P.C.*, 75 AD3d 1063, 905 NYS2d 410 (4th Dept 2010) (failure to file timely notice of appeal); *Siegel v Kranis*, 29 AD2d 477, 288 NYS2d 831 (2d Dept 1968). A cause of action for legal malpractice may be based on the attorney's preparation of a loan document that is usurious and does not fall under any of the exceptions to the law, *DeStaso v Condon Resnick, LLP*, 90 AD3d 809, 936 NYS2d 51 (2d Dept 2011).

E. Specific Instances in Which Attorney Not Liable or Potentially Liable for Malpractice

A law firm, retained by a client to bring an action against a county after the period to serve a notice of claim expired, established prima facie entitlement to summary judgment dismissing malpractice claim against it where it terminated the attorney-client relationship in time for a successor counsel to pursue an application for leave to serve a late notice of claim, advised the client regarding the limitations period, and urged that client should engage successor counsel immediately, *Buxton v Zukoff*, 200 AD3d 511, 155 NYS3d 313 (1st Dept 2021). Where an attorney's choice of an expert witness was a reasonable exercise of judgment, the client could not later maintain a malpractice claim because the court in the underlying action found the expert unqualified, *Dimond v Kazmierczuk & McGrath*, 15 AD3d 526, 790 NYS2d 219 (2d Dept 2005). It was not malpractice to advise the client to seek judicial instructions in a trust matter where there were serious questions of liability even if alternative methods of addressing the problem might have been pursued, *Rosner v Paley*, 65 NY2d 736, 492 NYS2d 13, 481 NE2d 553 (1985). Where none of the states having some contact with the controversy recognized the duty of an insurer to defend a patent infringement claim under the particular policy provision and the theory of coverage was largely unrecognized elsewhere, a New York law firm had no duty to advise its client of possible insurance coverage for the patent infringement claims that were the subject of the representation, *Darby & Darby, P.C. v VSI Intern., Inc.*, 95 NY2d 308, 716 NYS2d 378, 739 NE2d 744 (2000); see *Lewis v Desmond*, 187 AD2d 797, 589 NYS2d 678 (3d Dept 1992) (attorney not guilty of malpractice by counseling client to contest license revocation proceedings rather than suggesting surrendering license and thereby saving litigation costs).

V. Causation

To recover for an attorney's legal malpractice, plaintiff must show that the malpractice proximately caused the loss, *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 835 NYS2d 534, 867 NE2d 385 (2007); see *Dombrowski v Bulson*, 19 NY3d 347, 948 NYS2d 208, 971 NE2d 338 (2012); *AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 834 NYS2d 705, 866 NE2d 1033 (2007); *Britt v Legal Aid Soc., Inc.*, 95 NY2d 443, 718 NYS2d 264, 741 NE2d 109 (2000); *Boye v Rubin & Bailin, LLP*, 152 AD3d 1, 56 NYS3d 57 (1st Dept 2017); *Cahill v Ryan*, 266 AD2d 75, 699 NYS2d 8 (1st Dept 1999); *Zarin v Reid & Priest*, 184 AD2d 385, 585 NYS2d 379 (1st Dept 1992) (legal malpractice cause of action dismissed where plaintiffs prevailed on appeal by reason of arguments raised by defendants in court of first instance and not legal defense which plaintiffs assert defendants should have raised). In most negligence cases, plaintiff is required to show only that defendant's negligence was a substantial factor in bringing about the injury, PJI 2:70. In legal malpractice cases, however, the plaintiff is required to satisfy a more demanding test by proving that, "but for" defendant's negligence, plaintiff would have obtained a more favorable

result in the underlying litigation or would not have sustained the claimed loss in the underlying transaction, *Waggoner v Caruso*, 14 NY3d 874, 903 NYS2d 333, 929 NE2d 396 (2010); *Leder v Spiegel*, 9 NY3d 836, 840 NYS2d 888, 872 NE2d 1194 (2007), cert den sub nom. *Spiegel v Rowland*, 552 US 1257, 128 SCt 1696 (2008); *Maroulis v Friedman*, 153 AD3d 1250, 60 NYS3d 468 (2d Dept 2017); *Mid-Hudson Valley Federal Credit Union v Quartararo & Lois, PLLC*, supra; *AmBase Corp. v Davis Polk & Wardwell*, supra; *Davis v Klein*, 88 NY2d 1008, 648 NYS2d 871, 671 NE2d 1268 (1996); *Carmel v Lunney*, 70 NY2d 169, 518 NYS2d 605, 511 NE2d 1126 (1987); *Vooth v McEachen*, 181 NY 28, 73 NE 488 (1905); *Jancker v Silver, Forrester & Lesser, P.C.*, 135 AD3d 908, 24 NYS3d 182 (2d Dept 2016); *Cosmetics Plus Group, Ltd. v Traub*, 105 AD3d 134, 960 NYS2d 388 (1st Dept 2013) (citing PJI); *Ryan v Powers & Santola, LLP*, 73 AD3d 1273, 899 NYS2d 486 (3d Dept 2010); *Becovic v Poisson & Hackett*, 49 AD3d 435, 854 NYS2d 63 (1st Dept 2008); *Levine v Lacher & Lovell-Taylor*, 256 AD2d 147, 681 NYS2d 503 (1st Dept 1998); *Zarin v Reid & Priest*, supra; see *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 865 NYS2d 14 (1st Dept 2008) (plaintiff client claiming attorney breached fiduciary duty must show loss would not have occurred “but for” breach).

It should be noted, however, that in *Barnett v Schwartz*, 47 AD3d 197, 848 NYS2d 663 (2d Dept 2007), the Second Department held that the “but for” causation standard does not require a greater or more direct degree of causation than the “proximate cause” standard set forth in PJI 2:70 and, further, that the “but for” standard does not require a showing that defendant’s malpractice was the sole proximate cause, rather than a substantial cause, of plaintiff loss. Thus, it would appear that, under *Barnett*, plaintiff can prevail by showing that defendant attorney committed malpractice and that the malpractice was a proximate cause of the claimed damages, *Barnett v Schwartz*, supra; see *Quantum Corporate Funding, Ltd. v Ellis*, 126 AD3d 866, 6 NYS3d 255 (2d Dept 2015); *DeStaso v Condon Resnick, LLP*, 90 AD3d 809, 936 NYS2d 51 (2d Dept 2011); *Rock City Sound, Inc. v Bashian & Farber, LLP*, 74 AD3d 1168, 903 NYS2d 517 (2d Dept 2010). The soundness of the *Barnett* court’s reasoning has not yet been discussed by either the Court of Appeals or the other Departments. Thus, whether the “but for” standard of causation requires a showing that the malpractice was the sole proximate cause of the loss remains an open question.

One consequence of the “but for” causation standard is that it demands trial of a “lawsuit within a lawsuit” where the claim arises out of representation in a litigation, *Barnett v Schwartz*, 47 AD3d 197, 848 NYS2d 663 (2d Dept 2007); *Cramer v Englert*, 289 AD2d 617, 734 NYS2d 275 (3d Dept 2001); *McKenna v Forsyth & Forsyth*, 280 AD2d 79, 720 NYS2d 654 (4th Dept 2001); see *N. A. Kerson Co., Inc. v Shayne, Dachs, Weiss, Kolbrenner, Levy and Moe Levine*, 59 AD2d 551, 397 NYS2d 142 (2d Dept 1977), aff’d for reasons in AD concurring opinion, 45 NY2d 730, 408 NYS2d 475, 380 NE2d 302 (1978). In such situations, plaintiff has the burden of proving the merits of the claim in the underlying action as well as the attorney’s negligence, see *Fidler v*

Sullivan, 93 AD2d 964, 463 NYS2d 279 (3d Dept 1983). Although plaintiff has the burden to prove that the underlying lawsuit would have been satisfactorily concluded but for the attorney's negligence, defendant attorney has the burden to show that the lawsuit would have been defeated by an affirmative defense not predicated on the attorney's own negligence, *Nitis v Goldenthal*, 128 AD2d 687, 513 NYS2d 186 (2d Dept 1987); *Romanian American Interests, Inc. v Scher*, 94 AD2d 549, 464 NYS2d 821 (2d Dept 1983); see *Gonzales v O'Hagen & Reilly*, 189 AD2d 801, 592 NYS2d 431 (2d Dept 1993).

Where the act alleged to constitute legal malpractice would have been futile, no claim against the attorneys can be maintained, *Cosmetics Plus Group, Ltd. v Traub*, 105 AD3d 134, 960 NYS2d 388 (1st Dept 2013). Therefore, the requisite element of causation is not established where plaintiff alleges that defendant attorney failed to convey an offer of settlement but plaintiff also concedes that he or she would have rejected the offer, *Rubenstein & Rubenstein v Papadakos*, 31 AD2d 615, 295 NYS2d 876 (1st Dept 1968), *aff'd*, 25 NY2d 751, 303 NYS2d 508, 250 NE2d 570 (1969); see *Cannistra v O'Connor, McGuinness, Conte, Doyle, Oleson & Collins*, 286 AD2d 314, 728 NYS2d 770 (2d Dept 2001). Similarly, an attorney's failure to advise the client that it might not be primarily liable on a tax debt was held not actionable where the client did not show that it would have altered its bookkeeping if it had received that advice, *AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 834 NYS2d 705, 866 NE2d 1033 (2007); see *McGlynn v Burns & Harris*, 170 AD3d 1162, 94 NYS3d 884 (2d Dept 2019) (question of fact as to whether, at time law firm was retained, timely notice of accident could have been given to insurance carriers); *Wo Yee Hing Realty, Corp. v Stern*, 99 AD3d 58, 949 NYS2d 50 (1st Dept 2012) (attorney entitled to summary judgment dismissing legal malpractice claim where client failed to raise triable issue of fact regarding whether, absent attorney's negligence, client could have satisfied elements required to obtain tax benefit that client sought in real estate transaction). The "but for" standard of causation has also been applied to bar recovery by a client who claimed that defendant law firm committed malpractice by providing an "attorney" who was not, in fact, licensed, where the client failed to allege facts sufficiently demonstrating a causal relationship between the wrong and its damages, *Natural Organics Inc. v Anderson Kill & Olick, P.C.*, 67 AD3d 541, 891 NYS2d 321 (1st Dept 2009).

Where the alleged malpractice is based on the attorney's failure to perfect an appeal from an order dismissing the client's cause of action, the "but for" standard requires the client to show that, had the attorney perfected the appeal, the appeal would have been successful, the cause of action would have been reinstated and the client would have prevailed on the cause of action, *Coccia v Liotti*, 70 AD3d 747, 896 NYS2d 90 (2d Dept 2010). Similarly, plaintiff was not entitled to summary judgment on a malpractice claim based on attorney's negligent failure to timely move for entry of a default judgment where questions of fact remained as to whether default judgment motion would have been granted or, if granted, whether adversary could have succeeded in having the result-

ing judgment vacated, *Rodriguez v Killerlane*, 44 AD3d 420, 843 NYS2d 69 (1st Dept 2007). A plaintiff's claim that her attorney, who was relieved during the course of matrimonial litigation, failed to move for attorney's fees was without merit, where successor counsel had ample time and opportunity to the make the motion, and in fact did so move, *Knox v Aronson, Mayefsky & Sloan, LLP*, 168 AD3d 70, 91 NYS3d 23 (1st Dept 2018).

It has been held that a malpractice complaint should not be sustained if it does not set forth the requisite allegation that "but for" the attorney's alleged malpractice plaintiff would not have sustained a loss, *Franklin v Winard*, 199 AD2d 220, 606 NYS2d 162 (1st Dept 1993); *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590, 550 NYS2d 337 (1st Dept 1990). However, on a motion to dismiss, plaintiff is not obligated to show that it actually sustained damages, but instead need only make allegations from which damages attributable to defendant's malpractice may be inferred, *Rock City Sound, Inc. v Bashian & Farber, LLP*, 74 AD3d 1168, 903 NYS2d 517 (2d Dept 2010); *InKine Pharmaceutical Co., Inc. v Coleman*, 305 AD2d 151, 759 NYS2d 62 (1st Dept 2003).

VI. Client's Actions Affecting Attorney's Malpractice Liability

In general, an attorney may not shift to the client the legal responsibility that he or she was hired to undertake because of his or her superior knowledge, *Theresa Striano Revocable Trust v Blancato*, 71 AD3d 1122, 898 NYS2d 69 (2d Dept 2010); *Northrop v Thorsen*, 46 AD3d 780, 848 NYS2d 304 (2d Dept 2007); *Hart v Carro, Spanbock, Kaster & Cuiffo*, 211 AD2d 617, 620 NYS2d 847 (2d Dept 1995). Thus, where defendant attorney failed to obtain the workers' compensation carrier's consent or judicial approval to settle the client's third-party action as required by Workers' Compensation Law § 29(5), his negligence was not mitigated by plaintiff client's failure to apply for nunc pro tunc judicial approval himself, *Northrop v Thorsen*, supra. Likewise, defendant attorney's negligence in that situation was not mitigated by the failure of plaintiff's other attorneys to make such an application, since those attorneys had not been retained to represent plaintiff in the third-party action, *id.* However, there are circumstances in which the client's own negligence may bar recovery for the attorney's malpractice. Thus, recovery for legal malpractice was barred where the client failed to execute and return a document after being informed that an action could not be commenced without it, *Zeitlin v Morrison*, 167 App Div 220, 152 NYS 1000 (1st Dept 1915).

Where the alleged legal malpractice occurred in the context of litigation, a client's failure to pursue an appeal in the underlying litigation may bar a subsequent malpractice action against the attorney. Thus, a client who is likely to succeed on appeal of the underlying action is required to pursue such an appeal, *Grace v Law*, 24 NY3d 203, 997 NYS2d 334, 21 NE3d 995 (2014). If the client fails to do so, he or she is barred from maintaining a legal malpractice action against the at-

torney, *id.* However, if the client is not likely to succeed, he or she may bring a legal malpractice action without first pursuing an appeal of the underlying action, *id.* This standard permits an appellate court to correct any trial court error and allows the attorney to avoid an unnecessary malpractice lawsuit by being given the opportunity to rectify the client's unfavorable result, *id.*; see *Rodriguez v Fredericks*, 213 AD2d 176, 623 NYS2d 241 (1st Dept 1995).

Where plaintiff had entered into a settlement that included the dismissal of his appeal from a matrimonial judgment, his legal malpractice claims were deemed waived to the extent that they involved errors that could have been corrected on the appeal, *Rupert v Gates & Adams, P.C.*, 83 AD3d 1393, 919 NYS2d 706 (4th Dept 2011). Where plaintiffs, by their own conduct in voluntarily settling civil action prior to the appeal, precluded defendant from pursuing the very means by which he could have vindicated his representation, they would not be permitted to seek damages from defendant in order to recoup a portion of the settlement, *Rodriguez v Fredericks*, 213 AD2d 176, 623 NYS2d 241 (1st Dept 1995).

A legal malpractice action is barred if the client negotiated and structured the transaction, and the attorney was merely retained to memorialize it, *Coastal Broadway Associates v Raphael*, 298 AD2d 186, 748 NYS2d 141 (1st Dept 2002). Similarly, a legal malpractice action is generally barred if the client negotiated and controlled the terms of the settlement of the underlying lawsuit, *Sutherland v Milstein*, 266 AD2d 33, 698 NYS2d 15 (1st Dept 1999). The client's agreement to a stipulation settling the original lawsuit, however, does not always bar recovery for acts of malpractice incident to the original suit, *Kutner v Catterson*, 56 AD3d 437, 867 NYS2d 156 (2d Dept 2008); *Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 674 NYS2d 280 (1st Dept 1998); *U.S. Ice Cream Corp. v Bizar*, 240 AD2d 654, 659 NYS2d 492 (2d Dept 1997); see *Arnav Industries, Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 727 NYS2d 688, 751 NE2d 936 (2001) (ovrld on other grounds, *Oakes v Patel*, 20 NY3d 633, 965 NYS2d 752, 988 NE2d 488 (2013)) (fact that plaintiffs settled underlying claim that was subject of malpractice action does not bar malpractice action). Thus, a legal malpractice claim may be maintained if the settlement allegedly was effectively compelled by the mistakes of counsel, see *Maroulis v Friedman*, 153 AD3d 1250, 60 NYS3d 468 (2d Dept 2017); see also *Janker v Silver, Forrester & Lesser, P.C.*, 135 AD3d 908, 24 NYS3d 182 (2d Dept 2016); *Benishai v Epstein*, 116 AD3d 726, 983 NYS2d 618 (2d Dept 2014); *Keness v Feldman, Kramer & Monaco, P.C.*, 105 AD3d 812, 963 NYS2d 313 (2d Dept 2013). However, plaintiff must plead that, if the matter had not been settled, he or she would have obtained a more favorable outcome, *Schiller v Bender, Burrows and Rosenthal, LLP*, 116 AD3d 756, 983 NYS2d 594 (2d Dept 2014); see *Janker v Silver, Forrester & Lesser, P.C.*, *supra*. Where the court denied plaintiff's motion to vacate a settlement for inadequacy and the failure of the trial court to comply with the EPTL, the plaintiff was not collaterally estopped from asserting legal malpractice against the attorneys who represented her in the

settlement, *Weiss v Manfredi*, 83 NY2d 974, 616 NYS2d 325, 639 NE2d 1122 (1994). However, a client's settlement of the underlying action was held to preclude a legal malpractice action where defendant attorneys no longer represented the client at the time he settled and the client's successor attorney had sufficient time and opportunity to protect the client's rights, *New Kayak Pool Corp. v Kavinoky Cook LLP*, 125 AD3d 1346, 5 NYS3d 625 (4th Dept 2015); *Somma v Dansker & Aspromonte Associates*, 44 AD3d 376, 843 NYS2d 577 (1st Dept 2007); see *Davis v Cohen & Gresser, LLP*, 160 AD3d 484, 74 NYS3d 534 (1st Dept 2018); *Knox v Aronson, Mayefsky & Sloan, LLP*, 168 AD3d 70, 91 NYS3d 23 (1st Dept 2018) (claim that law firm, which was relieved during litigation, was negligent in failing to move for attorney's fees dismissed where client entered into settlement negotiated by successor counsel, agreeing to an award of attorney's fees).

The question of how a client's culpable conduct affects an attorney's malpractice liability is closely related to the causation element of legal malpractice. For example, in *Ryan v Powers & Santola, LLP*, 73 AD3d 1273, 899 NYS2d 486 (3d Dept 2010), the client's failure to provide requested information and documentation raised questions of fact as to whether the attorney's negligence caused the client's loss, precluding summary judgment for plaintiff.

In *Arnav Industries, Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 727 NYS2d 688, 751 NE2d 936 (2001) (ovrld on other grounds, *Oakes v Patel*, 20 NY3d 633, 965 NYS2d 752, 988 NE2d 488 (2013)), the Court of Appeals stated that the culpable conduct of the client may be pleaded by the defendant attorney "by way of affirmative defense as a mitigating factor" in the attorney's negligence. Similarly, in *Cicorelli v Capobianco*, 89 AD2d 842, 453 NYS2d 21 (2d Dept 1982), *aff'd*, 59 NY2d 626, 463 NYS2d 195, 449 NE2d 1273 (1983), the court recognized the applicability of comparative fault in this legal malpractice actions. Other cases have suggested that the client's culpable conduct is a factor to be assessed in mitigation of damages, *SF Holdings Group, Inc. v Kramer Levin Naftalis & Frankel LLP*, 56 AD3d 281, 866 NYS2d 674 (1st Dept 2008) (where sophisticated client signed agreement with full knowledge of its terms, client's negligence is factor to be assessed in mitigating damages); *Mandel, Resnik & Kaiser, P.C. v E.I. Electronics, Inc.*, 41 AD3d 386, 839 NYS2d 68 (1st Dept 2007) (sophisticated client's negligence in reviewing contract is factor to be assessed in mitigation of damages).

The effect of a client's failure to read critical documents has been the subject of considerable discussion in the case law. In *Arnav Industries, Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 727 NYS2d 688, 751 NE2d 936 (2001) (ovrld on other grounds, *Oakes v Patel*, 20 NY3d 633, 965 NYS2d 752, 988 NE2d 488 (2013)), allegations that defendant law firm negligently prepared a stipulation that erroneously stated the amount of a default judgment adequately stated a cause of action for legal malpractice despite the fact that the client had signed the stipulation without reading

it. Although a party who signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it, this principle did not preclude a client's malpractice claim where the client allegedly relied on its attorney's misstatement that the stipulation had been changed to correct only one typographical error, *id.* The same principle was reaffirmed in *Bishop v Maurer*, 9 NY3d 910, 844 NYS2d 165, 875 NE2d 883 (2007), in which the client relied on the attorney's representations about the effect of the estate planning documents that the attorney drafted and made no attempt to read the documents himself before signing them. Although the action in *Bishop* was properly dismissed because the allegations that incorrect advice had been given were conclusory, the Court of Appeals stated that, as a general proposition, "the conclusiveness of the underlying documents does not absolutely preclude an action for professional malpractice against an attorney for negligently giving to a client an incorrect explanation of the [legal documents'] contents," *id.*; see *Fielding v Kupferman*, 65 AD3d 437, 885 NYS2d 24 (1st Dept 2009); *Maurice W. Pomfrey & Associates, Ltd. v Hancock & Estabrook, LLP*, 50 AD3d 1531, 862 NYS2d 217 (4th Dept 2008). Allegations that defendant attorney gave an incorrect explanation of the contents of legal documents stated a cause of action where the documents did not conclusively establish the correctness of defendant's advice, *Kram Knarf, LLC v Djonovic*, 74 AD3d 628, 903 NYS2d 386 (1st Dept 2010). Where a federal bankruptcy court found that the plaintiff knowingly and fraudulently made false statements in a bankruptcy petition, he was barred from pursuing a legal malpractice claim against the attorney who prepared the petition under the doctrine of *in pari delicto*, which holds that a wrongdoer should not profit from his or her own misconduct, *Gobindram v Ruskin Moscou Faltischek, P.C.*, 175 AD3d 586, 106 NYS3d 339 (2d Dept 2019). However, the plaintiff in that case stated a cause of action for legal malpractice based upon his attorney's alleged failure to amend the bankruptcy petition at an early stage of litigation when the misstatement was discovered, *id.*

While a lawyer may not seek prospectively to limit his or her malpractice liability to a client by contract or otherwise, New York Rules of Professional Conduct, Rule 1.8(h)(1) (effective April 1, 2009) (formerly DR 6-102(A)), there are circumstances in which a client's informed waiver will be given effect in a malpractice action. Thus, an attorney is not negligent for taking a particular risk if the client is fully informed of the nature of the risk and is willing to accept it, *Byrnes v Palmer*, 18 App Div 1, 45 NYS 479 (2d Dept 1897), *aff'd*, 160 NY 699, 55 NE 1093 (1899). Similarly, a provision in a retainer letter acknowledging that jointly represented clients have had the opportunity to consult with independent counsel and "affirmatively waive with full understanding any conflict of interest" may be invoked to preclude a malpractice claim based on the alleged conflict, *Bishop v Maurer*, 33 AD3d 497, 823 NYS2d 366 (1st Dept 2006), *aff'd*, 9 NY3d 910, 844 NYS2d 165, 875 NE2d 883 (2007).

In an action by a client against his or her first attorney, the negligence of a successor attorney may not be imputed to the client, but

such negligence may be proven to show that the successor attorney caused the loss in whole or in part, *Boye v Rubin & Bailin, LLP*, 152 AD3d 1, 56 NYS3d 57 (1st Dept 2017); *Titsworth v Mondo*, 73 AD2d 1049, 425 NYS2d 422 (4th Dept 1980).

VII. Liability for Malpractice of Another

Attorneys practicing in partnership may be held liable for each other's malpractice, *Corless v Mazza*, 295 AD2d 848, 744 NYS2d 249 (3d Dept 2002); see Partnership Law § 24. Attorneys who are shareholders, employees, or agents of a professional service corporation are liable for their own acts of malpractice and those over whom they exert direct supervision and control when rendering services on behalf of the corporation, Business Corporation Law § 1505(a) (domestic professional service corporation); id § 1527 (foreign professional service corporation); see *DiPietro v Seth Rotter, P.C.*, 267 AD2d 1, 699 NYS2d 353 (1st Dept 1999); *Beltrone v General Schuyler & Co.*, 223 AD2d 938, 636 NYS2d 917 (3d Dept 1996); *Sucese v Kirsch*, 199 AD2d 718, 606 NYS2d 60 (3d Dept 1993). The same is true for partners in registered limited liability partnerships, Partnership Law § 26(c); see *Ederer v Gursky*, 9 NY3d 514, 851 NYS2d 108, 881 NE2d 204 (2007).

An attorney may be held liable under certain circumstances for negligence in selecting outside trial counsel or making a referral, *Cohen v Lipsig*, 92 AD2d 536, 459 NYS2d 98 (2d Dept 1983) (summary judgment held improper in light of outstanding questions of fact as to, among other things, whether client gave informed consent to defendant attorney's choice of trial counsel and whether defendant attorney exercised reasonable care in choosing such trial counsel); see *Reed v Finkelstein, Levine, Gittlesohn & Tetenbaum*, 304 AD2d 329, 756 NYS2d 577 (1st Dept 2003) (referring personal-injury attorney potentially liable for referred medical malpractice attorney's acts and omissions where both practiced in same New York courts before same judges and under same rules and both were listed on retainer agreement). However, a New York lawyer who recommends a foreign lawyer is required only to exercise care in the selection of the foreign lawyer and is not responsible for the foreign lawyer's acts and omissions, at least in the absence of proof that the New York lawyer explicitly or impliedly agreed to supervise the foreign attorney's work, *Broadway Maintenance Corp. v Tunstead & Schechter*, 110 AD2d 587, 487 NYS2d 799 (1st Dept 1985); see *Wildermann v Wachtell*, 149 Misc 623, 267 NYS 840 (Sup 1933), *aff'd*, 241 App Div 812, 271 NYS 954 (1st Dept 1934); see also *CVC Capital Corp. v Weil, Gotshal, Manges*, 192 AD2d 324, 595 NYS2d 458 (1st Dept 1993) (plaintiff failed to adduce nonconclusory evidence that New York attorney had duty to supervise Puerto Rican law firms retained by plaintiff client). Consistent with the latter principle, plaintiff-client's proof was deemed sufficient to support a malpractice cause of action where plaintiff's New York attorney had initially solicited a foreign lawyer's services without her knowledge, plaintiff did not enter into a retainer agreement with the foreign lawyer, plaintiff completely relied on the New York attorney to protect her interests in

the foreign jurisdiction and the subject of the foreign retention was not complex, *Whalen v DeGraff, Foy, Conway, Holt-Harris & Mealey*, 53 AD3d 912, 863 NYS2d 100 (3d Dept 2008).

Each member of a law partnership is liable for the torts of other partners, including intentional torts such as conversion of client funds, *Clients' Sec. Fund of State v Grandeau*, 72 NY2d 62, 530 NYS2d 775, 526 NE2d 270 (1988); see *Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 AD2d 384, 590 NYS2d 201 (1st Dept 1992); see also Revised Limited Partnership Act, Partnership Law §§ 121-101 through 121-130 (limiting liability of partners). The Lawyers' Fund for Clients Protection (formerly the Clients' Security Fund) is authorized to reimburse clients for losses caused by the dishonest conduct of their attorneys, see Judiciary Law § 468-b; State Finance Law § 97. When the Fund makes reimbursement, it becomes subrogated, to the extent of the payment made, to the rights of the client against those who are liable for the dishonest conduct of the offending attorney, Judiciary Law § 468-a. The right of subrogation includes the right to assert claims of malpractice, breach of contract and breach of trust against the law partners of the dishonest attorney, *Clients' Sec. Fund of State v Grandeau*, supra.

The duty owed by an attorney to his or her client to exercise care in the service of process is nondelegable and attorneys are not permitted to evade responsibility for its careful performance by the simple expedient of "farming out" the task to independent contractors, *Kleeman v Rheingold*, 81 NY2d 270, 598 NYS2d 149, 614 NE2d 712 (1993). Thus, an attorney may be held vicariously liable to his or her client for the negligence of a process server whom the attorney has hired, *id*; *Stanski v Ezersky*, 210 AD2d 186, 621 NYS2d 18 (1st Dept 1994).

An insurance company which retains an attorney as an independent contractor to defend its insured pursuant to its obligations under the insurance policy is not vicariously liable for the malpractice of the attorney, *Feliberty v Damon*, 72 NY2d 112, 531 NYS2d 778, 527 NE2d 261 (1988). For a discussion of whether an attorney can be liable to an insurance company which has hired him or her to represent an insured, see *Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 674 NYS2d 280 (1st Dept 1998).

VIII. Negligent Representation of Criminal Defendants

If the alleged malpractice involves representation in a criminal case, plaintiff must plead and prove that his or her conviction was due to the attorney's actions alone and not due to some consequence of the plaintiff's guilt, *Britt v Legal Aid Soc., Inc.*, 95 NY2d 443, 718 NYS2d 264, 741 NE2d 109 (2000); *Carmel v Lunney*, 70 NY2d 169, 518 NYS2d 605, 511 NE2d 1126 (1987); see *Dombrowski v Bulson*, 19 NY3d 347, 948 NYS2d 208, 971 NE2d 338 (2012); *Arnold v Devane*, 123 AD3d 1202, 998 NYS2d 509 (3d Dept 2014); *Hartman v Morganstern*, 28 AD3d 423, 814 NYS2d 169 (2d Dept 2006) (public policy prevents mainte-

nance of legal malpractice claim involving representation in criminal proceeding where plaintiff cannot assert innocence); *Rosado v Legal Aid Soc.*, 12 AD3d 356, 784 NYS2d 154 (2d Dept 2004). Further, absent a claim of innocence, a plaintiff cannot maintain a malpractice action against an attorney for failing to request “coterminous” rather than concurrent sentences and thereby arguably causing plaintiff to spend an additional month in prison, *Hartman v Morganstern*, 28 AD3d 423, 814 NYS2d 169 (2d Dept 2006). The existence of an undisturbed conviction precludes the client from pleading and proving the attorney’s malpractice, *Boomer v Gross*, 34 AD3d 1096, 825 NYS2d 171 (3d Dept 2006); *Dill v Russo*, *Garguilo & Fox*, 265 AD2d 447, 696 NYS2d 522 (2d Dept 1999); *Gill v Blau*, 234 AD2d 506, 651 NYS2d 182 (2d Dept 1996). Similarly, while the criminal charges at issue remain pending, a plaintiff is precluded from asserting innocence and, therefore, from pleading and proving the attorney’s malpractice, see *Dombrowski v Bulson*, *supra*; *Britt v Legal Aid Soc., Inc.*, *supra*.

The rule requiring a colorable claim of innocence is not limited to malpractice actions arising from representation at trial, *Boomer v Gross*, 34 AD3d 1096, 825 NYS2d 171 (3d Dept 2006). If plaintiff pleads guilty, even to a lesser offense, an action against the attorney is precluded unless the guilty plea is vacated, *Carmel v Lunney*, 70 NY2d 169, 518 NYS2d 605, 511 NE2d 1126 (1987). This principle is applicable even where the malpractice claim is related to the attorney’s advice on a matter collateral to the core of the criminal action, such as the immigration consequences of the client’s guilty plea, *Yong Wong Park v Wolff and Samson, P.C.*, 56 AD3d 351, 867 NYS2d 424 (1st Dept 2008); but see *Bass & Ullman v Chanes*, 185 AD2d 750, 586 NYS2d 610 (1st Dept 1992) (although plaintiff pleaded guilty to customs and mail fraud, legal malpractice claim relating to plaintiff’s business unrelated to criminal proceeding was not barred).

IX. Damages

The damages recoverable in a legal malpractice action include any loss “within the range of probable contemplation,” *Trimboli v Kinkel*, 226 NY 147, 123 NE 205 (1919), and not merely speculative loss, see *M & R Ginsburg, LLC v Segal, Goldman, Mazzotta & Siegel, P.C.*, 90 AD3d 1208, 934 NYS2d 269 (3d Dept 2011). The damages must be the “actual and ascertainable” losses resulting from the attorney’s negligence, *83 Willow, LLC v Apollo*, 187 AD3d 563, 135 NYS3d 11 (1st Dept 2020); *Leeder v Antonucci*, 174 AD3d 1469, 106 NYS3d 490 (4th Dept 2019); *New Kayak Pool Corp. v Kavinoky Cook LLP*, 125 AD3d 1346, 5 NYS3d 625 (4th Dept 2015); *Zarin v Reid & Priest*, 184 AD2d 385, 585 NYS2d 379 (1st Dept 1992). The purpose of compensatory damages in malpractice actions is to make the injured party whole, *83 Willow, LLC v Apollo*, *supra*. Thus, an attorney who negligently assured a client that she had marketable title to land was liable for the reasonable costs of the client’s broker’s commissions and any reimbursement costs paid to a purchaser who rejected the sale, but not the profits of the voided sale or the costs of the lawsuit with the purchaser, *Trimboli v*

Kinkel, *supra*. The lawsuit costs were not reasonably incurred in Trimboli, because it was “foolish as well as futile” for the client to litigate the validity of the sale, *id*.

At the pleading stage, plaintiff need not show that it actually sustained damages; it is sufficient to allege facts from which damages attributable to defendant’s conduct may reasonably be inferred, *InKine Pharmaceutical Co., Inc. v Coleman*, 305 AD2d 151, 759 NYS2d 62 (1st Dept 2003); see *Fletcher v Boies, Schiller & Flexner, LLP*, 75 AD3d 469, 906 NYS2d 212 (1st Dept 2010). However, a complaint was properly dismissed at the pleading stage where the damages alleged were speculative and incapable of being proven, *Giambrone v Bank of New York*, 253 AD2d 786, 677 NYS2d 608 (2d Dept 1998) (damages based on terms of unexecuted single-life trust which may have provided that plaintiff’s right to income was at trustees’ sole discretion); see *Bua v Purcell & Ingrao, P.C.*, 99 AD3d 843, 952 NYS2d 592 (2d Dept 2012). Further, a legal malpractice complaint was properly dismissed on summary judgment where plaintiff had failed to show actual damages although the matter had been pending for seven years and discovery was complete, *Igen, Inc. v White*, 250 AD2d 463, 672 NYS2d 867 (1st Dept 1998); see *Leeder v Antonucci*, 174 AD3d 1469, 106 NYS3d 490 (4th Dept 2019); *New Kayak Pool Corp. v Kavinoky Cook LLP*, 125 AD3d 1346, 5 NYS3d 625 (4th Dept 2015) (inability of plaintiff to establish actual damages is sufficient basis to grant summary judgment to defendant in legal malpractice action).

A plaintiff in a legal malpractice action is limited to recovering pecuniary damages occasioned by the malpractice, *Dombrowski v Bulson*, 19 NY3d 347, 948 NYS2d 208, 971 NE2d 338 (2012); see *Kaufman v Medical Liability Mut. Ins. Co.*, 121 AD3d 1459, 995 NYS2d 807 (3d Dept 2014). This rule applies to actions alleging malpractice in both civil and criminal cases, *id*; *Wilson v New York*, 294 AD2d 290, 743 NYS2d 30 (1st Dept 2002). Under the traditional rule, there can be no recovery for emotional distress occasioned by the attorney’s malpractice, *Andrewski v Devine*, 280 AD2d 992, 720 NYS2d 423 (4th Dept 2001); see *Green v Leibowitz*, 118 AD2d 756, 500 NYS2d 146 (2d Dept 1986); see also Annot: 41 ALR4th 351, or damage to the plaintiff’s reputation, *Kaufman v Medical Liability Mut. Ins. Co.*, *supra*. Thus, in *Dombrowski*, the court held that a plaintiff suing his former criminal defense attorney in legal malpractice could not recover nonpecuniary damages and was therefore prohibited from seeking damages for loss of liberty stemming from his incarceration.

In a legal malpractice suit arising from the loss of a cause of action, the measure of damages is generally the value of the claim lost, *Campagnola v Mulholland, Minion & Roe*, 76 NY2d 38, 556 NYS2d 239, 555 NE2d 611 (1990). The judgment cannot exceed the amount that could or would have been collected in the underlying action, *McKenna v Forsyth & Forsyth*, 280 AD2d 79, 720 NYS2d 654 (4th Dept 2001). Thus, defendant attorney is entitled to mitigate damages by offering evidence that the client’s recovery in the underlying personal injury action would

have been reduced under the collateral-source rule, *Stein v Levine*, 8 AD3d 652, 779 NYS2d 556 (2d Dept 2004); but see *Horstmann v Nicholas J. Grasso, P.C.*, 210 AD2d 671, 619 NYS2d 848 (3d Dept 1994) (defendant attorney could not invoke collateral-source provisions of CPLR 4545(c) to reduce portion of damages representing plaintiff's award for lost earnings where underlying action was for breach of contract rather than tort).

The plaintiff in a legal malpractice action cannot recover the value of any punitive damages that may have been lost as a result of the dismissal of the underlying action, *Braun v Rosenblum*, 25 AD3d 639, 811 NYS2d 683 (2d Dept 2006). An attorney cannot be held liable for causing the loss of a punitive damages claim because recognition of such liability would not further the purpose of punitive damages, i.e., to punish and deter future similar conduct, *Summerville v Lipsig*, 270 AD2d 213, 704 NYS2d 598 (1st Dept 2000).

A legal malpractice plaintiff may recover litigation expenses incurred in an attempt to avoid, minimize or reduce the damage caused by the attorney's wrongful conduct, *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 835 NYS2d 534, 867 NE2d 385 (2007). Thus, an attorney who admittedly requested a jury charge based on the wrong statutory provision and thereby placed his client at an unwarranted disadvantage was liable for the additional attorneys' fees and costs that the client incurred in appealing from the resulting verdict and participating in a second trial, *id.* The damages sustained by reason of an attorney's failure to prosecute a claim are not to be reduced by the amount of the contingent fee the attorney would have received had he or she performed the proper services, *Campagnola v Mulholland, Minion & Roe*, 76 NY2d 38, 556 NYS2d 239, 555 NE2d 611 (1990).

When a cause of action is lost as a result of an attorney's negligence, the client's injury is measured by the amount that would have been collected on that cause of action. The Second and Fourth Departments have held that it is the client's burden in a legal malpractice action to establish the collectibility of any judgment that would have been rendered in the underlying action, *Quantum Corporate Funding, Ltd. v Ellis*, 126 AD3d 866, 6 NYS3d 255 (2d Dept 2015); *Jedlicka v Field*, 14 AD3d 596, 787 NYS2d 888 (2d Dept 2005); *McKenna v Forsyth & Forsyth*, 280 AD2d 79, 720 NYS2d 654 (4th Dept 2001). However, the First Department has rejected that view and held that, "where relevant, the issue of noncollectibility should be treated as a matter constituting an avoidance or mitigation of the consequences of the attorney's malpractice," *Lindenman v Kreitzer*, 7 AD3d 30, 775 NYS2d 4 (1st Dept 2004). Under *Lindenman*, which overruled the First Department's decision in *Larson v Crucet*, 105 AD2d 651, 481 NYS2d 368 (1st Dept 1984), the burden of proving noncollectibility must be borne by defendant attorney, *Lindenman v Kreitzer*, *supra*; see also *Chiaffi v Wexler, Bergerman & Crucet*, 116 AD2d 614, 497 NYS2d 703 (2d Dept 1986) (refusing to strike affirmative defense to limit any malpractice recovery to amount that would have been collectible in underlying action). The defendant's

burden on this issue is limited to proving noncollectibility “between the date of the legal malpractice and the end of a reasonable period after the malpractice trial, short of the full 20-year viability period of a judgment,” *Lindenman v Kreitzer*, *supra*; see CPLR 211(b). However, the *Lindenman* court found it “appropriate to limit the defendant attorney’s burden of proving noncollectibility to the period between the date of legal malpractice and the end of a reasonable period of time after the malpractice trial, short of the full 20-year viability period of a judgment, without prejudice to the plaintiff to present evidence that subsequently becomes available concerning the collectibility of the judgment before the expiration of its full life span. The date as of which noncollectibility is to be established depends, in the final analysis, on the life span of the judgment and any other considerations deemed relevant by the court in balancing the equities,” *id.* The Fourth Department has also recognized that it is permissible for the defendant attorney to introduce expert testimony with respect to the collectibility of a hypothetical judgment against the potential defendant in the underlying action, *McKenna v Forsyth & Forsyth*, *supra*.

There may be a right to contribution in a legal malpractice action when two or more parties are alleged to be liable for damages for the same injury, *Frederick v Meighan*, 75 AD3d 528, 905 NYS2d 635 (2d Dept 2010); *Comi v Breslin & Breslin*, 257 AD2d 754, 683 NYS2d 345 (3d Dept 1999). Contribution is available whether or not the culpable parties are allegedly liable for the injury under the same or different theories, *id.* The breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought, *id.* Therefore, where plaintiff claims that defendant law firm was negligent in failing to discover and protect against misrepresentations of a seller and the law firm claims that any injury that plaintiff may have sustained was due, at least in part, to the alleged fraudulent concealment by the co-defendant seller, defendant law firm is entitled to seek contribution, *id.* Similarly, a law firm charged with failing to assert one of the several claims available to its client was entitled to seek contribution or indemnification from a subsequently retained firm on the theory that the latter firm’s negligent settlement of the client’s arbitration proceeding contributed to or aggravated the client’s loss, *Soussis v Lazer, Aptheker, Rosella & Yedid, P.C.*, 66 AD3d 993, 887 NYS2d 659 (2d Dept 2009).

CPLR 5001 permits an award of prejudgment interest from the date of the accrual of a legal malpractice action, *Barnett v Schwartz*, 47 AD3d 197, 848 NYS2d 663, 671 (2d Dept 2007); *Horstmann v Nicholas J. Grasso, P.C.*, 210 AD2d 671, 619 NYS2d 848 (3d Dept 1994); *Butler v Brown*, 180 AD2d 406, 579 NYS2d 79 (1st Dept 1992).

X. Malpractice Distinguished from Breach of Contract

In addition to any malpractice liability, an attorney may also be liable for breach of contract if he or she had made an express contract with the client to achieve a specific result or perform a particular act,

see *Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35, 675 NYS2d 14 (1st Dept 1998); *Saveca v Reilly*, 111 AD2d 493, 488 NYS2d 876 (3d Dept 1985); *Becker v Julien, Blitz & Schlesinger, P. C.*, 66 AD2d 674, 411 NYS2d 17 (1st Dept 1978) (there “may be” a breach of contract if particular attorney designated in contract does not try case). However, a breach of contract claim premised on the attorney’s failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of the malpractice claim and should be dismissed, *Levine v Lacher & Lovell-Taylor*, 256 AD2d 147, 681 NYS2d 503 (1st Dept 1998); *Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35, 675 NYS2d 14 (1st Dept 1998); see *Tulino v Hiller, P.C.*, 202 AD3d 1132, 164 NYS3d 157 (2d Dept 2022) (breach of contract action dismissed as duplicative of legal malpractice cause of action because both causes of action arose from same operative facts and did not allege distinct damages).

A claim against an attorney based solely on allegations that the attorney’s bill exceeded the amount set forth in the retainer agreement does not state a cause of action in malpractice, since such a claim does not relate to negligence in the performance of legal services, *Luddy v Osborn*, 186 AD2d 1069, 588 NYS2d 225 (4th Dept 1992). A malpractice action is also not the correct vehicle for a client to seek an accounting to recoup disbursements allegedly improperly charged against a jury award, *Mid-Hudson Valley Federal Credit Union v Quartararo & Lois, PLLC*, 155 AD3d 1218, 64 NYS3d 389 (3d Dept 2017) (fraud); *McDonald v Edelman & Edelman, P.C.*, 118 AD3d 562, 988 NYS2d 591 (1st Dept 2014). Such a claim implicates a breach of fiduciary duty and is therefore governed by the residual six-year statute of limitations, *id*; see CPLR 213(1). Fee disputes involving amounts between \$1,000 and \$50,000 are subject to a statewide attorneys’ fee-dispute resolution program, which gives clients in non-criminal matters the option of submitting most fee disputes to binding arbitration, see 22 NYCRR 137. Part 137 does not apply to “claims involving substantial legal questions, including professional malpractice or misconduct,” 22 NYCRR 137.1(b)(3).

XI. Tort Claims Against Attorneys Other Than Malpractice

The courts do not permit actions against attorneys by third parties for ethical violations where the specific elements of traditional common-law torts are not satisfied, *Shapiro v McNeill*, 92 NY2d 91, 677 NYS2d 48, 699 NE2d 407 (1998). Thus, in *Drago v Buonagurio*, 46 NY2d 778, 413 NYS2d 910, 386 NE2d 821 (1978), the Court of Appeals declined to recognize a cause of action brought by doctors claiming that a medical malpractice action brought by the attorney against them was baseless, since the elements of negligence, abuse of process, malicious prosecution and prima facie tort were not present. However, “frivolous” litigation conduct by attorneys may now be subject to sanctions under 22 NYCRR Part 130, see also CPLR 8303-a. Further, Civil Rights Law §§ 70 and 71 provide for civil liability, including treble damages, for malicious and vexatious suits brought in the name of another without the named party’s consent, see *Mintz & Gold, LLP v Zimmerman*, 56 AD3d 358, 869 NYS2d 394 (1st Dept 2008).

Judiciary Law § 487 permits an injured person to recover treble damages against an attorney who “[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party.” The statute also prescribes the same relief against an attorney who “[w]ilfully delays his [or her] client’s suit with a view to his [or her] own gain” or who “wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for.” Although the statute applies only when there has been deceit directed against a court or deceit during the course of a judicial proceeding, *Meimeteas v Carter Ledyard & Milburn LLP*, 105 AD3d 643, 963 NYS2d 583 (1st Dept 2013), Judiciary Law § 487 also makes the forbidden conduct a misdemeanor and imposes criminal penalties, a criminal conviction is not a condition precedent to bringing a civil action under the statute, *Schindler v Issler & Schrage, P.C.*, 262 AD2d 226, 692 NYS2d 361 (1st Dept 1999). Liability may be imposed under the statute for an attempted but unsuccessful deceit upon a court, *Amalfitano v Rosenberg*, 12 NY3d 8, 874 NYS2d 868, 903 NE2d 265 (2009). Likewise, the costs of defending litigation instituted by a complaint containing a material misrepresentation are a recoverable item of damages even if the court on which the deceit was attempted did not act on the belief that the attorney’s misrepresentation was true, *id.* A complaint that does not allege any injury proximately caused by counsel’s deceit or collusion does not state a cause of action for a violation of Judiciary Law § 487, *Maroulis v Friedman*, 153 AD3d 1250, 60 NYS3d 468 (2d Dept 2017); *McDonald v Edelman & Edelman, P.C.*, 118 AD3d 562, 988 NYS2d 591 (1st Dept 2014). In the First and Fourth Departments, a violation of the statute must be supported by a showing that the attorney either intended to deceive, or engaged in a chronic and extreme pattern of legal delinquency, *Koch v Sheresky, Aronson & Mayefsky LLP*, 184 AD3d 410, 125 NYS3d 413 (1st Dept 2020); *Brookwood Companies, Inc. v Alston & Bird LLP*, 146 AD3d 662, 49 NYS3d 10 (1st Dept 2017); *Duszyński v Allstate Ins. Co.*, 107 AD3d 1448, 967 NYS2d 796 (4th Dept 2013); *Scarborough v Napoli, Kaiser & Bern, LLP*, 63 AD3d 1531, 880 NYS2d 800 (4th Dept 2009); *Jaroslawicz v Cohen*, 12 AD3d 160, 783 NYS2d 467 (1st Dept 2004). However, in the Second Department, an attorney’s “chronic, extreme pattern of legal delinquency” is not a valid alternative predicate for liability under Judiciary Law § 487, since an intent to deceive is required, *Dupree v Voorhees*, 102 AD3d 912, 959 NYS2d 235 (2d Dept 2013); see *Lauder v Goldhamer*, 180 AD3d 885, 116 NYS3d 610 (2d Dept 2020); *Cullin v Spiess*, 122 AD3d 792, 997 NYS2d 460 (2d Dept 2014). Expert testimony is not required to prove or rebut a claim under Judiciary Law § 487, *Koch v Sheresky, Aronson & Mayefsky LLP*, *supra* (affidavit from legal expert not required to meet prima facie burden in support of defendants’ summary judgment motion; affidavit from someone with actual knowledge of the allegations sufficed).

A cause of action pursuant to Judiciary Law § 487 is not duplicative of a cause of action for legal malpractice, *Tulino v Hiller, P.C.*, 202 AD3d 1132, 164 NYS3d 157 (2d Dept 2022).

A cause of action for damages under Judiciary Law § 487 is

governed by the six-year catch-all limitations period, see CPLR 213(1), rather than the three-year period provided in CPLR 214(2) for claims to recover on liabilities, penalties or forfeitures created or imposed by statute, *Melcher v Greenberg Traurig, LLP*, 23 NY3d 10, 988 NYS2d 101, 11 NE3d 174 (2014).

Other tort causes of action may not be maintained in a malpractice action when the damages would be the same as those occasioned by the legal malpractice. There can be no fraud claim against an attorney for concealment of malpractice where the damages sought for fraud are the same as the damages for the malpractice, *White of Lake George Inc. v Bell*, 251 AD2d 777, 674 NYS2d 162 (3d Dept 1998) (plaintiff asserting fraud cause of action must plead intentional misrepresentations causing additional separate damages); *Boye v Rubin & Bailin, LLP*, 152 AD3d 1, 56 NYS3d 57 (1st Dept 2017) (breach of fiduciary duty claim); *Zarin v Reid & Priest*, 184 AD2d 385, 585 NYS2d 379 (1st Dept 1992) (breach of fiduciary duty alleging concealment of malpractice); *La Brake v Enzien*, 167 AD2d 709, 562 NYS2d 1009 (3d Dept 1990) (fraud claim); see *Maroulis v Friedman*, 153 AD3d 1250, 60 NYS3d 468 (2d Dept 2017) (breach of fiduciary duty claim duplicative of malpractice claim); but see *Mitschele v Schultz*, 36 AD3d 249, 826 NYS2d 14 (1st Dept 2006) (recognizing separate cause of action against accountant for fraud where accountant not only concealed malpractice from client but also perpetrated fraud on client from outset of retention).

In *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972, 638 NE2d 511 (1994), the Court held that, where defendant attorneys had drafted—and therefore had notice of—an agreement by their client to pay a portion of the proceeds of his lawsuit to plaintiffs, defendant attorneys could be held liable to plaintiffs for disregarding the agreement and paying all of the proceeds to their client. Although the *Leon* Court held that plaintiffs’ complaint stated a basis for inferring that they had an attorney-client relationship with defendants and that defendants were therefore potentially liable to plaintiffs for either malpractice or breach of fiduciary duty, the Court of Appeals indicated in a subsequent decision that the attorneys in *Leon* were being held potentially “liable as any individual would be who knowingly facilitates the misappropriation of property,” *Shapiro v McNeill*, 92 NY2d 91, 677 NYS2d 48, 699 NE2d 407 (1998); see *Radio Engineering Industries, Inc. v Denton*, 30 AD3d 672, 817 NYS2d 170 (3d Dept 2006).

Since an attorney’s relationship with clients is inherently fiduciary, claims involving legal malpractice are often joined with causes of action based on alleged breaches of fiduciary duties, *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 865 NYS2d 14 (1st Dept 2008); *Maroulis v Friedman*, 153 AD3d 1250, 60 NYS3d 468 (2d Dept 2017). However, such claims will be dismissed as duplicative unless the breach of fiduciary duty claim is based on facts that are different from those underlying the malpractice claim, *Knox v Aronson, Mayefsky & Sloan, LLP*, 168 AD3d 70, 91 NYS3d 23 (1st Dept 2018); *Maroulis v Friedman*, *supra*; see *Nevelson v Carro, Spanbock, Kaster &*

Cuiffo, 290 AD2d 399, 736 NYS2d 668 (1st Dept 2002). The violation of an ethical duty such as the duty of undivided loyalty to a client may also constitute a breach of the attorney's fiduciary duty, but the client can recover under that theory only if actual damages were sustained as a result, *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, supra. Moreover, where a claim for damages arises out of a breach of an attorney's fiduciary duty, the plaintiff must prove that the damages would not have arisen "but for" the breach, just as is required in an action for legal malpractice, *id.*

XII. Other Considerations

Whether the attorney's conduct met the required standard of care is generally a question for the jury, *Werle v Rumsey*, 278 NY 186, 15 NE2d 572 (1938); *Greene v Payne, Wood and Littlejohn*, 197 AD2d 664, 602 NYS2d 883 (2d Dept 1993); *Grago v Robertson*, 49 AD2d 645, 370 NYS2d 255 (3d Dept 1975). However, where it is clear that the attorney exercised his or her judgment reasonably, summary judgment should be granted dismissing the action, *Rubinberg v Walker*, 252 AD2d 466, 676 NYS2d 149 (1st Dept 1998); see *Buxton v Zukoff*, 200 AD3d 511, 155 NYS3d 313 (1st Dept 2021). Likewise, a plaintiff will be entitled to summary judgment where there is no conflict in the evidence, defendant's conduct fell below any permissible standard of due care and plaintiff's conduct was not really involved, *Logalbo v Plishkin, Rubano & Baum*, 163 AD2d 511, 558 NYS2d 185 (2d Dept 1990).

Unless the ordinary experience of the fact finder provides a sufficient basis for judging the adequacy of the professional service or the attorney's conduct fell below any standard of due care, expert testimony will be necessary to establish that the attorney breached a standard of professional care and skill, *Northrop v Thorsen*, 46 AD3d 780, 848 NYS2d 304 (2d Dept 2007); *Zasso v Maher*, 226 AD2d 366, 640 NYS2d 243 (2d Dept 1996); *Greene v Payne, Wood and Littlejohn*, 197 AD2d 664, 602 NYS2d 883 (2d Dept 1993). Consistent with this standard, expert testimony is not required where the attorney agreed to include a provision in a contract and failed to do so, see *Serhofer v Groman & Wolf, P.C.*, 203 AD2d 354, 610 NYS2d 294 (2d Dept 1994), or where an attorney who knew of a deadline for filing a notice of claim in another state failed to ask the foreign attorney he had retained for that purpose whether the notice had been filed, *Whalen v DeGraff, Foy, Conway, Holt-Harris & Mealey*, 53 AD3d 912, 863 NYS2d 100 (3d Dept 2008). Expert testimony may, depending on the complexity of a given case, be necessary to establish that an attorney's negligence proximately caused the client's losses, see *Cosmetics Plus Group, Ltd. v Traub*, 105 AD3d 134, 960 NYS2d 388 (1st Dept 2013) (bankruptcy issue); *Wo Yee Hing Realty, Corp. v Stern*, 99 AD3d 58, 949 NYS2d 50 (1st Dept 2012) (federal tax issue); *Suppiah v Kalish*, 76 AD3d 829, 907 NYS2d 199 (1st Dept 2010) (immigration law issue). As to the need for and admissibility of expert testimony in an attorney malpractice case, see Annot: 14 ALR4th 170. As to expert testimony generally, see PJI 1:90.

A judicial determination that an attorney is entitled to recover

legal fees precludes a malpractice action based on the same services, *Siegel v Werner & Zaroff, P.C.*, 270 AD2d 119, 704 NYS2d 570 (1st Dept 2000); *Pirog v Ingber*, 203 AD2d 348, 609 NYS2d 675 (2d Dept 1994); *Chisholm-Ryder Co., Inc. v Sommer & Sommer*, 78 AD2d 143, 434 NYS2d 70 (4th Dept 1980). Similarly, a legal malpractice claim could not be maintained where the Supreme Court approved an Infant Compromise Order, which distributed part of the proceeds of plaintiff's judgment in the underlying action to defendant attorney, since such judicial action necessarily determined that the fee was appropriate and that there was no malpractice, *Bauza v Livingston*, 40 AD3d 791, 836 NYS2d 645 (2d Dept 2007).

A legal malpractice claim survives a client's death and may be prosecuted by the client's estate representative, *Newbach v Giaimo & Vreeburg*, 209 AD2d 222, 618 NYS2d 307 (1st Dept 1994).

For a discussion of principles governing the limitations period for bringing a legal malpractice action, see Introductory Comment to Malpractice.

PJI 2:153. Malpractice—Architect

An architect who prepares plans and specifications for a building impliedly represents that he or she has the reasonable degree of skill usually possessed by a member of the architectural profession and is familiar with the construction materials and practices in ordinary use in the construction of such a building and with the various building code provisions governing construction of such a building. An architect is not required to have that degree of skill that belongs only to a few persons of extraordinary skill but must keep informed of currently approved methods in general use in the profession and in the construction industry. An architect is liable to a client for defects in the building resulting from the architect's failure in the preparation of plans and specifications to use that degree of skill usually possessed by architects and for failure to be familiar with the various code provisions and current materials and practices in general use in the construction industry.

An architect who undertakes to supervise the construction of a building is under a duty to use reasonable care to see that the work complies with the various code provisions and the plans and

specifications and is done in a good and workman-like manner. By reasonable care is meant that degree of care that a reasonably prudent architect would use under the same circumstances. An architect is not required to remain constantly at the job site but must make such inspections at the site and be present to oversee such portions of the construction as a reasonably prudent architect would do.

Comment

Caveat: Failure to use due care in design or supervision allows recovery of both tort and contract damages, except those damages may be precluded by the running of the applicable statute of limitations, *Sears, Roebuck & Co. v Enco Associates, Inc.*, 43 NY2d 389, 401 NYS2d 767, 372 NE2d 555 (1977); *Hotel Utica, Inc. v Armstrong*, 62 AD2d 1147, 404 NYS2d 455 (4th Dept 1978); see *Brushton-Moira Cent. School Dist. v Fred H. Thomas Associates, P.C.*, 91 NY2d 256, 669 NYS2d 520, 692 NE2d 551 (1998); Introductory Statement preceding PJI 2:150; see also *Video Corp. of America v Frederick Flatto Associates, Inc.*, 58 NY2d 1026, 462 NYS2d 439, 448 NE2d 1350 (1983). The scope of evidence admissible on the issue of liability under either theory is the same, *Brushton-Moira Cent. School Dist. v Fred H. Thomas Associates, P.C.*, supra. Under CPLR 214(6), which was enacted to change the effect of *Sears, Roebuck & Co. v Enco Associates, Inc.*, supra, and *Santulli v Englert, Reilly & McHugh, P.C.*, 78 NY2d 700, 579 NYS2d 324, 586 NE2d 1014 (1992), claims that are essentially ones for malpractice are governed by the three-year statute of limitations regardless of whether the underlying theory is contract or tort and, in contract cases, regardless of whether the breached contractual duty was express or implied, *Matter of R.M. Kliment & Frances Halsband, Architects (McKinsey & Co., Inc.)*, 3 NY3d 538, 788 NYS2d 648, 821 NE2d 952 (2004). It has been held that General Business Law § 399-c, which prohibits use of mandatory arbitration clauses in contracts for the sale or purchase of consumer goods, applies to contracts between natural persons and architects for architectural services in connection with the construction of a home, and, thus, such clauses cannot be invoked to preclude plenary malpractice actions in such situations, *Ragucci v Professional Const. Services*, 25 AD3d 43, 803 NYS2d 139 (2d Dept 2005).

As to an architect who undertakes preparation of plans the charge is based on *Hubert v Aitken*, 2 NYS 711 (CP Ct 1888), aff'd, 5 NYS 839 (CP Ct 1889) and aff'd, 123 NY 655, 25 NE 954 (1890); *Potter v Gilbert*, 130 App Div 632, 115 NYS 425 (1st Dept 1909), aff'd, 196 NY 576, 90 NE 1165 (1909); *Major v Leary*, 241 App Div 606, 268 NYS 413 (2d Dept 1934), and the portion of the charge relating to an architect who undertakes supervision is based on *Straus v Buchman*, 96 App Div 270, 89 NYS 226 (1st Dept 1904), aff'd, 184 NY 545, 76 NE 1109 (1906);

Petersen v Rawson, 34 NY 370 (1866); Hubert v Aitken, *supra*; Clinton v Boehm, 139 App Div 73, 124 NYS 789 (1st Dept 1910); see Annot: 59 ALR3d 767. The charge states the common law obligations of the architect and must be modified as the contract between the owner and the architect requires. Note, however, GOL § 5-324 invalidates an agreement by an owner, contractor, subcontractor or supplier to indemnify an architect, engineer or surveyor for liability arising out of defects in maps, plans, designs or specifications. As to an architect's liability for defective plans, see Annot: 97 ALR3d 455; 25 ALR2d 1085; for improperly issuing a certificate of completion, see Annot: 43 ALR2d 1227. An architect is not subject to an action sounding in breach of warranty or strict products liability, *Sears, Roebuck & Co. v Enco Associates, Inc.*, 43 NY2d 389, 401 NYS2d 767, 372 NE2d 555 (1977). Generally as to an architect's duty to exercise care and skill, 76 NYJur2d, Malpractice §§ 21–33. Expert testimony is required to prove malpractice unless the alleged act of malpractice can be evaluated by lay persons, 530 East 89 Corp. v Unger, 43 NY2d 776, 402 NYS2d 382, 373 NE2d 276 (1977); Michael v He Gin Lee Architect Planner, PLLC, 153 AD3d 704, 61 NYS3d 236 (2d Dept 2017); Columbus v Smith & Mahoney P.C., 259 AD2d 857, 686 NYS2d 235 (3d Dept 1999).

The architect's duty of professional care extends to the client, and to those members of a limited class whose reliance on the architect's service was, or at least should have been, specifically foreseen, *Gordon v Holt*, 65 AD2d 344, 412 NYS2d 534 (4th Dept 1979); see *White v Guarente*, 43 NY2d 356, 401 NYS2d 474, 372 NE2d 315 (1977). As to engineering consultants, see *Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 541 NYS2d 335, 539 NE2d 91 (1989).

The original opinion in *Hubert v Aitken*, 5 NYS 839 (CP Ct 1889), *aff'd*, 123 NY 655, 25 NE 954 (1890), spells out the obligation of the architect to keep abreast of generally accepted practices and to possess reasonable knowledge and skill with respect to the trades involved and the strength of materials. As to these things, the architect may not rely on the artisans in the trade. The opinion on reargument makes clear that in supervising construction it is not necessarily negligence for the architect to rely upon inquiry of the artisans concerning construction work performed in the architect's absence. In *Straus v Buchman*, 96 App Div 270, 89 NYS 226 (1st Dept 1904), *aff'd*, 184 NY 545, 76 NE 1109 (1906), the court held that, with respect to the placing of beams, the architect was not exonerated because the work had been done during the architect's absence from the job.

Damages to the client have been said to be measured by "the cost of correction of the defects in the buildings constructed or, if the defects were not remediable, the difference in value between properly constructed buildings and those that were in fact built," *Sosnow v Paul*, 36 NY2d 780, 369 NYS2d 693, 330 NE2d 643 (1975); see *Brushton-Moira Cent. School Dist. v Fred H. Thomas Associates, P.C.*, 91 NY2d 256, 669 NYS2d 520, 692 NE2d 551 (1998); *Sears, Roebuck & Co. v*

Enco Associates, Inc., 43 NY2d 389, 401 NYS2d 767, 372 NE2d 555 (1977); *Steiner v Wenning*, 43 NY2d 831, 402 NYS2d 567, 373 NE2d 366 (1977); *Paver and Wildfoerster v Catholic High School Ass'n*, 38 NY2d 669, 382 NYS2d 22, 345 NE2d 565 (1976); see also *Video Corp. of America v Frederick Flatto Associates, Inc.*, 85 AD2d 448, 448 NYS2d 498 (1st Dept 1982), mod, 58 NY2d 1026, 462 NYS2d 439, 448 NE2d 1350 (1983). The proper measure of damages in such circumstances is computed as of the date of the breach, and not at the date of the trial, *Brushston-Moira Cent. School Dist. v Fred H. Thomas Associates, P.C.*, supra. Other cases have used only the cost of putting the building in the condition in which it would have been had the architect properly performed, *Hubert v Aitken*, 2 NYS 711 (CP Ct 1888), aff'd, 5 NYS 839 (CP Ct 1889) and aff'd, 123 NY 655, 25 NE 954 (1890); *Straus v Buchman*, 96 App Div 270, 89 NYS 226 (1st Dept 1904), aff'd, 184 NY 545, 76 NE 1109 (1906); but the difference in value test has support in authority, see Annot: 25 ALR2d 1085. Where the defect is trivial and innocent and the cost to correct it is disproportionately great, the damages are measured by the difference in value, *Nieman-Irving & Co. v Lazenby*, 263 NY 91, 188 NE 265 (1933); *Jacob & Youngs v Kent*, 230 NY 239, 129 NE 889 (1921). In property damage cases the measure of damages is the difference in value or the cost of remedying the defect, whichever is less, *Gass v Agate Ice Cream*, 264 NY 141, 190 NE 323 (1934).

In *Assouline Ritz LLC v Edward I. Mills & Associates, Architects, PC*, 91 AD3d 473, 937 NYS2d 11 (1st Dept 2012), plaintiffs purchased a five-story building intending to renovate it and add six floors to it. In making the purchase, plaintiffs relied on the advice of the defendant-architect that the applicable zoning laws permitted the additional floors. That advice was erroneous and plaintiffs were required to change the plans to comply with the zoning laws. Plaintiffs ultimately demolished the building and replaced it with a new eleven-story structure. In affirming the denial of defendant's motion to dismiss the malpractice complaint, the court declared that plaintiffs would be entitled to recover the losses they incurred as a proximate result of their reliance on defendant's misadvice, which would be the reduction in value on the resale of the existing property. If defendant proves that plaintiffs failed to make reasonably diligent efforts to mitigate their damages and the extent to which those efforts would have diminished plaintiffs' loss, plaintiffs' right of recovery will be subject to reduction.

General Business Law § 399-c, which prohibits the use of mandatory arbitration clauses in contracts for the sale or purchase of "consumer goods," applies to a contract to provide architectural services in connection with the construction of a home, rendering the arbitration clause unenforceable, *Ragucci v Professional Const. Services*, 25 AD3d 43, 803 NYS2d 139 (2d Dept 2005).

As to the statute of limitations applicable to malpractice claims, see the Introductory Statement preceding PJI 2:149.

PJI 2:154. Malpractice—Accountant

A (certified public, public) accountant who undertakes to examine the books and audit the accounts of a client does not guarantee the correctness of the accounts. (He, she, it) undertakes to use such skill and care in the performance of the work as a reasonably skillful and diligent (certified public, public) accountant would use under the same circumstances. (He, she, it) is not responsible for mere error of judgment but if (he, she, it) fails to make an investigation that would ordinarily be made by a reasonably skillful accountant, or if, in making an investigation, fails to use the care that a reasonably skillful and diligent accountant would use under the circumstances, (he, she, it) is liable for any loss that could reasonably have been anticipated at the time (he, she, it) was hired.

Comment

Based on *Craig v Anyon*, 212 App Div 55, 208 NYS 259 (1st Dept 1925), *aff'd*, 242 NY 569, 152 NE 431 (1926); *National Sur. Corp. v Lybrand*, 256 App Div 226, 9 NYS2d 554 (1st Dept 1939); *Smith v London Assur. Corp.*, 109 App Div 882, 96 NYS 820 (2d Dept 1905); see *Collins v Esserman & Pelter*, 256 AD2d 754, 681 NYS2d 399 (3d Dept 1998) (citing PJI); 76 NYJur2d Malpractice §§ 6–20; Annots: 35 ALR4th 225; 92 ALR3d 396; 46 ALR3d 979; see also *Harnett, Responsibilities of Insurance Agents and Brokers*, § 7.13.

This charge is applicable only where there is a direct professional relationship between the accountant and the client. In order for a party who is not in privity with accountants to impose liability for negligence in the preparation of financial reports, it must be alleged and proved that the accountants were aware of a particular purpose for which the reports were to be employed and of the intent that a known party would rely on the reports, and the knowledge of the accountants must be evinced by some conduct linking them to the party bringing suit, *Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 493, 493 NYS2d 435, 483 NE2d 110 (1985); *Caprer v Nussbaum*, 36 AD3d 176, 825 NYS2d 55 (2d Dept 2006) (condominium owner can maintain negligence action against accountant who prepared condominium's financial statements, which determine owner's common charges, demonstrating relationship approaching privity); *Ambassador Factors v Kandel & Co.*, 215 AD2d 305, 626 NYS2d 803 (1st Dept 1995). An alternate theory of recovery against an accounting practice is misrepresentation, *Ambassador Factors v Kandel & Co.*, *supra*. As to the liability of an accountant to third persons for negligent misrepresentation, see PJI 3:21.

Accounting malpractice contemplates a failure to exercise due care and proof of a material deviation from recognized and accepted professional standards for accountants and auditors, generally measured by generally accepted accounting principles (i.e., GAAP) and generally accepted auditing standards (i.e., GAAS) promulgated by the American Institute of Certified Public Accountants, Board of Trustees of IBEW Local 43 Elec. Contractors Health and Welfare, Annuity and Pension Funds v D'Arcangelo & Co., LLP, 124 AD3d 1358, 1 NYS3d 659 (4th Dept 2015); Cumis Ins. Society Inc. v Tooke, 293 AD2d 794, 739 NYS2d 489 (3d Dept 2002); see Collins v Esserman & Pelter, 256 AD2d 754, 681 NYS2d 399 (3d Dept 1998).

An accountant is, of course, liable to the client for malpractice, see *Ultramares Corporation v Touche*, 255 NY 170, 174 NE 441 (1931). The duty of the accountant depends upon the nature and scope of the retainer, see 1136 *Tenants' Corp. v Max Rothenberg & Co.*, 27 AD2d 830, 277 NYS2d 996 (1st Dept 1967), *aff'd*, 21 NY2d 995, 290 NYS2d 919, 238 NE2d 322 (1968); *Cumis Ins. Society Inc. v Tooke*, 293 AD2d 794, 739 NYS2d 489 (3d Dept 2002); *National Sur. Corp. v Lybrand*, 256 App Div 226, 9 NYS2d 554 (1st Dept 1939).

The accountant's negligent act must have been a proximate cause of the damage claimed, *Craig v Anyon*, 212 App Div 55, 208 NYS 259 (1st Dept 1925), *aff'd*, 242 NY 569, 152 NE 431 (1926); *Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214, 639 NYS2d 329 (1st Dept 1996); *Geotel, Inc. v Wallace*, 162 AD2d 166, 556 NYS2d 577 (1st Dept 1990) (since corporate officer was authorized to write checks, payment of checks by bank was not proximate cause of loss, and failure of accountants to detect issuance of such checks was not material to loss sustained by corporation due to officer's unauthorized securities trading). The plaintiff must establish, beyond the point of speculation and conjecture, a causal connection between its losses and the defendant's actions, *KBL, LLP v Community Counseling & Mediation Services*, 123 AD3d 488, 999 NYS2d 18 (1st Dept 2014); *Herbert H. Post & Co. v Sidney Bitterman, Inc.*, *supra*; *Leading Insurance Group Insurance Company, Ltd. (U.S. Branch), Inc. v Friedman LLP*, 195 AD3d 418, 150 NYS3d 237 (1st Dept 2021) (lost time damages were speculative where client did not prove he would have acted earlier if reserve deficiencies were discovered in accountant's audit). Therefore, the plaintiff must show that "but for" the accountant's alleged malpractice, plaintiff would not have sustained some actual ascertainable damages, *Herbert H. Post & Co. v Sidney Bitterman, Inc.*, *supra*; see *KBL, LLP v Community Counseling & Mediation Services*, *supra*. However, even where an accountant's error may have led tax authorities to "red flag" and thereafter audit plaintiff's tax return, plaintiff could not recover the expenses he incurred in defending against the audit, since there was no evidence that any erroneously reported item created a tax liability that would not otherwise have existed, *Penner v Hoffberg Oberfest Burger & Berger*, 44 AD3d 554, 844 NYS2d 229 (1st Dept 2007); see *Leading Insurance Group Insurance Company, Ltd. (U.S. Branch), Inc. v Friedman LLP*, *supra* (that regulatory authority would

have taken same action against plaintiff even in the absence of accountant error considered in determining whether damages claim against accountant was speculative).

Comparative negligence is a partial defense, CPLR 1401; see PJI 2:36, but only when it has contributed to the accountant's failure to perform the contract and report the truth, see *Hall & Co., Inc. v Steiner and Mondore*, 147 AD2d 225, 543 NYS2d 190 (3d Dept 1989); see also *Craig v Anyon*, 212 App Div 55, 208 NYS 259 (1st Dept 1925), *aff'd*, 242 NY 569, 152 NE 431 (1926); *National Sur. Corp. v Lybrand*, 256 App Div 226, 9 NYS2d 554 (1st Dept 1939).

In the absence of negligence on the client's part, the client is entitled to recover such losses as could reasonably have been anticipated at the time the accountant was engaged in the performance of the work, *National Sur. Corp. v Lybrand*, 256 App Div 226, 9 NYS2d 554 (1st Dept 1939); *Smith v London Assur. Corp.*, 109 App Div 882, 96 NYS 820 (2d Dept 1905); see *Components Direct, Inc. v European American Bank and Trust Co.*, 175 AD2d 227, 572 NYS2d 359 (2d Dept 1991) (accountants, who allegedly misadvised client to pay tax liability, rather than seek extension, could be held liable for damages flowing from termination of line of credit that occurred as a result of an overdraft to pay the tax liability).

Where an accountant relies upon inaccurate financial records supplied by an officer of a corporate client and a special relationship exists that establishes a duty on the part of the officer to provide correct information, the accountant may implead the officer individually, *Raymond Corp. v Coopers & Lybrand*, 105 AD2d 926, 482 NYS2d 377 (3d Dept 1984).

For statute of limitations purposes, the claim against the accountant accrues upon the client's receipt of the accountant's work product, not when tax deficiency is assessed, *Ackerman v Price Waterhouse*, 84 NY2d 535, 620 NYS2d 318, 644 NE2d 1009 (1994); *Grosso Moving & Packing Co., Inc. v Damens*, 233 AD2d 128, 649 NYS2d 136 (1st Dept 1996). The doctrine of continuous representation applies to actions against accountants, *Ackerman v Price Waterhouse*, 252 AD2d 179, 683 NYS2d 179 (1st Dept 1998); see *Board of Trustees of IBEW Local 43 Elec. Contractors Health and Welfare, Annuity and Pension Funds v D'Arcangelo & Co., LLP*, 124 AD3d 1358, 1 NYS3d 659 (4th Dept 2015). The continuous representation must be in connection with the specific matter directly in dispute and not merely the continuation of a general professional relationship, *id.* For a discussion of the statute of limitations for suits against accountants, see Introductory Statement preceding PJI 2:150.

5. COMMON CARRIER**a. DUTY TO PASSENGER****Introductory Statement**

The principles of liability of a common carrier to those who are actually present in its vehicles are well settled and are discussed in the Charges and Comments which follow. With respect to conditions existing on premises owned and maintained by the carrier, at one time it was important to determine whether plaintiff was a passenger of the carrier since the liability of the carrier would depend upon whether plaintiff was a passenger, invitee, licensee or trespasser. Older cases, see *Garricott v New York State Rys.*, 223 NY 9, 119 NE 94 (1918); *Palmeri v Manhattan Ry. Co.*, 133 NY 261, 30 NE 1001 (1892); *Reschke v Syracuse, L.S. & N.R. Co.*, 155 App Div 48, 139 NYS 555 (4th Dept 1913), *aff'd*, 211 NY 602, 105 NE 1097 (1914); *Amoruso v New York City Transit Authority*, 12 AD2d 11, 207 NYS2d 855 (1st Dept 1960); see also 17 NYJur2d, Carriers § 355, defined a passenger broadly so as to include a person who has entered an area maintained by the carrier for the use of customers while waiting to board, see also 11 ALR2d 1075 as to rights of a person who accompanied a passenger to the platform. This broad definition is no longer significant in view of the abolition of the status categories and adoption of a single standard of reasonable care under the circumstances, see *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868 (1976); see generally Introductory Statement Preceding PJI 2:89. As a result, former charge PJI 2:160 has been deleted.

A “common carrier” is a person or entity engaged in the business of transporting persons or property for compensation, *Anderson v Fidelity & Casualty Co. of New York*, 228 NY 475, 127 NE 584 (1920); *Gerhard & Hey v Cattaraugus Tanning Co.*, 241 NY 413, 150 NE 500 (1926). The test for determining whether an entity is a common carrier is whether it holds itself out, either expressly or by a course of conduct, to carry persons or property for hire, so long as it has room, for all that may see fit to employ it, *Anderson v Fidelity & Casualty Co. of New York*, *supra*; *Gerhard & Hey v Cattaraugus Tanning Co.*, *supra*. Common carriers are distinguished from private carriers by their general obligation to take on all persons or property up to the capacity of their vehicles, *Anderson v Fidelity & Casualty Co. of New York*, *supra*; *Gerhard & Hey v Cattaraugus Tanning Co.*, *supra*; see *Blake v First Transit Transp. Service*, 126 AD3d 1054, 6 NYS3d 678 (3d Dept 2015) (applying principles applicable to common carriers to entity that provided transportation services to individuals in custody of department of corrections). The absence of a regular schedule of operation or of a definite terminal does not necessarily defeat a carrier’s status as a common carrier, *Anderson v Fidelity & Casualty Co. of New York*, *supra*. Thus, taxicabs are treated as common carriers, *id*; see *Kelleher v F.M.E. Auto Leasing Corp.*, 192 AD2d 581, 596 NYS2d 136 (2d Dept 1993); *Mironov*

v New York Mut. Underwriters, 147 AD2d 761, 537 NYS2d 345 (3d Dept 1989).

The standard of care owed to a passenger is no different from the general standard of reasonable care under the circumstances, see *Bethel v New York City Transit Authority*, 92 NY2d 348, 681 NYS2d 201, 703 NE2d 1214 (1998); *Blake v First Transit Transp. Service*, 126 AD3d 1054, 6 NYS3d 678 (3d Dept 2015); *Grant v Metropolitan Transp. Authority*, 67 AD2d 611, 412 NYS2d 7 (1st Dept 1979); see PJI 2:161. Under this standard, there is no stratification of degrees of care as a matter of law; rather, "there are only different amounts of care, as a matter of fact," *Bethel v New York City Transit Authority*, *supra*. The duty of a private carrier to exercise reasonable care for the safety of their passengers does not extend to circumstances that could not reasonably be foreseen by the carrier, such as the act of a fellow passenger in closing a door on plaintiff's hand, *Kelly v Otis*, 190 AD2d 1056, 593 NYS2d 673 (4th Dept 1993).

With respect to maintenance of premises, if a common carrier has reason to anticipate a large crowd gathering at a station or other passenger area furnished by the carrier, it must take such precautions as may be required to avoid injury resulting from rushing or crowding of assembling passengers, *Reschke v Syracuse, L.S. & N.R. Co.*, 155 App Div 48, 139 NYS 555 (4th Dept 1913), *aff'd*, 211 NY 602, 105 NE 1097 (1914). However, a carrier is not liable for injury caused by pushing by a crowd waiting for a bus where there is no station or platform or other designated waiting area and the people are waiting in the public street, *McMahon v Surface Transp. Corp. of N.Y.*, 272 App Div 202, 69 NYS2d 859 (1st Dept 1947); see *Coppersmith v New York*, 194 AD2d 586, 599 NYS2d 75 (2d Dept 1993).

The duty owed includes the duty to use reasonable care in providing and maintaining safe and adequate premises, *Cruz v New York City Transit Authority*, 136 AD2d 196, 526 NYS2d 827 (2d Dept 1988); see *Harrison v New York City Transit Authority*, 113 AD3d 472, 978 NYS2d 194 (1st Dept 2014) (municipal common carrier required to exercise ordinary care in maintaining subway platform). Except where the carrier created the condition, plaintiff must prove that the carrier had actual or constructive notice of the dangerous or defective condition that caused the accident and, further, had sufficient opportunity to remedy it, *id.* For a discussion of the duty of municipal and non-municipal carriers to protect against the conduct of third persons on the premises, see PJI 2:163, Comment, *infra*.

While the caselaw defining who is a passenger may now be mostly of historical interest, a few basic principles should be briefly noted for guidance in the event that an issue should arise in which it is important to determine whether plaintiff was a passenger of a common carrier.

A person actually in a vehicle owned and operated by a private company under contract to a railroad to transport prospective pas-

sengers to the railroad station at a daily compensation is a railroad passenger even though he or she has not paid the fare, *Buffett v Troy & B.R. Co.*, 40 NY 168 (1869). The passenger-carrier relationship continues when the passenger alights at an intermediate stop, at the express or implied invitation of the carrier, to use rest room facilities, *Gold v Swiss Air Transp. Co.*, 33 AD2d 777, 307 NYS2d 166 (2d Dept 1969). Any attempt to exclude liability for an injury occurring at such facilities is exculpatory and invalid unless the passenger is offered a contract at a lower rate containing such exclusion, *id.*

Similarly, a plaintiff working on a ship is not a passenger and is owed a limited duty by the vessel owner under the Longshore and Harbor Workers' Compensation Act, *Scindia Steam Nav. Co., Ltd. v De Los Santos*, 451 US 156, 101 SCt 1614 (1981); *Schnapp v Miller's Launch, Inc.*, 150 AD3d 32, 49 NYS3d 449 (1st Dept 2017).

State law requires that a common carrier give notice, e.g., to the Commissioner of Transportation, of accidents happening upon its line, Transportation Law § 117.

(1) ASPECTS OF DUTY

PJI 2:161. Common Carrier—Duty to Passenger—Operation

As you have heard, the plaintiff AB claims [*state plaintiff's claims*]. The defendant CD denies [*state allegations that defendant denies*] and claims [*state defendant's claims*].

A (railroad, subway, bus company, taxi company, airline) owes its passengers a duty to use reasonable care in operating its (trains, buses, taxis, aircraft) for their safety. Reasonable care means the care that a reasonably prudent (railroad, subway, bus company, taxi company, airline) would use under the same circumstances, in light of the dangers and risks that were known to the (railroad, subway, bus company, taxi company, airline) or that it should reasonably have foreseen.

In order for AB to recover from CD, AB must prove that (1) (he, she) was a passenger on CD's (train, bus, taxi, aircraft); (2) [*state plaintiff's claims*] occurred, (3) CD's employee(s) failed to use reasonable care in operating CD's (train, bus, taxi, aircraft); (4) [*omit in bifurcated trial:*] AB was injured; and (5) CD's (employee's, employees') failure to use reasonable care in operating CD's (train, bus, taxi, aircraft) was a substantial factor in bringing about (the accident, AB's injury).

If you decide that: (1) AB was not a passenger on CD's (train, bus, taxi, aircraft); or (2) [*state plaintiff's claims*] did not occur; or (3) CD's employee(s) did not fail to use reasonable care in operating its (train, bus, taxi, aircraft); or (4) [*omit in bifurcated trial:*] AB was not injured; or (5) CD's (employee's, employees') failure to use reasonable care in operating its (train, bus, taxi, aircraft) was not a substantial factor in bringing about (the accident, AB's injury), then you will find for CD and go no further [*state where appropriate: on this claim*].

On the other hand, if you decide that: (1) AB

was a passenger on CD's (train, bus, taxi, aircraft); and (2) [state plaintiff's claims] occurred; and (3) CD's employee(s) failed to use reasonable care in operating its (train, bus, taxi, aircraft); and (4) [omit in bifurcated trial:] AB was injured; and (5) CD's (employee's, employees') failure to use reasonable care in operating its (train, bus, taxi, aircraft) was a substantial factor in bringing about (the accident, AB's injury), you will find for AB and go on to consider AB's damages.

[PJI 2:70 should also be charged; where comparative fault has been raised, PJI 2:36 should be charged]

Comment

Caveat: The charge has been drafted for use in both non-bifurcated trials and bifurcated trials, where the issues of negligence and injury are tried separately. In bifurcated trials, the charge should be appropriately modified as indicated.

Based on *Bethel v New York City Transit Authority*, 92 NY2d 348, 681 NYS2d 201, 703 NE2d 1214 (1998); *Stierle v Union Ry. Co.*, 156 NY 70, 50 NE 419 (1898); *Bracco v MABSTOA*, 117 AD2d 273, 502 NYS2d 158 (1st Dept 1986) (citing PJI); *O'Leary v American Airlines*, 100 AD2d 959, 475 NYS2d 285 (2d Dept 1984) (citing PJI); *Kuhn v Niagara Frontier Transit System, Inc.*, 13 AD2d 902, 215 NYS2d 617 (4th Dept 1961); *Amoruso v New York City Transit Authority*, 12 AD2d 11, 207 NYS2d 855 (1st Dept 1960); *Thomas v Central Greyhound Lines, Inc.*, 6 AD2d 649, 180 NYS2d 461 (1st Dept 1958); *Taddeo v Tilton*, 248 App Div 290, 289 NYS 427 (4th Dept 1936); see *Transportation Law* § 97-a (requiring promulgation of rules for flag protection of stopped trains); 17 NYJur2d, Carriers § 390. As to goods, the common carrier is an insurer, see *Kingsley Sportswear, Inc. v Standard Hauling Co., Inc.*, 49 AD2d 854, 374 NYS2d 19 (1st Dept 1975); 17 NYJur2d, Carriers § 270, and may not contract for exemption, but as to baggage may limit damages to \$150 unless a greater value is declared and paid for, see *Transportation Law* § 109; 17 NYJur2d, Carriers § 287.

In *Bethel v New York City Transit Authority*, 92 NY2d 348, 681 NYS2d 201, 703 NE2d 1214 (1998), the Court of Appeals re-examined earlier decisions holding that common carriers owe a "high," a "very high" or the "highest" degree of care to assure the safety of their passengers, see *Kelley v Manhattan Ry. Co.*, 112 NY 443, 20 NE 383 (1889), and realigned the standard of care required of common carriers with the traditional, basic negligence standard of reasonable care under the circumstances, see *McLean v Triboro Coach Corporation*, 302 NY 49, 96 NE2d 83 (1950) (suggesting need for re-examination of prior standard); see also *Adams v New York City Transit Authority*, 88 NY2d 116, 643

NYS2d 511, 666 NE2d 216 (1996) (abrogating rule making common carriers vicariously liable for acts of employees not within scope of employment). Under that standard, there is no stratification of the carrier's duty as to operation as a matter of law; rather, "there are only different amounts of care, as a matter of fact" and the carrier's duty as to operation is only that of reasonable care, *Bethel v New York City Transit Authority*, *supra*; see *Grant v Metropolitan Transp. Authority*, 67 AD2d 611, 412 NYS2d 7 (1st Dept 1979).

The emergency rule, stated in PJI 2:14, applies to a carrier's duty to its passengers, *Wynn v Central Park, N. & E.R.R. Co.*, 133 NY 575, 30 NE 721 (1892); see Comment to PJI 2:165.

In an action by a passenger, the carrier has the burden of explaining how a collision occurred because the doctrine of *res ipsa loquitur* applies, *Plumb v Richmond Light & R. Co.*, 233 NY 285, 135 NE 504 (1922); *Horowitz v Kevah Konner, Inc.*, 67 AD2d 38, 414 NYS2d 540 (1st Dept 1979); *Prosser & Keeton, Torts* (5th Ed.).

Exposure of a passenger to danger, which the exercise of reasonable foresight would have avoided, is negligent conduct on the part of a carrier, *Watson v Adirondack Trailways*, 45 AD2d 504, 359 NYS2d 912 (3d Dept 1974). It is, therefore, a question for the jury whether overcrowding of the vehicle constitutes negligence, *Ligon v International Ry. Co.*, 269 App Div 809, 55 NYS2d 444 (4th Dept 1945); see Annot: 26 ALR2d 1219.

As to the carrier's liability to passengers for violation of the Federal Safety Appliance Acts or Boiler Inspection Acts, see PJI 2:181; as to the application of the doctrine of *respondeat superior* to carriers, see *Palmeri v Manhattan Ry. Co.*, 133 NY 261, 30 NE 1001 (1892); PJI 2:235-PJI 2:238; as to the carrier's responsibility for retaining a known incompetent employee, see PJI 2:240.

State law requires that a common carrier give notice, e.g., to the Commissioner of Transportation, of accidents happening upon its line, Transportation Law § 117. The former prohibition against admitting such reports in evidence in an action against the carrier was eliminated by the 1980 amendment to Transportation Law § 117.

PJI 2:162. Common Carrier—Duty to Passenger—When Passenger is Under an Impairment

As you have heard, the plaintiff AB claims [state plaintiff's claims]. The defendant CD denies [state allegations that defendant denies] and claims [state defendant's claims].

A (railroad, subway, bus company, taxi company, airline) has a duty to a passenger who is

(sick, mentally or physically impaired, intoxicated, a child) to use such care or to give such assistance for (his, her) safety and welfare as is reasonably required by the passenger's condition and the existing circumstances, provided that the (railroad's, subway's, bus company's, taxi company's, airline's) employee(s) knew or should reasonably have known of the passenger's condition.

In order for AB to recover from CD, AB must prove that (1) (he, she) was a passenger on CD's (railroad, subway, bus, taxi, airline); (2) [*state plaintiff's claims*] occurred; (3) (he, she) (is, was) (sick, mentally or physically impaired, intoxicated, a child); (4) CD's employee(s) knew or should reasonably have known of AB's condition; (5) CD's employee(s) failed to use such care or to give such assistance for AB's safety and welfare as was reasonably required by AB's condition and the existing circumstances; (6) [*omit in bifurcated trial:*] AB was injured; and (7) CD's (employee's, employees') failure to use such care or to give such assistance for AB's safety and welfare as was reasonably required by AB's condition and the existing circumstances was a substantial factor in bringing about (the accident, AB's injury).

If you decide that: (1) AB was not a passenger on CD's (railroad, subway, bus, taxi, aircraft); or (2) [*state plaintiff's claims*] did not occur; or (3) AB (is, was) not (sick, mentally or physically impaired, intoxicated, a child); or (4) CD's employee(s) did not know or should not reasonably have known of AB's condition; or (5) CD's employee(s) did not fail to use such care or to give such assistance for AB's safety and welfare as was reasonably required by AB's condition and the existing circumstances; or (6) [*omit in bifurcated trial:*] AB was not injured; or (7) CD's (employee's, employees') failure to use care or to give such assistance for AB's safety and welfare as was reasonably required by AB's condition and the existing circumstances was not a substantial factor in bringing about (the accident, AB's injury), then you will find for CD and go no further [*state where appropriate: on this claim*].

On the other hand, if you decide that: (1) AB was a passenger on CD's (railroad, subway, bus, taxi, aircraft); and (2) [*state plaintiff's claims*] did occur; and (3) AB (is, was) (sick, mentally or physically impaired, intoxicated, a child); and (4) CD's employee(s) knew or should reasonably have known of AB's condition; and (5) CD's employee(s) failed to use such care or to give such assistance for AB's safety and welfare as was reasonably required by AB's condition and the existing circumstances; and (6) [*omit in a bifurcated trial:*] AB was injured; and (7) CD's (employee's, employees') failure to use care or to give such assistance for AB's safety and welfare as was reasonably required by AB's condition and the existing circumstances was a substantial factor in bringing about (the accident, AB's injury), then you will find for AB and go on to consider AB's damages.

[*PJI 2:70 should also be charged; where comparative fault has been raised, PJI 2:36 should be charged*]

Comment

Caveat: The charge has been drafted for use in both non-bifurcated trials and bifurcated trials, where the issues of negligence and injury are tried separately. In bifurcated trials, the charge should be appropriately modified as indicated.

Based on *Jones v New York Cent. R. Co.*, 4 NY2d 963, 177 NYS2d 492, 152 NE2d 519 (1958); *Lewis v Metropolitan Transp. Authority*, 99 AD2d 246, 472 NYS2d 368 (1st Dept 1984), *aff'd*, 64 NY2d 670, 485 NYS2d 252, 474 NE2d 612 (1984); *Kasper v Metropolitan Transp. Authority Long Island Bus*, 90 AD3d 998, 935 NYS2d 645 (2d Dept 2011) (citing PJI); *Kelleher v F.M.E. Auto Leasing Corp.*, 192 AD2d 581, 596 NYS2d 136 (2d Dept 1993); see *Elliott v New York Rapid Transit Corporation*, 293 NY 145, 56 NE2d 86 (1944); *Longacre v Yonkers R. Co.*, 236 NY 119, 140 NE 215 (1923); *Fardette v New York & Stamford R. Co.*, 233 NY 660, 135 NE 959 (1922); *Fagan v Atlantic Coast Line R. Co.*, 220 NY 301, 115 NE 704 (1917); *Middleton v Whitridge*, 213 NY 499, 108 NE 192 (1915).

It is generally a question for the jury to determine whether the carrier exercised the degree of care required under the circumstances, *O'Leary v American Airlines*, 100 AD2d 959, 475 NYS2d 285 (2d Dept 1984) (citing PJI); see *Robinson v New York City Transit Authority*, 105 AD2d 614, 481 NYS2d 85 (1st Dept 1984). The duty of care may include

whether a driver knew or should have known of a passenger's disability and whether the driver provided the passenger with a safe place of egress in light of the disability, *Raines v Manhattan and Bronx Surface Transit Operating Authority*, 116 AD3d 606, 983 NYS2d 796 (1st Dept 2014).

Under federal law, an airline has discretion to refuse to carry a sick or invalid person, and that exercise of discretion must be measured by determining whether under all the circumstances the decision was arbitrary, capricious or irrational, thus constituting an abuse of the discretion conferred by law upon the carrier, *Adamsons v American Airlines, Inc.*, 58 NY2d 42, 457 NYS2d 771, 444 NE2d 21 (1982).

State law requires that a common carrier give notice, e.g., to the Commissioner of Transportation, of accidents happening upon its line, Transportation Law § 117.

PJI 2:163. Common Carrier—Duty To Protect Passenger From Injury by Third Person

As you have heard, the plaintiff AB claims that (he, she) was injured when EF [*state plaintiff's claims*]. The defendant CD denies [*state allegations that defendant denies*] and claims [*state defendant's claims*].

A (railroad, subway, bus company, taxi company, airline) has a duty to use reasonable care to protect a passenger from being injured by another (passenger, person). If the (railroad's, subway's, bus company's, taxi company's, airline's) employee(s) knew or should have known of behavior by a (passenger, person) and, based on such behavior, should reasonably have anticipated that an injury could occur, the (railroad, subway, bus company, taxi company, airline) has the duty to take reasonable steps to prevent injury.

In order for AB to recover from CD, AB must prove that (1) (he, she) was a passenger on CD's (railroad, subway, bus, taxi, airline); (2) [*state plaintiff's claims*] occurred; (3) CD's employee(s) knew, or by the use of reasonable care should have known, of [*set forth conduct by third person on which plaintiff's claim relies*]; (4) CD's employee(s) should reasonably have anticipated that an injury could

occur; (5) CD did not take reasonable steps to prevent injury; (6) AB was injured by EF's conduct; and (7) CD's (employee's, employees') failure to take reasonable steps to prevent injury was a substantial factor in bringing about AB's injury.

If you decide that: (1) AB was not a passenger on CD's (railroad, subway, bus, taxi, airline); or (2) *[state plaintiff's claims]* did not occur; or (3) CD's employee(s) did not know, and by the use of reasonable care would not have known, of *[set forth conduct by third person on which plaintiff's claim relies]*; or (4) CD's employee(s) should not reasonably have anticipated that an injury could occur; or (5) CD's employee(s) did take reasonable steps to prevent injury; or (6) AB was not injured by EF's conduct; or (7) CD's (employee's, employees') failure to take reasonable steps to prevent injury was not a substantial factor in bringing about AB's injury, then you will find for CD and go no further *[state where appropriate: on this claim]*.

On the other hand, if you decide that: (1) AB was a passenger on CD's (railroad, subway, bus, taxi, airline); and (2) *[state plaintiff's claims]* did occur; and (3) CD's employee(s) knew, or by the use of reasonable care would have known, of *[set forth conduct by third person on which plaintiff's claim relies]*; and (4) CD's employee(s) should reasonably have anticipated an injury could occur; and (5) CD's employee(s) did not take reasonable steps to prevent injury; and (6) AB was injured by EF's conduct; and (7) CD's (employee's, employees') failure to take reasonable steps to prevent injury was a substantial factor in bringing about AB's injury, then you will find for AB and go on to consider AB's damages.

[PJI 2:70 should also be charged; where comparative fault has been raised, PJI 2:36 should be charged]

Comment

Caveat: The charge has been drafted for use in a non-bifurcated trial in which the negligence, injury and damages issues are tried

together. Where the negligence and injury issues are to be tried separately, references to the injury element should be omitted.

Based on *Scalise v New York*, 2 AD2d 984, 157 NYS2d 620 (2d Dept 1956), *aff'd*, 3 NY2d 951, 169 NYS2d 26, 146 NE2d 786 (1957); see *Green Bus Lines v Ocean Accident & Guaranty Corporation*, 287 NY 309, 39 NE2d 251 (1942); *Putnam v Broadway & S.A.R. Co.*, 55 NY 108, 15 Abb Pr NS 383 (1873); *Shernov v New York City Transit Authority*, 79 AD2d 1021, 435 NYS2d 55 (2d Dept 1981), *aff'd*, 55 NY2d 175, 448 NYS2d 141, 433 NE2d 124 (1982); *Watson v Adirondack Trailways*, 45 AD2d 504, 359 NYS2d 912 (3d Dept 1974); Annot: 43 ALR4th 189; 34 ALR4th 1054.

Caveat: Use of the word “highest” in a charge describing the degree of care required of passenger carriers is improper, *Bethel v New York City Transit Authority*, 92 NY2d 348, 681 NYS2d 201, 703 NE2d 1214 (1998); see *Boyd v Manhattan & Bronx Surface Transit Operating Authority*, 9 NY3d 89, 845 NYS2d 781, 876 NE2d 1197 (2007); Comment to PJI 2:161, PJI 2:164.

Common carriers

The duty owed by common carriers includes the obligation to exercise reasonable care to protect patrons against injury caused by the conduct of third persons, *Kelly v Otis*, 190 AD2d 1056, 593 NYS2d 673 (4th Dept 1993). Thus, a carrier has both a right and a duty to expel an unruly or dangerous passenger for the protection of other passengers if the harm can be reasonably anticipated, *Green Bus Lines v Ocean Accident & Guaranty Corporation*, 287 NY 309, 39 NE2d 251 (1942).

The duty of non-governmental carriers to exercise reasonable care for the safety of their passengers does not extend to circumstances that could not reasonably be foreseen by the carrier, such as the act of a fellow passenger in closing a door on plaintiff's hand, *Kelly v Otis*, 190 AD2d 1056, 593 NYS2d 673 (4th Dept 1993), or an assault by a fellow passenger where the carrier was not on notice of the attacker's disorderly conduct, *Farmer v Green Bus Lines, Inc.*, 254 AD2d 389, 679 NYS2d 88 (2d Dept 1998); *Rabadi by Rabadi v Westchester*, 160 AD2d 858, 554 NYS2d 291 (2d Dept 1990). The court may determine as a matter of law that the carrier had no reason to anticipate the injury, see *Scalise v New York*, 2 AD2d 984, 157 NYS2d 620 (2d Dept 1956), *aff'd*, 3 NY2d 951, 169 NYS2d 26, 146 NE2d 786 (1957); *Panico v Long Island R.R.*, 262 AD2d 293, 691 NYS2d 556 (2d Dept 1999) (plaintiff failed to present any evidence indicating that actions of passenger, who with no provocation indiscriminately shot passengers in train, were foreseeable).

Governmental Carriers

Absent a special relationship, see Comment to PJI 2:225 and 2:229A, there may be no duty on the part of a publicly operated carrier to protect a passenger from assault by third parties, since such a duty necessarily

implicates the governmental function of providing police protection, *Weiner v Metropolitan Transp. Authority*, 55 NY2d 175, 448 NYS2d 141, 433 NE2d 124 (1982); *Turton v New York City Transit Authority*, 102 AD3d 953, 961 NYS2d 205 (2d Dept 2013); *Frazier v Manhattan and Bronx Surface Transit Operating Authority*, 75 AD3d 619, 905 NYS2d 657 (2d Dept 2010); *Banks v New York City Dept. of Educ.*, 70 AD3d 988, 895 NYS2d 512 (2d Dept 2010); see *Clinger v New York City Transit Authority*, 85 NY2d 957, 626 NYS2d 1008, 650 NE2d 855 (1995); *Bardavid v New York City Transit Authority*, 97 AD2d 353, 467 NYS2d 360 (1st Dept 1983), *aff'd*, 61 NY2d 986, 475 NYS2d 364, 463 NE2d 1216 (1984); *Rivera v New York City Transit Authority*, 184 AD2d 417, 585 NYS2d 367 (1st Dept 1992) (illumination in subway involves governmental function of providing security). Further, even where a special relationship exists, the carrier may not be liable for decisions and actions that are discretionary, as distinguished from ministerial, see *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011); *Matter of World Trade Center Bombing Litigation*, 17 NY3d 428, 933 NYS2d 164, 957 NE2d 733 (2011). This principle applies even under circumstances in which a non-governmental carrier would be liable, see *Valdez v New York*, *supra*. The immunity from liability rests on the same considerations as does the immunity of a municipality or other governmental body from liability for failure to provide adequate police protection, *Weiner v Metropolitan Transp. Authority*, *supra*; see *Balsam v Delma Engineering Corp.*, 90 NY2d 966, 665 NYS2d 613, 688 NE2d 487 (1997); *Clinger v New York City Transit Authority*, *supra*; *Bardavid v New York City Transit Authority*, *supra*; *Rivera v New York City Transit Authority*, *supra*. For a discussion of the liability of municipal entities for claims involving lack of police protection, see PJI 2:225 and 2:229A.

Public Authorities Law § 1212(3) authorizes private recovery against the New York City Transit Authority for the negligence of its employees in the operation of the subway system. Based on this statute, the Court of Appeals held in *Crosland v New York City Transit Authority*, 68 NY2d 165, 506 NYS2d 670, 498 NE2d 143 (1986), that the Transit Authority could be held liable to a passenger who was assaulted while transit employees looked on without summoning help, even though they allegedly could have done so without risk to themselves. The facts in *Crosland* have been recognized as an exception to the special relationship requirement, *Turton v New York City Transit Authority*, 102 AD3d 953, 961 NYS2d 205 (2d Dept 2013); *Frazier v Manhattan and Bronx Surface Transit Operating Authority*, 75 AD3d 619, 905 NYS2d 657 (2d Dept 2010); *Murphy v New York City Transit Authority*, 74 AD3d 1158, 904 NYS2d 169 (2d Dept 2010); *Bastien v New York City Transit Authority*, 67 AD3d 716, 888 NYS2d 210 (2d Dept 2009).

State law requires that a common carrier give notice, e.g., to the Commissioner of Transportation (Transportation Law § 117), of accidents happening upon its railroad line.

PJI 2:164. Common Carrier—Duty to Passenger to Maintain Equipment in Safe Condition

As you have heard, the plaintiff AB claims [*state plaintiff's claims*]. The defendant CD denies [*state allegations that defendant denies*] and claims [*state defendant's claims*].

A (railroad, subway, bus company, taxi company, airline) has the duty to use reasonable care under all of the circumstances to maintain its (vehicles, equipment) for the safety of its passengers. Reasonable care means that degree of care that a reasonably prudent (railroad, subway, bus company, taxi company, airline) would use under the same circumstances in light of the dangers and risks that were known to the (railroad, subway, bus company, taxi company, airline) or that it should reasonably have foreseen. A (railroad, subway, bus company, taxi company, airline) is not liable for injuries caused by unsafe conditions unless it knew or, in the use of reasonable care should have known, that its equipment was not in safe condition in sufficient time to correct the condition or take suitable precautions.

In order for AB to recover from CD, AB must prove that (1) (he, she) was a passenger on CD's (train, subway, bus, taxi, aircraft); (2) [*state plaintiff's claims*] occurred; (3) CD's employee(s) knew or, by the use of reasonable care, would have known of the [*state condition that plaintiff claims was unsafe*]; (4) [*state condition that plaintiff claims was unsafe*] was an unsafe condition; (5) CD's employee(s) knew or, by the use of reasonable care, should have known of the unsafe condition in time to take corrective action or suitable precautions; (6) CD's employee(s) failed to take corrective action or suitable precautions; and (7) [*omit in a bifurcated trial:*] AB was injured; and (8) CD's (employee's, employees') failure to use reasonable care to maintain the equipment in safe condition was a substantial factor in bringing about (the accident, AB's injury).

If you find that (1) AB was not a passenger on

CD's (railroad, subway, bus, taxi, airline); or (2) *[state plaintiff's claims]* did not occur; or (3) CD's employee(s) did not know and, by the use of reasonable care, would not have known of the *[state condition that plaintiff claims was unsafe]*; or (4) *[state condition that plaintiff claims was unsafe]* was not an unsafe condition; or (5) CD's employee(s) did not know and should not have known of the unsafe condition in time to take corrective action or suitable precautions; (6) CD's employee(s) did take corrective action or suitable precautions; or (7) *[omit in bifurcated trial:]* AB was not injured; or (8) CD's (employee's, employees') failure to take corrective action or suitable precautions was not a substantial factor in bringing about (the accident, AB's injury), then you will find for CD and go no further *[state where appropriate: on this claim]*.

On the other hand, if you decide that: (1) AB was a passenger on CD's (railroad, subway, bus, taxi, aircraft); and (2) *[state plaintiff's claims]* did occur; and (3) CD's employee(s) knew or, by the use of reasonable care, would have known of the *[state condition that plaintiff claims was unsafe]*; and (4) *[state condition that plaintiff claims was unsafe]* was unsafe; and (5) CD's employee(s) knew or should have known of the unsafe condition in time to take corrective action or suitable precautions; (6) CD's employee(s) failed to take corrective action or suitable precautions; and (7) *[omit in bifurcated trial:]* AB was injured; and (8) CD's (employee's, employees') failure to take corrective action or suitable precautions was a substantial factor in bringing about (the accident, AB's injury), then you will find for AB and go on to consider AB's damages.

[PJI 2:70 should also be charged; where comparative fault has been raised, PJI 2:36 should be charged]

Comment

Caveat: The charge has been drafted for use in both non-bifurcated trials and bifurcated trials, where the issues of negligence and injury are tried separately. In bifurcated trials, the charge should be appropriately modified as indicated.

Boyd v Manhattan & Bronx Surface Transit Operating Authority, 9 NY3d 89, 845 NYS2d 781, 876 NE2d 1197 (2007); Bethel v New York City Transit Authority, 92 NY2d 348, 681 NYS2d 201, 703 NE2d 1214 (1998).

Under prior law, as to equipment, machinery, appliances and a roadbed, a common carrier was held to the highest degree of care that human prudence and foresight could suggest, Duhme v Hamburg-American Packet Co., 184 NY 404, 77 NE 386 (1906); Stierle v Union Ry. Co., 156 NY 70, 50 NE 419 (1898); Barbato v Vollmer, 273 App Div 169, 76 NYS2d 528 (3d Dept 1948); 14 Am Jur 2d, Carriers §§ 1028–1040. In Bethel v New York City Transit Authority, 92 NY2d 348, 681 NYS2d 201, 703 NE2d 1214 (1998), the Court re-examined these decisions and concluded that the duty of highest care should not continue to be applied to common carriers and realigned the standard of care in such cases with the traditional, basic negligence standard of reasonable care under all of the circumstances of the particular case. Under that standard, there is no stratification of the degrees of care as a matter of law; rather, “there are only differing amounts of care, as a matter of fact,” *id.* For that reason, the court should avoid charge language suggesting that there is something special or unique about a common carrier’s duty of care and, if requested to do so, should inform the jury that plaintiff must prove that defendant knew, or using reasonable care should have known, that its equipment was not in a reasonably safe condition, Boyd v Manhattan & Bronx Surface Transit Operating Authority, 9 NY3d 89, 845 NYS2d 781, 876 NE2d 1197 (2007); see Blake v First Transit Transp. Service, 126 AD3d 1054, 6 NYS3d 678 (3d Dept 2015).

An owner or operator of a bus has a duty to keep the bus floor clean, but it has a reasonable period of time after the abatement of a storm to rectify a slippery condition resulting from a snow, ice or rain storm, Boarman v Siegel, Kelleher and Kahn, 41 AD3d 1247, 837 NYS2d 822 (4th Dept 2007).

The failure to furnish or maintain equipment required by Public Service Commission regulations presents a jury question of defendant’s liability in an action by a passenger who suffered frostbite as a result of the failure of a bus heater, Owen v Rochester-Penfield Bus Co., 304 NY 457, 108 NE2d 606 (1952). As to a railroad’s liability to a passenger for violation of the Federal Safety Appliance Acts or Boiler Inspection Acts, see PJI 2:181. As to the general unavailability of an implied cause of action under the Federal Aviation Act of 1958, see Rauch v United Instruments, Inc., 548 F2d 452 (3d Cir 1976).

State law requires that a common carrier give notice, e.g., to the Commissioner of Transportation (Transportation Law § 117), of accidents happening upon its railroad line.

**PJI 2:165. Common Carrier—Duty to Passenger—
Sudden Stop or Jerk**

As you have heard, the plaintiff AB claims [*state*

plaintiff's claims]. The defendant CD denies [*state allegations that defendant denies*] and claims [*state defendant's claims*].

A (railroad, bus company, taxi company, airline) owes a duty to use reasonable care for the safety of its passengers. However, starting, slowing or stopping may not always be done smoothly and occasionally there may be some jolting. A (railroad, bus company, taxi company, airline) is ordinarily not liable for injury to a passenger when that happens. But, in the absence of an emergency, the (railroad, bus company, taxi company, airline) must avoid unusual and violent jerks, lurches or sudden stops.

In order for AB to recover from CD, AB must prove that (1) (he, she) was a passenger on CD's (railroad, subway, bus, taxi, aircraft); (2) the (jerking, lurching or sudden stopping) of CD's (train, subway, bus, taxi, aircraft) was unusual and violent; (3) the (jerking, lurching or sudden stopping) did not result from an emergency or, if there was an emergency, the emergency was created or contributed to by (CD, CD's employee); (4) [*omit in bifurcated trial*] AB was injured; and (5) the (jerking, lurching or sudden stopping) was a substantial factor in bringing about (the accident, AB's injury).

If you find that (1) AB was not a passenger on CD's (railroad, subway, bus, taxi, aircraft); or (2) the (jerking, lurching or sudden stopping) of CD's (train, subway, bus, taxi, aircraft) was not unusual and violent; or (3) the (jerking, lurching or sudden stopping) resulted from an emergency that was not created or contributed to by (CD, CD's employee[s]); or (4) [*omit in a bifurcated trial:*] AB was not injured; or (5) the (jerking, lurching or sudden stopping) was not a substantial factor in bringing about (the accident, AB's injury), then you will find for CD and go no further [*state where appropriate: on this claim*].

On the other hand, if you decide that: (1) AB

was a passenger on CD's (railroad, subway, bus, taxi, aircraft); and (2) the (jerking, lurching or sudden stopping) of CD's (train, subway, bus, taxi, airplane) was unusual and violent; and (3) the (jerking, lurching or sudden stopping) either did not result from an emergency or resulted from an emergency that was created or contributed to by (CD, CD's employee[s]); and (4) *[omit in a bifurcated trial:]*AB was injured; and (5) the (jerking, lurching or sudden stopping) was a substantial factor in bringing about (the accident, AB's injury), then you will find for AB and go on to consider AB's damages.

[PJI 2:70 should also be charged; where comparative fault has been raised, PJI 2:36 should be charged]

Comment

Caveat: The charge has been drafted for use in both non-bifurcated trials and bifurcated trials, where the issues of negligence and injury are tried separately. In bifurcated trials, the charge should be appropriately modified as indicated.

Based upon *Beach v Rochester Transit Corporation*, 301 NY 511, 93 NE2d 74 (1950); *Kokofsky v New York*, 297 NY 553, 74 NE2d 478 (1947); *Trudell v New York Rapid Transit Corporation*, 281 NY 82, 22 NE2d 244 (1939); *Stierle v Union Ry. Co.*, 156 NY 70, 50 NE 419 (1898); *Thomas v Central Greyhound Lines, Inc.*, 6 AD2d 649, 180 NYS2d 461 (1st Dept 1958); *Lombardi v New York State Rys.*, 224 App Div 438, 231 NYS 306 (4th Dept 1928); *Waddy v Brooklyn Heights R. Co.*, 156 App Div 30, 140 NYS 824 (2d Dept 1913); see *Urquhart v New York City Transit Authority*, 85 NY2d 828, 623 NYS2d 838, 647 NE2d 1346 (1995); 14 Am Jur 2d, Carriers §§ 1046–1048.

To establish a prima facie case of negligence against a common carrier for injuries sustained by a passenger when the vehicle comes to a halt, the plaintiff must demonstrate that the stop caused a jerk or lurch that was “unusual and violent,” *Urquhart v New York City Transit Authority*, 85 NY2d 828, 623 NYS2d 838, 647 NE2d 1346 (1995); *Stark v New York City Transit Authority*, 203 AD3d 776, 160 NYS3d 643 (2d Dept 2022); *Harris v Manhattan and Bronx Surface Transit Operating Authority*, 138 AD2d 56, 529 NYS2d 290 (1st Dept 1988).

Proof that the stop was unusual or violent must consist of more than a mere characterization of the stop in those terms by the plaintiff, *Urquhart v New York City Transit Authority*, 85 NY2d 828, 623 NYS2d 838, 647 NE2d 1346 (1995); *Stark v New York City Transit Authority*,

203 AD3d 776, 160 NYS3d 643 (2d Dept 2022). There must be objective evidence of the force of the stop sufficient to establish an inference that the stop was extraordinary and violent, *Urquhart v New York City Transit Authority*, *supra*; *Stark v New York City Transit Authority*, *supra*.

A plaintiff's trial testimony that, as she was holding onto a metal hand grip, the bus made an unexpected "very violent short stop" causing her to fall "over the seats" was insufficient to support a jury verdict given the lack of objective support necessary to support claim that the movement was unusual and violent, *Stark v New York City Transit Authority*, 203 AD3d 776, 160 NYS3d 643 (2d Dept 2022). A plaintiff's averment that there was a "bump and sweaval" prior to accident was insufficient to raise a triable issue of fact regarding whether movement was unusual and violent, *Blake v First Transit Transp. Service*, 126 AD3d 1054, 6 NYS3d 678 (3d Dept 2015).

However, a plaintiff's claim that the bus was traveling at a high rate of speed when it came to a sudden, unusual and violent stop, causing a crowd of people standing behind her to be thrown against her, was sufficient to defeat a motion for summary judgment, *Harris v Manhattan and Bronx Surface Transit Operating Authority*, 138 AD2d 56, 529 NYS2d 290 (1st Dept 1988); *Disalvatore v New York City Transit Authority*, 45 AD3d 402, 845 NYS2d 312 (1st Dept 2007) (defendant's summary judgment motion properly denied where plaintiff testified at deposition that she walked "shakily" toward seat because bus was "speeding," "swaying," "jolting from side to side," "bouncing up and down" and "moving erratically"; plaintiff also testified that she had never experienced anything like it on any bus and that she was thrown as bus made "sharp turn" while traveling "quite fast").

Res ipsa loquitur may apply where the circumstances of the occurrence permit a presumption or an inference of negligence, *Trudell v New York Rapid Transit Corporation*, 281 NY 82, 22 NE2d 244 (1939); *Schulz v Finn*, 273 App Div 780, 75 NYS2d 15 (2d Dept 1947). Because the presumption creates a *prima facie* case for the plaintiff, the defendant is required to come forward with a reasonable explanation, *Horowitz v Kevah Konner, Inc.*, 67 AD2d 38, 414 NYS2d 540 (1st Dept 1979). The burden of proof, however, remains with the plaintiff, *Kay v Metropolitan St. Ry. Co.*, 163 NY 447, 57 NE 751 (1900); *Maher v Metropolitan St. Ry. Co.*, 102 App Div 517, 92 NYS 825 (1st Dept 1905).

A carrier is not responsible for a sudden stop if it establishes that the stop was caused by an emergency not of its own creation and without any negligence on its part, *Hoffman v Lehman*, 2 NY2d 824, 159 NYS2d 839, 140 NE2d 749 (1957); *Kokofsky v New York*, 297 NY 553, 74 NE2d 478 (1947); *Mintz v International Ry. Co.*, 227 NY 197, 124 NE 893 (1919); *Fay v New York City Transit Authority*, 149 AD3d 593, 52 NYS3d 359 (1st Dept 2017); *Appel v New York City Transit Authority*, 114 AD2d 393, 494 NYS2d 36 (2d Dept 1985); *Nieves v Manhattan and Bronx Surface Transit Operating Authority*, 31 AD2d 359, 297 NYS2d

743 (1st Dept 1969), see PJI 2:14. Railroad Law § 83 exonerates the railroad from liability to a passenger riding on the platform or in any baggage, wood or freight car, provided (1) the railroad posted a notice of its regulation to that effect, *De Leon v New York City Transit Authority*, 50 NY2d 176, 428 NYS2d 625, 406 NE2d 442 (1980), and (2) there is sufficient room inside the passenger cars for accommodation of the passenger, *Meagher v Long Island R. Co.*, 27 NY2d 39, 313 NYS2d 378, 261 NE2d 384 (1970). That section does not, however, bar recovery by a passenger who enters upon the platform after the conductor opens the door for passengers to alight, when the posted notice does not expressly forbid passengers from entering upon the platform until the train has stopped, *Rogers v Long Island R. Co.*, 29 AD2d 47, 285 NYS2d 803 (1st Dept 1967), *aff'd*, 22 NY2d 918, 295 NYS2d 47, 242 NE2d 84 (1968); see 17 NYJur2d, Carriers §§ 410–413.

The carrier is under a duty to allow its passengers a reasonable time within which to enter or alight, *Masterson v Crosstown St. Ry. Co. of Buffalo*, 201 NY 499, 94 NE 1086 (1911); *McDonald v Long Island R. Co.*, 116 NY 546, 22 NE 1068 (1889). It was held that a passenger is contributorily negligent as a matter of law in attempting to board a train that is moving in excess of four to six miles per hour, *Triola v Long Island R. Co.*, 5 AD2d 691, 169 NYS2d 79 (2d Dept 1957).

State law requires that a common carrier give notice, e.g. to the Commissioner of Transportation (Transportation Law § 117), of accidents happening upon its railroad line.

PJI 2:166. Common Carrier—Duty to Passenger—To Provide a Safe Place To Get On or Get Off

A carrier owes a duty to its (passenger, prospective passenger) to provide a reasonably safe place to (get on, get off) its vehicle.

The plaintiff AB claims that the defendant CD did not provide a reasonably safe place to (get on, get off) its vehicle [state plaintiff's contentions, such as: the bus operator stopped too far from the curb to allow AB to safely (get on, get off) CD's bus]. The defendant CD claims that [state defendant's contentions, such as: the distance between its vehicle and the curb was not too far to allow AB to safely (get on, get off) the bus].

If you find that [CD's bus did not stop too far from the curb to allow AB to safely get on, get off its bus], then you will find that CD was not negligent and you need proceed no further in your deliberations

[state where appropriate:] (on this issue). If you find that [CD's bus did stop too far from the curb to allow AB to safely (get off, get on) the bus], then you will find that CD was negligent and you will proceed to consider whether that negligence was a substantial factor in causing AB's injury, that is, whether reasonable people would regard it as a cause of the injury.

[Where defendant has asserted an affirmative defense of culpable conduct on the part of plaintiff, PJI 2:36 should be charged]

Comment

Based on *Miller v Fernan*, 73 NY2d 844, 537 NYS2d 123, 534 NE2d 40 (1988); *Welch v Triple Cities Traction Corporation*, 290 NY 836, 50 NE2d 238 (1943) (deep snow); *Keener v Tilton*, 283 NY 454, 28 NE2d 912 (1940) (depression); *Krupnick v Branikowski*, 271 NY 612, 3 NE2d 210 (1936) (vehicle stopped at other than usual stopping place); *Malawer v New York City Transit Authority*, 18 AD3d 293, 795 NYS2d 201 (1st Dept 2005), *aff'd*, 6 NY3d 800, 812 NYS2d 438, 845 NE2d 1268 (2006) (ice); *Lesser v Manhattan and Bronx Surface Transit Operating Authority*, 157 AD2d 352, 556 NYS2d 274 (1st Dept 1990), *aff'd*, 79 NY2d 1031, 584 NYS2d 439, 594 NE2d 933 (1992) (accumulated snow and ice on interior steps); *Lewis v Metropolitan Transp. Authority*, 99 AD2d 246, 472 NYS2d 368 (1st Dept 1984), *aff'd*, 64 NY2d 670, 485 NYS2d 252, 474 NE2d 612 (1984) (re: duty of reasonable care generally); *Barcellos v Triboro Coach Corp.*, 11 AD2d 1045, 207 NYS2d 969 (2d Dept 1960), *aff'd*, 11 NY2d 702, 225 NYS2d 768, 180 NE2d 919 (1962) (depression); *Thomas v Jamaica Buses, Inc.*, 5 AD2d 843, 170 NYS2d 852 (2d Dept 1958), *aff'd*, 5 NY2d 862, 182 NYS2d 15, 155 NE2d 863 (1958) (high step, passenger wearing brace and using cane); *Defay v New York*, 174 AD3d 406, 101 NYS3d 603 (1st Dept 2019) (bus stopped seven or eight feet from curb adjacent to bus stop near pothole); *Schwartz v Brooklyn & Queens Transit Corp.*, 264 App Div 905, 36 NYS2d 70 (2d Dept 1942) (snow and ice, vehicle stopped 4 to 5 feet from curb); *Young v Jamaica Buses*, 262 App Div 860, 28 NYS2d 197 (2d Dept 1941) (snow and ice, vehicle stopped 10 feet from curb); *MacKenzie v Union R. Co.*, 82 App Div 124, 81 NYS 748 (1st Dept 1903), *aff'd*, 178 NY 638, 71 NE 1134 (1904) (excavation, vehicle stopped at other than usual stopping place); see *Bracco v MABSTOA*, 117 AD2d 273, 502 NYS2d 158 (1st Dept 1986); Annot: 7 ALR4th 1031; 58 ALR2d 948; see also *Grau v Lynbrook*, 5 AD2d 874, 172 NYS2d 552 (2d Dept 1958) (snow and ice, vehicle stopped 4 to 5 feet from curb, complaint dismissed).

A common carrier is obligated to exercise ordinary care in the maintenance of its stairways, platforms and stations, *Harrison v New York City Transit Authority*, 113 AD3d 472, 978 NYS2d 194 (1st Dept 2014); *Shirman v New York City Transit Authority*, 264 AD2d 832, 695 NYS2d

582 (2d Dept 1999); *O'Hara v New York City Transit Authority*, 248 AD2d 138, 670 NYS2d 419 (1st Dept 1998). This includes the duty to provide adequate lighting, *Shirman v New York City Transit Authority*, *supra*. The duty does not, however, impose upon the carrier responsibility for the condition of the public thoroughfare over which it has no control, *McMahon v Surface Transp. Corp. of N.Y.*, 272 App Div 202, 69 NYS2d 859 (1st Dept 1947). Where the stairway or approach is owned by another and used as a means of access to other businesses or tenants, the common carrier still has a duty to exercise reasonable care to maintain the stairway or approach in safe condition or to warn patrons of any unsafe conditions if the stairway is used "primarily" as a means of access to and egress from the common carrier, *Bingham v New York City Transit Authority*, 8 NY3d 176, 832 NYS2d 125, 864 NE2d 49 (2007) (citing *Schlessinger v Manhattan Ry. Co.*, 49 Misc 504, 98 NYS 840 (AppT 1906)); *St. Germain v Seaman*, 206 AD3d 502, 168 NYS3d 314 (1st Dept 2022). Whether the stairway or approach is used primarily as a means of access or egress is ordinarily a question of fact, *Bingham v New York City Transit Authority*, *supra*. In holding that the carrier has a duty if the stairway or approach is used "primarily" by its passengers, the Court of Appeals appears to have rejected the analyses in *O'Hara v New York City Transit Authority*, 248 AD2d 138, 670 NYS2d 419 (1st Dept 1998), and *Pena v New York City Transit Authority*, 237 AD2d 150, 655 NYS2d 357 (1st Dept 1997), which indicated that the carrier's duty exists only if the stairway or approach is used exclusively to provide passenger access and egress. The Court in *Bingham* noted that *Bethel v New York City Transit Authority*, 92 NY2d 348, 681 NYS2d 201, 703 NE2d 1214 (1998), and *Adams v New York City Transit Authority*, 88 NY2d 116, 643 NYS2d 511, 666 NE2d 216 (1996), which both indicated that carriers are not to be held to a heightened standard of care, did not eliminate all distinctions between common carriers and other tortfeasors. The Court noted, without further comment, that the carrier's duty to keep approaches and platforms safe has not been extended to the common areas of multi-carrier facilities; see *Mashall v Long Island R.R.*, 149 AD3d 721, 50 NYS3d 554 (2d Dept 2017) (area used to access bus stop, taxi stand, and train station is akin to common area in multi-carrier facility for which defendant railroad did not owe duty of care to maintain).

In a case where the stairway or approach to the defendant common carrier's facility is owned by another and there is a question as to the defendant's responsibility to maintain the stairway or approach in a safe condition or at least to warn of any unsafe condition, the following charge may be used:

PJI 2:166.1

Although the defendant CD did not own the (stairway, approach) to its (subway platform, bus station), CD still had a duty to exercise reasonable care to maintain (the stairway, approach) in a safe

condition or to warn patrons of any unsafe conditions if the (stairway, approach) was used primarily as a means of entering and leaving the (platform, station). You must decide whether (the stairway or approach) was used primarily as a means to enter or leave CD's (subway platform, bus station). Even if the (stairway, approach) was used by others, it may be considered to have been used primarily by CD's passengers if most of the people who used it were entering or departing passengers.

If you decide that the (stairway, approach) where AB was injured was not used primarily as a means of entering or leaving CD's (subway platform, bus station), then you will proceed no further [add where appropriate: (on this claim)]. If you decide that the (stairway, approach) was used primarily as a means of entering and leaving CD's (platform, station), you will go on to consider whether CD failed to provide a safe (stairway, approach) for patrons or failed to warn patrons of any unsafe condition.

(Where appropriate, the applicable portions of PJI 2:90 (possessor's liability for condition or use of premises—standard of care) should be charged.)

A carrier is not responsible for the negligent designation of stopping places by executive departments of government, *Rodriguez v Manhattan and Bronx Surface Transit Operating Authority*, 117 AD2d 541, 498 NYS2d 826 (1st Dept 1986). Where the carrier is responsible, it must be established that the place where the passenger was let off was a proximate cause of the accident, *Mooney v Niagara Frontier Transit Metro System, Inc.*, 125 AD2d 997, 510 NYS2d 393 (4th Dept 1986); *Ortola v Bouvier*, 110 AD2d 1077, 488 NYS2d 934 (4th Dept 1985); *Brooks v Manhattan and Bronx Surface Transit Operating Authority*, 94 AD2d 656, 462 NYS2d 217 (1st Dept 1983); *Kuhn v Niagara Frontier Transit System, Inc.*, 13 AD2d 902, 215 NYS2d 617 (4th Dept 1961). Thus, where the carrier discharged its passenger in a place of safety, injuries sustained as the result of the passenger's independent decision to cross a busy street outside the crosswalk and against the traffic light were not proximately caused by any fault of the carrier, *Rodriguez v Manhattan and Bronx Surface Transit Operating Authority*, 117 AD2d 541, 498 NYS2d 826 (1st Dept 1986); see *Kramer v Lagnese*, 144 AD2d 648, 535 NYS2d 13 (2d Dept 1988); *Swendra v Oc-Unk, Inc.*, 134 AD2d 905, 522 NYS2d 64 (4th Dept 1987). For a charge on proximate cause, see PJI 2:70.

A common carrier must provide a reasonably safe, direct entrance or exit from the vehicle, clear of any dangerous obstruction or defect and a safe path from which to leave the area, *Malawer v New York City Transit Authority*, 6 NY3d 800, 812 NYS2d 438, 845 NE2d 1268 (2006); *Garcia v Hope Ambulette Service Corp.*, 307 AD2d 860, 763 NYS2d 605 (1st Dept 2003); *Gross v New York City Transit Authority*, 256 AD2d 128, 681 NYS2d 513 (1st Dept 1998); *Connolly v Rogers*, 195 AD2d 649, 599 NYS2d 731 (3d Dept 1993); see *Smith v Sherwood*, 16 NY3d 130, 919 NYS2d 102, 944 NE2d 637 (2011); *Caruso v Premier Paratransit, LLC*, 176 AD3d 668, 107 NYS3d 698 (2d Dept 2019); *Kasper v Metropolitan Transp. Authority Long Island Bus*, 90 AD3d 998, 935 NYS2d 645 (2d Dept 2011) (citing PJI); *Conrad v Westchester*, 259 AD2d 724, 687 NYS2d 404 (2d Dept 1999). This duty is breached if the carrier did anything to compel or even suggest that the passenger take a defective or dangerous path of ingress or egress, *Garcia v Hope Ambulette Service Corp.*, *supra*; see *Raines v Manhattan and Bronx Surface Transit Operating Authority*, 116 AD3d 606, 983 NYS2d 796 (1st Dept 2014). However, once a passenger safely disembarks from a bus at a designated bus stop, the bus company's duty to the passenger is satisfied where the bus company has exercised no control over the designation of the bus stop, *Rios v New York*, 33 AD3d 780, 822 NYS2d 638 (2d Dept 2006). Moreover, the carrier is not liable for injuries sustained by a passenger who voluntarily chose to follow an indirect and treacherous path, instead of using a clear, direct and safe path, *Blye v Manhattan and Bronx Surface Transit Operating Authority*, 124 AD2d 106, 511 NYS2d 612 (1st Dept 1987), *aff'd*, 72 NY2d 888, 532 NYS2d 752, 528 NE2d 1225 (1988); *Caruso v Premier Paratransit, LLC*, *supra*; *Francias v New York*, 222 AD2d 215, 634 NYS2d 483 (1st Dept 1995). But a jury issue is presented where there is a factual dispute as to whether there was any safe alternative route that the passenger could have chosen, *Miller v Fernan*, 73 NY2d 844, 537 NYS2d 123, 534 NE2d 40 (1988); *Connolly v Rogers*, *supra*. Where a passenger was injured while attempting to board a paratransit vehicle before it had come to a complete stop, the defendant was entitled to summary judgment, since it neither breached its duty to provide a safe place to embark nor forced the passenger to traverse a dangerous path, *Caruso v Premier Paratransit, LLC*, *supra*.

The principle that a common carrier's duty of care generally ceases upon the passenger's safe disembarkation applies to passenger vessels, see *Hayes v New York*, 34 AD3d 208, 824 NYS2d 24 (1st Dept 2006). In the case of cruise ships, the carrier's duty terminates when the passenger disembarks at the end of the voyage, *id* (citing *Sullivan v Ajax Navigation Corp.*, 881 F Supp 906 (SDNY 1995)). Thus, in *Hayes v New York*, *supra*, the carrier, which had no notice of a risk of assault to any of its passengers, could not be held liable for injuries resulting from an attack by one passenger against another that took place at a substantial distance from the ship in an area controlled by another entity.

When the passenger with knowledge of his position alights without looking, he is guilty of negligence as a matter of law, *Greenspan v Bernstein*, 272 App Div 243, 70 NYS2d 145 (1st Dept 1947), *aff'd*, 297 NY 808, 78 NE2d 492 (1948).

Where it is obvious that a passenger suffers from a disability, the common carrier is under a special duty with regard to the passenger by reason of his or her insensible condition to exercise such care, precaution and aid as are reasonably necessary for the passenger's safety and to bestow upon the passenger any special care and attention beyond that given to the ordinary passenger, *Fagan v Atlantic Coast Line R. Co.*, 220 NY 301, 115 NE 704 (1917); *Kelleher v F.M.E. Auto Leasing Corp.*, 192 AD2d 581, 596 NYS2d 136 (2d Dept 1993); see *Raines v Manhattan and Bronx Surface Transit Operating Authority*, 116 AD3d 606, 983 NYS2d 796 (1st Dept 2014); PJI 2:162. However, in the absence of evidence that the 77-year-old plaintiff was incapable of negotiating the descent from the bus to the street, the bus driver had no duty to engage the bus's kneeling device even though the driver was unable to stop and discharge passengers at the curb, *Trainer v New York*, 41 AD3d 202, 838 NYS2d 512 (1st Dept 2007); see *Santiago v New York City Transit Authority*, 69 AD3d 530, 893 NYS2d 59 (1st Dept 2010) (bus operator not liable where 57-year-old plaintiff did not ask driver to lower bus platform and did not appear unable to negotiate differential between platform and curb). Similarly, a driver has no duty to assist a passenger off the bus even where the bus company's internal rules provide otherwise, since an internal rule that goes beyond the standard of ordinary care cannot be the basis of liability, *Ziman-Scheuer v Golden Touch Transp. of NY, Inc.*, 149 AD3d 635, 52 NYS3d 360 (1st Dept 2017).

If the presence of guardrails on a train station platform would not have prevented the accident, owing to the necessity that there be an opening through which passengers could enter, it is error to charge that the jury could consider the absence of guardrails in determining the carrier's negligence, *McKinney v New York Consol. R. Co.*, 230 NY 194, 129 NE 652 (1920); *Bloom v New York City Transit Authority*, 42 AD2d 696, 345 NYS2d 588 (2d Dept 1973).

The existence of a gap between a train or subway and a platform, necessary to the operation of the train or subway because the cars must not scrape the platform and space must be provided to allow for the oscillation and swaying of the train or subway, is insufficient, standing alone, to establish negligence, *Ryan v Manhattan Ry. Co.*, 121 NY 126, 23 NE 1131 (1890); *Howell v New York City Transit Authority*, 123 AD3d 439, 998 NYS2d 174 (1st Dept 2014). Plaintiff must establish that the size of the gap was unreasonably large, *Howell v New York City Transit Authority*, supra; see *Pemberton v New York City Transit Authority*, 304 AD2d 340, 758 NYS2d 29 (1st Dept 2003); see also *Yarde v New York City Transit Authority*, 4 AD3d 352, 771 NYS2d 185 (2d Dept 2004) (5-inch gap, standing alone, did not constitute negligence). A necessary element of that showing is competent evidence of the size of the gap, *Howell v New York City Transit Authority*, supra; *Glover v New York City Transit Authority*, 60 AD3d 587, 876 NYS2d 40 (1st Dept 2009); see *Sanchez v New York*, 85 AD3d 580, 926 NYS2d 52 (1st Dept 2011). An important consideration in gauging whether a particu-

lar gap is unreasonably large is whether it occurs on straight (i.e., tangent) or curved track, *Ryan v Manhattan Ry. Co.*, *supra*; *Portillo v New York City Transit Authority*, 84 AD3d 535, 922 NYS2d 397 (1st Dept 2011). The New York City Transit Authority's compliance with its internal operating standards regarding the necessary and maximum permissible gaps between subway cars and platforms do not entitle it to qualified immunity because no public planning body passed on the standards, *Leon v New York City Transit Authority*, 96 AD3d 554, 947 NYS2d 33 (1st Dept 2012); *Tzilianos v New York City Transit Authority*, 91 AD3d 435, 936 NYS2d 159 (1st Dept 2012); *Sanchez v New York*, *supra*; see generally *Weiss v Fote*, 7 NY2d 579, 200 NYS2d 409, 167 NE2d 63 (1960) (discussing qualified immunity). Moreover, the Transit Authority's compliance with those internal operating standards does not necessarily establish, as a matter of law, that it was not negligent, *Tzilianos v New York City Transit Authority*, *supra*.

A subway company is not negligent merely because it permits crowds to gather on its platforms, *Garcia v New York City Transit Authority*, 114 AD3d 720, 980 NYS2d 135 (2d Dept 2014). Liability may arise only where the crowd was so large and unmanaged that a user of the platform was restricted in his or her free movement or was unable to find a safe standing place and the injury was proximately caused by the dangerous condition, *id.*; *Cross v Murray*, 260 App Div 1030, 24 NYS2d 500 (2d Dept 1940); see *Williams v New York Rapid Transit Corporation*, 272 NY 366, 6 NE2d 58 (1936).

The New York City Transit Authority is not responsible for the maintenance of bus stops within the City, including the road, sidewalks and curbs attendant thereto, *Shaller v New York*, 41 AD3d 697, 839 NYS2d 766 (2d Dept 2007); *Brown v New York*, 250 AD2d 638, 672 NYS2d 419 (2d Dept 1998), or to a bus shelter, *Little v New York City Transit Authority*, 132 AD3d 738, 18 NYS3d 110 (2d Dept 2015). Responsibility for repairing bus stop defects rests with the City of New York even where the New York City Transit Authority allegedly created or contributed to the condition as a result of the normal operation of its buses, *Shaller v New York*, *supra*; see *Little v New York City Transit Authority*, *supra*. Similarly, the New York City Department of Transportation rather than the New York City Transit Authority is responsible for designating and eliminating bus stops, and, thus, the Transit Authority's duty to passengers ends once they safely disembark at a designated bus stop, see *Rios v New York*, 33 AD3d 780, 822 NYS2d 638 (2d Dept 2006).

(2) LIMITATION OF LIABILITY

**PJI 2:170. Common Carrier—Duty to Passenger—
Limitation of Liability by Contract**

Passengers who travel free on a pass given to them by their employer may be bound by the condition in the pass that makes them assume the risk of injury to themselves or their property while they are traveling. That means that they give up the right to make a claim for any injury to themselves or their property while they are traveling. Whether they have given up this right depends on whether the pass was given to them as a gratuity or gift, or whether it was job-related. In making that determination, you will take into consideration the plaintiff's job and the reason the pass was given to (him, her). If you find that plaintiff was traveling for (his, her) own pleasure or convenience and that the pass was neither a part of (his, her) compensation nor a job benefit, then the condition in the pass bars plaintiff from recovering. On the other hand, if you find that plaintiff's travel was job related, or that (he, she) was entitled as a job benefit or compensation to free transportation while traveling (to and from work, for plaintiff's own pleasure or convenience, for the reason plaintiff was traveling at the time) then the condition in the pass does not bar plaintiff from recovering.

Comment

Based on *Vroom v New York Cent. & H.R.R. Co.*, 129 App Div 858, 115 NYS 1063 (4th Dept 1909), *aff'd*, 197 NY 588, 91 NE 1121 (1910); *Hopkins v Long Island R. Co.*, 21 AD2d 814, 251 NYS2d 590 (2d Dept 1964); *Kroehling v New York*, 270 App Div 909, 61 NYS2d 474 (2d Dept 1946); *Montalbano v New York Cent. R. Co.*, 267 App Div 617, 47 NYS2d 877 (4th Dept 1944); *Gill v Erie R. Co.*, 151 App Div 131, 135 NYS 355 (4th Dept 1912); see 14 Am Jur 2d, Carriers §§ 942–955.

Sections 1373(a), 1373(b), 10722(c)(d), 10723, 10724 and 10761 of 49 USC prohibit issuance of free passes by railroad, motor, water or air carriers engaged in interstate or foreign commerce except to specified persons. By forbidding common carriers engaged in interstate commerce from issuing free passes, except to specified classes of persons, Congress

preempted the field to the exclusion of state laws, *Francis v Southern Pac. Co.*, 333 US 445, 68 SCt 611 (1948); *Kansas City Southern Ry. Co. v Van Zant*, 260 US 459, 43 SCt 176 (1923). Under Federal law, a pass issued gratuitously to an employee or member of his or her family may provide for exoneration from liability, id, except a liability imposed by the Federal Safety Appliance Acts, *Boyer v Atchison, T. & S. F. Ry. Co.*, 34 Ill App 2d 330, 181 NE2d 372 (1st Dist 1962). However, a passenger accompanying livestock (drover), riding on a drover's pass, is a passenger for hire and not bound by an exoneration clause, *Norfolk Southern R. Co. v Chatman*, 244 US 276, 37 SCt 499 (1917); *New York Cent. R. Co. v Lockwood*, 84 US 357 (1873).

Under New York law, a carrier (by whatever means of transportation) may contract to limit or exonerate itself from liability only (1) to a person carried gratuitously (cases cited in first paragraph of this comment) or (2) to a person carried at a reduced fare if the person has been given the choice of buying a full rate ticket that has the full protection of the carrier's liability, *Conklin v Canadian-Colonial Airways*, 266 NY 244, 194 NE 692 (1935); *Anderson v Erie R. Co.*, 223 NY 277, 119 NE 557 (1918); *Gold v Swiss Air Transp. Co.*, 33 AD2d 777, 307 NYS2d 166 (2d Dept 1969); see 17 NYJur2d, Carriers §§ 490–498; 2A Warren's Negligence, Common Carriers § 4.02 (4th Ed.). A contract limiting liability between a carrier and the United States for transportation of mail is not binding on a postal employee, *Seybolt v New York, L.E. & W.R. Co.*, 95 NY 562 (1884). Similarly, such a contract between a carrier and an express company is not binding on an express employee, *Brewer v New York, L.E. & W.R. Co.*, 124 NY 59, 26 NE 324 (1891); see Annot: 36 ALR2d 1412. Where, however, a passenger accompanying freight does not ride under a special contract between the employer and the carrier, but under a pass containing an exoneration clause, New York cases are in conflict whether the clause is binding upon the passenger, depending upon whether he or she pays no fare, a reduced fare, or is deemed to have paid a full fare that is included in the cost of transporting the freight, *Poucher v New York Cent. R. Co.*, 49 NY 263 (1872); *Hodge v Rurland R. Co.*, 112 App Div 142, 97 NYS 1107 (3d Dept 1906), amended, 115 App Div 881, 100 NYS 764 (3d Dept 1906), *aff'd*, 194 NY 570, 88 NE 1121 (1909); *Bissell v New York Cent. R. Co.*, 25 NY 442 (1862); *Smith v New York Cent. R. Co.*, 24 NY 222 (1862). However, the New York drover cases have little remaining practical effect, since the federal statutes referred to above have preempted the field for interstate and foreign carriers, *Francis v Southern Pac. Co.*, 333 US 445, 68 SCt 611 (1948); *Willcox v Erie R. Co.*, 162 App Div 94, 147 NYS 360 (1st Dept 1914) (concurring opinion).

Where employees are engaged in the course of employment, both federal (45 USC § 55) and state (Railroad Law § 64) statutes invalidate contracts or other attempts by the carrier to exempt itself from liability created by the laws governing the carrier's responsibility to its employees.

As to employees not in the course of employment or members of

their families, *McDougall v Lehigh Val. R. Co.*, 21 Misc2d 946, 198 NYS2d 91 (NY City Ct 1959); *Gonzales v Baltimore & O. R. Co.*, 318 F2d 294 (4th Cir 1963), including a spouse and children, see *Broughton v United Air Lines, Inc.*, 189 F Supp 137 (WDMo 1960), a carrier is not liable for ordinary negligence. Whether the pass was issued gratuitously is a jury question, *Warner v New York Cent. R. Co.*, 23 AD2d 642, 256 NYS2d 969 (1st Dept 1965); *Montalbano v New York Cent. R. Co.*, 267 App Div 617, 47 NYS2d 877 (4th Dept 1944). If the carrier is obligated by a collective bargaining agreement to issue the pass to the employee and the employee's spouse, it is not a gratuity, *Martin v Greyhound Corp.*, 227 F2d 501 (6th Cir 1955). The fact that the user of a free pass purchases a parlor car seat from the conductor does not make the pass non-gratuitous, *Ulrich v New York Cent. & H.R.R. Co.*, 108 NY 80, 15 NE 60 (1888). The burden of proof that the pass was issued gratuitously rests on the carrier, *Lebron v New York City Transit Authority*, 44 NY2d 782, 406 NYS2d 38, 377 NE2d 482 (1978).

Under federal law, the carrier remains responsible even to a gratuitous passenger for wilful or wanton injury, see *Northern Pac. Ry. Co. v Adams*, 192 US 440, 24 SCT 408 (1904); *Martin v Greyhound Corp.*, 227 F2d 501 (6th Cir 1955); *Broughton v United Air Lines, Inc.*, 189 F Supp 137 (WDMo 1960). Unlike federal law, New York holds that the degree of negligence has no bearing; the non-liability clause in a pass, if effective at all, exonerates from gross as well as ordinary negligence, *Perkins v New York Cent. R. Co.*, 24 NY 196 (1862); *Montalbano v New York Cent. R. Co.*, 267 App Div 617, 47 NYS2d 877 (4th Dept 1944); see *Hopkins v Long Island R. Co.*, 21 AD2d 814, 251 NYS2d 590 (2d Dept 1964).

The limitation of liability in a pass protects not only the issuing carrier but all connecting lines and terminal owners to the passenger's point of destination, *Wilder v Pennsylvania R. Co.*, 245 NY 36, 156 NE 88 (1927); *Gonzales v Baltimore & O. R. Co.*, 318 F2d 294 (4th Cir 1963). The limitation of liability in a bill of lading protects an employee of the carrier acting within the scope of his or her authority, *Howard v Finnegans Warehouse Corp.*, 33 AD2d 1090, 307 NYS2d 1022 (3d Dept 1970).

The limitation of liability in a pass or a reduced rate contract will not be given effect if not clear and unequivocal, and assented to by the passenger, *Dow v Syracuse, L. & B. Ry.*, 81 App Div 362, 80 NYS 941 (4th Dept 1903); see 17 NYJur2d, Carriers § 537; 2A Warren's Negligence, Common Carriers § 402(1) (4th Ed). A notice on the back of a paying passenger's ticket not assented to by the passenger is insufficient, *Rawson v Pennsylvania R. Co.*, 48 NY 212 (1872); *Blossom v Dodd*, 43 NY 264 (1870); but see *Perkins v New York Cent. R. Co.*, 24 NY 196 (1862). But where the notice is contained in a contract integrated with the ticket, the ticket "is more than a mere token or voucher." Acceptance of the ticket implies assent to its terms; the passenger "is charged as if he had signed" and it does not matter that he failed to read the conditions contained in the ticket, *Murray v Cunard*

S.S. Co., 235 NY 162, 139 NE 226 (1923); *Reichman v Compagnie Generale Transatlantique*, 290 NY 344, 49 NE2d 474 (1943); see Annot: 5 ALR Fed 394. Such a provision bars recovery even to a pass user who is an infant not accompanied by his or her parents, see 41 ALR 1092. Whether the passenger had knowledge of and assented to the contract terms may be a jury question, see *Rawson v Pennsylvania R. Co.*, 48 NY 212 (1872); *Perkins v New York Cent. R. Co.*, 24 NY 196 (1862).

With respect to limitation of liability concerning baggage, see as to intrastate carriage, Transportation Law §§ 109, 181 and 199; as to interstate carriage, 49 USC § 11707(c)(3); as to ocean voyages see Annot: 5 ALR Fed 394; see generally 17 NYJur2d, Carriers §§ 537–543; 2A Warren’s Negligence, Common Carriers § 4 (4th Ed.).

State law requires that a common carrier give notice, e.g., to the Commissioner of Transportation (Transportation Law § 117), of accidents happening upon its railroad line.

PJI 2:171. Common Carrier—Injury or Death of Passenger—Limitation of Liability Under Treaty (Warsaw Convention) and Special Contract (Montreal Agreement)

The flight on which (plaintiff, plaintiff’s decedent) AB was traveling was “international transportation” within the meaning of a treaty known as the Warsaw Convention relating to international air travel and a special contract under that Treaty called “the Montreal Agreement.” That Treaty and Agreement govern the rights of the parties in this case.

Under that Treaty and Agreement the defendant CD [*insert name of airline*] is liable for damages sustained by AB as the result of the accident up to a limit of \$75,000. However, if there was willful misconduct on the part of CD or any of its officers, agents or employees acting within the scope of their employment, the \$75,000 limit no longer applies if that willful misconduct was a substantial factor in causing AB’s (injury, decedent’s death).

Willful misconduct does not require that CD or any of its employees deliberately intended to harm (AB, AB’s decedent). Willful misconduct means intentionally doing, or intentionally failing to do, an act knowing that doing the act, or failing to do

it, will probably result in injury or damage. It may also mean doing an act in such a reckless manner, or failing to do an act that is so clearly required under the circumstances, as to indicate a reckless disregard of the consequences that would naturally and probably occur from doing or failing to do the act.

CD is responsible for the act or failure to act of its officers, agents or employees if what they did or failed to do occurred within the scope of their employment. AB claims that there was willful misconduct in that *[here set forth the specific claim and relate it to the above definition as, for example, in violating FAA regulations, safety standards, defendant's own internal standards and procedures or other conduct]*. You must first decide if CD acted or failed to act as claimed by AB. If you find that CD acted or failed to act as claimed by AB, you must then decide the question of willful misconduct. The *[here describe the act, failure to act]* would not necessarily constitute willful misconduct. But, if you find that the (act, failure to act) was intentional and that it was done with the knowledge that it would probably result in damage or injury, or that it was so reckless as to indicate an indifference to the consequences that would naturally and probably occur as a result, then that would be willful misconduct.

If you find that there was no willful misconduct or that, if there was willful misconduct, it was not a substantial factor in causing (AB's injury, decedent's death), your verdict would be for the amount of damages actually sustained by AB up to \$75,000. If you find that there was willful misconduct and that such misconduct was a substantial factor in causing (AB's injury, decedent's death) then your verdict would be in the full amount of the damages sustained.

Comment

Caveat: The foregoing charge is based on the Warsaw Convention of 1929, 49 Stat 3000; see Annotation to 49 U.S.C. § 1502, as augmented in 1966 by the Montreal Agreement (Agreement CAB 18900), to which

virtually all American and foreign air carriers were parties. The Warsaw Convention and Montreal Agreement are discussed below. Effective November 4, 2003, the Warsaw Convention and Montreal Agreement were replaced by the *Convention for the Unification of Certain Rules for International Carriage by Air, Done at Montreal 28 May 1999* (the “Montreal Convention”), which significantly alters the rules for claims brought for the injury or death of international air passengers.

Under the Montreal Convention, the carrier’s liability, without regard to fault, has been raised from \$75,000 to the present equivalent of approximately \$140,000 for each victim, with provisions for regular upward adjustments for inflation. Additionally, the Montreal Convention eliminates the Warsaw Convention’s burden of proving “wilful misconduct” as a threshold for avoiding the monetary limitation on liability. Claimants may now obtain full compensatory damages unless the carrier can show that it was not negligent or that the occurrence was caused solely by the negligence or wrongful act of a third party. Punitive damages, however, are not recoverable. Another significant new feature of the Montreal Convention is that claimants suing on behalf of passengers who permanently reside (or resided) in nations that have ratified the Montreal Convention (including the United States) may bring suit in the passengers’ nations of residence as well as in the carrier’s domicile or principal place of business. The applicability of the Montreal Convention to pre-existing claims and causes of action is a matter for future resolution, see *Kodak v American Airlines*, 9 Misc3d 107, 805 NYS2d 223 (AppT 2005) (Warsaw Convention rather than Montreal Convention applicable where acts giving rise to action occurred before November 4, 2003). While the Warsaw Convention and Montreal Agreement have been superseded by the Montreal Convention, the case law construing and applying them continue to have relevance for the existing cases to which its provisions apply. Additionally, the case law may have some future utility in determining the meaning and effect of the Montreal Convention provisions.

Under the former Montreal Agreement, most American and foreign air carriers agreed to waive the right, under Article 20 of the Convention, to exculpate themselves by showing they took all possible measures to avoid damage. As a result, they were absolutely liable for damages up to \$75,000. The monetary limitation does not apply in cases in which wilful misconduct is shown, see *Rosman v Trans World Airlines, Inc.*, 34 NY2d 385, 358 NYS2d 97, 314 NE2d 848 (1974). The order of the Civil Aeronautics Board approving the Montreal Agreement and detailing its background can be found in Annotation to 49 USC § 1502. The Agreement is discussed in *Day v Trans World Airlines, Inc.*, 528 F2d 31 (2d Cir 1975); Sincoff, *Absolute Liability and Increased Damages in International Aviation Accidents*, 52 ABAJ 1122; Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv L Rev 497, and the Symposium on the Warsaw Convention, 33 J of Air Law & Commerce 519–695. The United States was a party to the Warsaw Convention which, being a treaty, was part of the law of the

land and superseded state law, *Wyman v Pan American Airways*, 181 Misc 963, 43 NYS2d 420 (Sup 1943), *aff'd*, 267 App Div 947, 48 NYS2d 459 (1st Dept 1944), *aff'd*, 293 NY 878, 59 NE2d 785 (1944).

The two year period within which to sue as provided by Article 29 of the Warsaw Convention, 49 USC § 1502 is a condition precedent, *Seguritan v Northwest Airlines, Inc.*, 86 AD2d 658, 446 NYS2d 397 (2d Dept 1982), *aff'd*, 57 NY2d 767, 454 NYS2d 991, 440 NE2d 1339 (1982), and is not subject to extensions or tolls, see *Kahn v Trans World Airlines, Inc.*, 82 AD2d 696, 443 NYS2d 79 (2d Dept 1981) (CPLR 208, toll by reason of infancy inapplicable). This condition precedent applies even if the ticket delivered to the passenger did not comply with the Convention and was the equivalent, because of its illegible type, of no ticket at all, *Bergman v Pan Am. World Airways, Inc.*, 32 AD2d 95, 299 NYS2d 982 (1st Dept 1969).

Whether the flight is "international transportation," and thus within the treaty coverage, is a question of law, *Ross v Pan American Airways*, 299 NY 88, 85 NE2d 880 (1949); *Garcia v Pan American Airways*, 295 NY 852, 67 NE2d 257 (1946); see *Egan v Kollsman Instrument Corp.*, 21 NY2d 160, 287 NYS2d 14, 234 NE2d 199 (1967) (abrogated on other grounds by, *Chan v Korean Air Lines, Ltd.*, 490 US 122, 109 SCt 1676 (1989)). Jurisdiction over the action under the Warsaw Convention was limited to the courts of the place of (1) domicile of the carrier; or (2) its principal place of business; or (3) the place where the ticket was purchased; or (4) the place of destination, Article 28, subd. 1; *Varkonyi v S. A. Empresa De Viacao Airea Rio Grandense (Varig)*, 71 Misc2d 607, 336 NYS2d 193 (Sup 1972). As to place of destination, see *Rinck v Deutsche Lufthansa AG.*, 44 NY2d 714, 405 NYS2d 456, 376 NE2d 929 (1978); *Smith v Canadian Pac. Airways, Limited*, 452 F2d 798 (2d Cir 1971) (abrogated on other grounds by, *Benjamins v British European Airways*, 572 F2d 913 (2d Cir 1978)).

Recovery may be had for "plaintiff's palpable, objective bodily injuries, including those caused by the psychic trauma" of an aircraft hi-jacking "and for the damages flowing from those bodily injuries, but not for the trauma as such or for the non-bodily or behavioral manifestations of that trauma," *Rosman v Trans World Airlines, Inc.*, 34 NY2d 385, 358 NYS2d 97, 314 NE2d 848 (1974); see *Cohen v Varig Airlines (S.A. Empresa de Viacao Aerea Rio Grandense)*, 62 AD2d 324, 405 NYS2d 44 (1st Dept 1978); see also *Husserl v Swiss Air Transport Co., Ltd.*, 351 F Supp 702 (SDNY 1972), *aff'd*, 485 F2d 1240 (2d Cir 1973).

The treaty covered accidents on board the aircraft or in the course of any of the operations of embarking or disembarking, Article 17. Limitation of liability for injury sustained in places not covered by the treaty is governed by contact law and is invalid absent a choice of rates, see *Gold v Swiss Air Transp. Co.*, 33 AD2d 777, 307 NYS2d 166 (2d Dept 1969); PJI 2:170 and Comment.

Delivery to the passenger of a ticket containing specified informa-

tion was required by Article 3, which further provided that, if no ticket was delivered, the carrier was not entitled to those provisions of the treaty that excluded or limited its liability, *Scherer v Pan American World Airways, Inc.*, 54 AD2d 636, 387 NYS2d 580 (1st Dept 1976). Thus, if the airline failed to deliver a ticket to plaintiff at the outset of the trip, the airline could not invoke the liability ceilings of the Convention, *Manion v Pan American World Airways, Inc.*, 55 NY2d 398, 449 NYS2d 693, 434 NE2d 1060 (1982). As to what constitutes “deliver,” see *Ross v Pan American Airways*, 299 NY 88, 85 NE2d 880 (1949), which holds that there is no need for a carrier claiming the limitation to show more than the delivery of an appropriate ticket and the travel of the passenger thereunder.

The Warsaw Convention was applicable to claims of passengers injured during a terrorist attack that occurred while the passengers were standing in line awaiting a final security check before boarding, as the passengers were regarded as being in the process of embarking, *Evangelinos v Trans World Airlines, Inc.*, 550 F2d 152 (3d Cir 1977); *Day v Trans World Airlines, Inc.*, 528 F2d 31 (2d Cir 1975); *Leppo v Trans World Airlines, Inc.*, 56 AD2d 813, 392 NYS2d 660 (1st Dept 1977). The Convention was held not to apply to claims made by passengers injured during a terrorist attack that occurred while the passengers were retrieving their baggage, *Martinez Hernandez v Air France*, 545 F2d 279 (1st Cir 1976).

Where the ticket legibly recited the Convention’s limitation on damages in the event of passenger injury or death, the failure to print the notice of such limitation in 10-point type, as required by the Montreal Agreement, did not deny the air carrier the benefit of the damage limitation, *Chan v Korean Air Lines, Ltd.*, 490 US 122, 109 SCt 1676 (1989); see also *Arkin v New York Helicopter Corp.*, 149 AD2d 5, 544 NYS2d 343 (1st Dept 1989) (failure of airline to record number and weight of passenger’s checked baggage on passenger tickets and baggage checks pursuant to Article 4 of the Warsaw Convention precludes airline from limiting its liability for lost baggage to the amount specified in the Convention).

The definition of wilful misconduct in the pattern charge is based on the charges given in *Berner v British Com. Pac. Airlines, Limited*, 219 F Supp 289 (SDNY 1963), rev’d on other grounds, 346 F2d 532 (2d Cir 1965); *Pekelis v Transcontinental & Western Air, Inc.*, 187 F2d 122 (2d Cir 1951); *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines Holland v Tuller*, 292 F2d 775 (DC Cir 1961); *Goepp v American Overseas Airlines*, 281 App Div 105, 117 NYS2d 276 (1st Dept 1952), aff’d, 305 NY 830, 114 NE2d 37 (1953); see also *Intern. Min. Corp. v Aerovias Nacionales De Colombia S.A.*, 57 AD2d 64, 393 NYS2d 405 (1st Dept 1977), aff’d, 45 NY2d 915, 411 NYS2d 220, 383 NE2d 866 (1978); *Grey v American Airlines*, 227 F2d 282 (2d Cir 1955); *American Airlines v Ulen*, 186 F2d 529 (DC Cir 1949), (“it covers not only the acts accomplished deliberately, but also acts of insouciance

without concern for the consequences"); 8 Am Jur 2d, Aviation 112; Notes 37 NYULR 323 and 4 Virginia J Int'l Law 123; Restatement, Torts, Second 500; 32 J of Air Law & Commerce 291. On the issue of willful misconduct, the court may properly refuse to charge that the instinct of self preservation raises a presumption that the aircraft crew acted with due care, *LeRoy v Sabena Belgian World Airlines*, 344 F2d 266 (2d Cir 1965).

Under the Warsaw Convention, plaintiff has the burden of proving willful misconduct by a fair preponderance of the evidence, *Goepp v American Overseas Airlines*, 281 App Div 105, 117 NYS2d 276 (1st Dept 1952), *aff'd*, 305 NY 830, 114 NE2d 37 (1953); *Cohen v Varig Airlines (S.A. Empresa de Viacao Aerea Rio Grandense)*, 62 AD2d 324, 405 NYS2d 44 (1st Dept 1978); *Grey v American Airlines*, 227 F2d 282 (2d Cir 1955).

Article 17 of the Warsaw Convention permitted compensation only for legally cognizable harm but left the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules, *Zicherman v Korean Air Lines Co., Ltd.*, 516 US 217, 116 SCt 629 (1996). Thus, the questions of who may recover and what compensatory damages may be awarded are determined by domestic law. In an action brought by the mother and sister of a passenger killed when a Korean Airline plane was shot down over the Sea of Japan, the Death on the High Seas Act applied, rather than state law or general maritime law; under that Act, plaintiffs were not entitled to recover damages for loss of society, *Zicherman v Korean Air Lines Co., Ltd.*, *supra*.

b. DUTY TO PUBLIC**PJI 2:175. Common Carrier—Duty to Public—At Crossing (And Comparative Negligence of Motorist)**

Because railroads have schedules, and trains are not as easy to control as automobiles, a train has the right of way at a grade crossing, and the engineer has the right to assume that motorists will exercise reasonable care for their own safety. However, the railroad has a duty to a motorist on the highway to give timely and adequate warning of a train's approach. In determining whether a warning was timely and adequate you should consider all of the surrounding circumstances, including the train's speed as it approached the crossing; the kind of warning that was given; the grade of the highway and the railroad roadbed where they come together; the weather conditions; and any obstructions to a motorist's view as (he, she) approached the crossing. If you find that a timely and adequate warning was given, the railroad would not be negligent and your finding will be for defendant. If you find that no warning was given, or that the warning given was not timely and adequate, then the railroad would be negligent and plaintiff would be entitled to recover if you further find that the railroad's negligence was a substantial factor in causing the accident. In that event you will next consider whether there was any negligence on the plaintiff's part that contributed to the happening of the accident.

While approaching the crossing, plaintiff was required to use that degree of care for (his, her) own safety that a reasonably careful motorist would use under the same circumstances. Plaintiff had to use reasonable care even if the railroad did not give (any warning, timely and adequate warning). Plaintiff had a duty to look and listen. If you find that the presence of the crossing was obvious but that plaintiff's view of it and the area from which the train came was limited, (he, she) had to

take that fact into consideration in approaching the crossing. As required by the Railroad Law, there was an approach warning sign on each side of the grade crossing.

Plaintiff also had to obey the Railroad Law and a failure to do so would be negligence. That law imposes a duty upon a motorist to "reduce speed to a safe limit upon passing such sign." This does not, however, require that a motorist stop before crossing the railroad track. A "safe limit" means such speed as is reasonably safe under all of the circumstances. The Railroad Law also requires a motorist upon passing a warning sign to proceed "cautiously and carefully with the vehicle under complete control."

In deciding whether plaintiff used reasonable care you will consider all of the surrounding circumstances, including whether plaintiff looked and listened with reasonable care; whether there was any obstruction of plaintiff's view; what warning there was of the crossing; if there was a warning sign, whether plaintiff reduced (his, her) speed to a safe limit upon passing it; what warning or notice plaintiff had of the approach of the train; the grade of the highway and the railroad roadbed as they came together; and the condition of the weather.

If you find that the plaintiff failed to proceed cautiously and carefully with (his, her) vehicle under complete control as (he, she) approached the crossing and that such failure was a substantial factor in causing the accident, you will find that (he, she) was also at fault. If you find that as plaintiff approached the crossing (he, she) looked and listened with reasonable care and reduced (his, her) speed to a safe limit on passing the warning sign, and proceeded cautiously and carefully with the vehicle under complete control or the plaintiff's conduct was not a substantial factor in causing the accident, you will find that plaintiff was not at fault.

Comment

In regard to the railroad's duty, see *Hubbs v Boston & M. R. R.*, 260 NY 223, 183 NE 370 (1932); *Baker v Lehigh Valley R. Co.*, 248 NY 131, 161 NE 445 (1928); *Spooner v Delaware, L. & W.R. Co.*, 115 NY 22, 21 NE 696 (1889); *Merenda v Consolidated Rail Corp.*, 248 AD2d 684, 670 NYS2d 869 (2d Dept 1998) ("standing car" rule); *Hicks v Erie R. Co.*, 10 AD2d 795, 197 NYS2d 803 (4th Dept 1960) (paramount right of way); *McCowan v Lehigh V. R. Co.*, 232 App Div 446, 250 NYS 170; *Caledonian Ins. Co. v Erie R. Co.*, 219 App Div 685, 220 NYS 705 (4th Dept 1927); *Bailey v Baltimore & O. R. Co.*, 227 F2d 344 (2d Cir 1955) (railroad's duty to warn). The noise of an approaching train is not of itself an adequate warning, *Crough v New York Cent. R. Co.*, 260 NY 227, 183 NE 372 (1932); nor is the glare of the locomotive headlight at night, *Stokes v Delaware & Hudson R. Corporation*, 234 App Div 597, 256 NYS 71 (3d Dept 1932), *aff'd*, 260 NY 644, 184 NE 128 (1932); *Bailey v Baltimore & O. R. Co.*, *supra* (speed of train); *Crough v New York Cent. R. Co.*, *supra* (grade of highway and roadbed); *Hessner v Delaware & Hudson Railway Co.*, 38 NY2d 906, 382 NYS2d 754, 346 NE2d 555 (1976); *McCowan v Lehigh V. R. Co.*, *supra*; see also *Crough v New York Cent. R. Co.*, *supra*, (obstruction of view); Railroad Law § 53 (sign boards, flagmen and gates at crossing); 6A Warren's Negligence, Collisions of Trains, Chap. 11 (3d Ed.).

In regard to the motorist's duty, see *Wadsworth v Delaware, L. & W. R. Co.*, 296 NY 206, 71 NE2d 868 (1947) (duty though railroad gave no warning or failed to give timely warning); *Crough v New York Cent. R. Co.*, 260 NY 227, 183 NE 372 (1932); *Schrader v New York, C. & St. L.R. Co.*, 254 NY 148, 172 NE 272 (1930); *Chamberlain v Lehigh Valley R. Co.*, 238 NY 233, 144 NE 512 (1924); *Horton v New York Cent. R. Co.*, 237 NY 38, 142 NE 345 (1923) (not required to stop); *La Goy v Director General of Railroads*, 231 NY 191, 131 NE 886 (1921) (duty to look and listen); *Avery v New York, O. & W. Ry. Co.*, 205 NY 502, 99 NE 86 (1912); *Judson v Central Vermont R. Co.*, 158 NY 597, 53 NE 514 (1899); *Delaney v Orangetown*, 44 AD2d 396, 354 NYS2d 957 (2d Dept 1974), *aff'd*, 36 NY2d 770, 368 NYS2d 841, 329 NE2d 672 (1975); *Gilliard v Long Island R. Co.*, 61 AD2d 829, 402 NYS2d 589 (2d Dept 1978), *rev'd on other grounds*, 45 NY2d 996, 413 NYS2d 116, 385 NE2d 1044 (1978); Railroad Law § 53-a (proceeding cautiously and carefully). A traveler is not negligent where, because of cars on the tracks and other obstructions, it was impossible to see an approaching train until he was actually upon the tracks, *Hessner v Delaware & Hudson Railway Co.*, 38 NY2d 906, 382 NYS2d 754, 346 NE2d 555 (1976); *Stevenson v New York & L.B.R. Co.*, 224 NY 584, 120 NE 876 (1918); see *Miller v Fenton*, 247 AD2d 740, 669 NYS2d 391 (3d Dept 1998).

The pattern charge assumes that the warning sign required by Railroad Law § 53-a was in place and visible. If such is not the case the charge would have to be modified by deleting reference to the provisions of § 53-a; see by way of analogy PJI 2:80A and Comment in regard to stop signs. The pattern charge was cited with approval in *Vasquez by*

Vega v Consolidated Rail Corp., 180 AD2d 247, 584 NYS2d 345 (3d Dept 1992).

Former Penal Code § 421, which made it a misdemeanor for an engineer to fail to ring the bell or sound the whistle at crossings, imposed no civil duty on the railroad, *Vandewater v New York & N.E.R. Co.*, 135 NY 583, 32 NE 636 (1892); see *Killen v New York Cent. R. Co.*, 225 App Div 8, 232 NYS 76 (4th Dept 1928). Such provision is now in Railroad Law § 53-b (former Penal Law § 1985), but the reasoning of *Vandewater* would still seem to be applicable, see *Bailey v Baltimore & O. R. Co.*, 227 F2d 344 (2d Cir 1955); 6A Warren's Negligence, Collisions of Trains, § 3.05 (3d Ed.).

The railroad's duty to give warning may be the same at a private road crossing as at a public highway crossing, *Crough v New York Cent. R. Co.*, 260 NY 227, 183 NE 372 (1932); see *Russell v Fusco*, 267 AD2d 738, 699 NYS2d 798 (3d Dept 1999).

Unless ordered to do so, the railroad is not required to keep a flagger, gate or automatic bell at a crossing, *Ernst v Hudson River R. Co.*, 39 NY 61, 36 How Pr 84 (1868); *Gilliland v Delaware & Hudson Co.*, 207 App Div 509, 202 NYS 710 (3d Dept 1924); *Bailey v Baltimore & O. R. Co.*, 227 F2d 344 (2d Cir 1955); see also *Clementoni v Consolidated Rail Corp.*, 30 AD3d 986, 817 NYS2d 474 (4th Dept 2006) (owner of private road that crossed railroad tracks had no duty to control crossing by erecting gates or devices to warn of approaching train), *aff'd*, 8 NY3d 963, 836 NYS2d 507, 868 NE2d 187 (2007), but if established practice is to have a flagger and that person does not appear, that fact may be considered in deciding whether someone who has come to rely on the presence of the flagger was negligent, *Elias v Lehigh Valley R. Co.*, 226 NY 154, 123 NE 73 (1919). Unless required to do so, the railroad's failure to guard the crossing with gates is not negligence, *Killen v New York Cent. R. Co.*, 225 App Div 8, 232 NYS 76 (4th Dept 1928); see *McKelvey v Delaware, L. & W.R. Co.*, 253 App Div 109, 300 NYS 1263 (4th Dept 1937) (here a flagger was stationed at the intersection holding a stop sign). If gates or a signal are installed but are malfunctioning or not operative, the railroad may be liable, *Hamilton v Erie R. Co.*, 219 NY 343, 114 NE 399 (1916); *Cruz v Long Island R. Co.*, 28 AD2d 282, 284 NYS2d 959 (1st Dept 1967); see Annot: 90 ALR2d 350.

Railroad Law § 53 requires a railroad to maintain a sign at a highway crossing except that the Commissioner of Transportation may dispense with such a sign in cities and villages. That section also provides that the Commissioner of Transportation may order that a flagger be stationed, gates be erected, automatic gates or signals be installed or other means of protection be provided. Railroad Law § 53-a requires that the railroad or the governmental authority charged with the duty of maintaining the highway maintain an approach warning sign on each side of a crossing unless the Commissioner of Transportation deems it impracticable to do so, in which event the Commissioner may direct other suitable warning signs. The design and location of the

sign shall conform to the Department of Transportation's manual for a uniform system of traffic control devices. If the municipality fails to maintain the warning sign, it may be held liable for resulting injury, *Cabri v Long Island R. Co.*, 306 NY 765, 118 NE2d 475 (1954); *Hebbard v Ives*, 8 AD2d 648, 184 NYS2d 971 (3d Dept 1959). The absence of a warning sign cannot be excluded as a cause of an accident unless the plaintiff's familiarity with the crossing would have lead to the same course of conduct if the sign had been present, see *Miller v Fenton*, 247 AD2d 740, 669 NYS2d 391 (3d Dept 1998). The Commissioner of Transportation may obtain a court order requiring compliance with § 53-a.

In 1970, Congress enacted the Federal Railroad Safety Act ("FRSA") "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents," 49 USC § 20101. The FRSA grants the Secretary of Transportation the authority to "prescribe regulations and issue orders for every area of railroad safety," 49 USC § 20103(a), and directs the Secretary to "maintain a coordinated effort to develop and carry out solutions to the railroad grade crossing problem," 49 USC § 20134(a). A state may adopt or continue to enforce a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the state requirement, 49 USC § 20106. Once the Secretary, in conjunction with the Federal Highway Administration, has funded a railroad crossing improvement and the warning devices are actually installed and operating, the federal regulations displace state and private decision making authority by establishing a federal law requirement that certain protective devices be installed or federal approval obtained, *Norfolk Southern Ry. Co. v Shanklin*, 529 US 344, 120 SCt 1467 (2000). In *Norfolk Southern Railway Co.*, the Supreme Court held that FRSA preempts state tort claims concerning a railroad's failure to maintain adequate warning devices at crossings where the installation has been federally funded, *id*; see *Budik v CSX Transp., Inc.*, 88 AD3d 1097, 931 NYS2d 176 (3d Dept 2011) (plaintiff's claim premised on railroad company's alleged negligence in permitting vegetation in its right of way to obstruct motor vehicle operator's vision of railroad crossing not preempted by 49 USC § 20103).

The duty of an engineer to give such signals as are reasonably required under all of the circumstances is not met by signalling only at particular intervals, *Baker v Lehigh Valley R. Co.*, 248 NY 131, 161 NE 445 (1928). The mere presence of a flagger does not meet the burden of providing an adequate signal, *id*; see Annot: 5 ALR2d 112. Testimony by a witness in a position to have heard the signal that a whistle was not blown nor a bell rung is sufficient to present a *prima facie* case against the railroad, *Latourelle v New York Cent. R. Co.*, 301 NY 103, 92 NE2d 911 (1950).

In the absence of an ordinance regulating speed, the railroad has the right to operate its trains at such rate of speed as it sees fit provided the train gives due and timely notice of its approach, *McKelvey v*

Delaware, L. & W.R. Co., 253 App Div 109, 300 NYS 1263 (4th Dept 1937); *Phelps v Erie R. Co.*, 134 App Div 729, 119 NYS 141 (3d Dept 1909); *Bailey v Baltimore & O. R. Co.*, 227 F2d 344 (2d Cir 1955). A speed limit may be fixed by ordinance (Railroad Law § 53, subd. 2), or Commissioner of Transportation order and, if so, the jury should be charged that violation of the ordinance or order is evidence of negligence, see PJI 2:25.

The failure to give warning must be a proximate cause of the injury, see PJI 2:70; see also *Clementoni v Consolidated Rail Corp.*, 30 AD3d 986, 817 NYS2d 474 (4th Dept 2006) (even if private landowners had duty to erect warning sign at rail crossing, breach of duty not proximate cause of accident where plaintiff acknowledged awareness of crossing), *aff'd*, 8 NY3d 963, 836 NYS2d 507, 868 NE2d 187 (2007).

With respect to comparative negligence of the driver on the highway, see *Hessner v Delaware & Hudson Ry. Co.*, 46 AD2d 463, 363 NYS2d 126 (3d Dept 1975), *aff'd*, 38 NY2d 906, 382 NYS2d 754, 346 NE2d 555 (1976); *Gilliard v Long Island R. Co.*, 61 AD2d 829, 402 NYS2d 589 (2d Dept 1978), *rev'd* on other grounds, 45 NY2d 996, 413 NYS2d 116, 385 NE2d 1044 (1978); *Miller v Fenton*, 247 AD2d 740, 669 NYS2d 391 (3d Dept 1998). Annot: 90 ALR2d 350. See VTL § 1171, which requires drivers of certain specified types of vehicles to stop, look and listen before proceeding across the tracks; VTL § 1125(a)(2), which provides that when within one hundred feet of, or while traversing a railroad grade crossing, no vehicle shall be driven to the left side of the roadway; and VTL § 1170, which requires all drivers to stop when (1) an audible or clearly visible signal device gives warning of the immediate approach of a train, (2) a crossing gate is lowered or a flagger signals the approach or passage of a train, (3) a train within approximately 1500 feet emits an audible signal and presents an immediate hazard, or (4) an approaching train is plainly visible and in hazardous proximity to the crossing. Section 1170 also prohibits driving through, around or under a crossing gate which is closed or is being opened or closed. Failure to look from a point at which the driver has an unobstructed view does not constitute negligence as a matter of law when the driver looks where he or she has a partial view, *Scheel v Long Island R. Co.*, 17 NY2d 872, 271 NYS2d 303, 218 NE2d 338 (1966); see *Hessner v Delaware & Hudson Railway Co.*, 38 NY2d 906, 382 NYS2d 754, 346 NE2d 555 (1976). The negligent failure to approach a railroad crossing with sufficient caution to ensure that one has enough time to stop is not, without more, reckless so as to constitute a superseding cause of a subsequent collision, *Miller v Fenton*, *supra*.

If the facts of the case warrant it, defendant may be entitled to a charge in the following form to be inserted after the third full paragraph of the charge:

PJI 2:175.1

Plaintiff testified that (he, she) looked and did

not see the train. If you find that the train was in plain view at the time and that plaintiff could have seen the approaching train had (he, she) looked, you may find that either plaintiff did not look, or looked but disregarded what (he, she) saw.

Based on *Unger v Belt Line Ry. Corporation*, 234 NY 86, 136 NE 303 (1922); *Kidd v New York Cent. & H.R.R. Co.*, 218 NY 313, 112 NE 1051 (1916); *Hagglund v Erie R. Co.*, 210 NY 46, 103 NE 770 (1913); *Dolfini v Erie R. Co.*, 178 NY 1, 70 NE 68 (1904); see *Guller v Consolidated Rail Corp.*, 242 AD2d 283, 661 NYS2d 42 (2d Dept 1997); see also *Russell v Fusco*, 267 AD2d 738, 699 NYS2d 798 (3d Dept 1999). This has no application where visibility is in issue, *Delaney v Orangetown*, 44 AD2d 396, 354 NYS2d 957 (2d Dept 1974), *aff'd*, 36 NY2d 770, 368 NYS2d 841, 329 NE2d 672 (1975); see PJI 2:36 (re: comparative fault).

With respect to comparative negligence of a passenger in a car approaching the crossing, see *Crough v New York Cent. R. Co.*, 260 NY 227, 183 NE 372 (1932); *Baker v Lehigh Valley R. Co.*, 248 NY 131, 161 NE 445 (1928).

With respect to comparative negligence of a person with impaired vision, hearing or the like approaching a railroad crossing, see Annot: 65 ALR2d 703.

With respect to comparative negligence of a driver approaching a crossing during a snowstorm, see *Delaney v Orangetown*, 44 AD2d 396, 354 NYS2d 957 (2d Dept 1974), *aff'd*, 36 NY2d 770, 368 NYS2d 841, 329 NE2d 672 (1975).

A railroad may also incur liability in the following types of crossing cases:

Construction or Maintenance of Crossing

Railroad Law § 21 imposes upon a railroad the duty of constructing and maintaining a roadway at least 16 feet wide where the railroad crosses a highway at grade. The crossing must be reasonably safe for ordinary travel and the railroad is liable for breach of that duty, *Harri-man v New York, C. & St. L.R. Co.*, 253 NY 398, 171 NE 686 (1930); *Wasmer v Delaware, L. & W.R. Co.*, 80 NY 212 (1880); Annot: 64 ALR2d 1199. The duty imposed on an operating railroad by Railroad Law § 21 is continuous and nondelegable and cannot be abrogated when the railroad's interest in a crossing is acquired by lease, *Reyes v CSX Transp., Inc.*, 19 AD3d 193, 796 NYS2d 606 (1st Dept 2005). Liability for improper maintenance is, however, dependent on notice of a defect in the crossing, either actual or constructive, *Stanley v Long Island R. Co.*, 154 App Div 196, 138 NYS 905 (2d Dept 1912). Whether the duty has been met is a question for the jury, *Sturman v New York Cent. R.*

Co., 280 NY 57, 19 NE2d 679 (1939); *Spooner v Delaware, L. & W.R. Co.*, 115 NY 22, 21 NE 696 (1889); *Sponable v Davis*, 226 App Div 717, 233 NYS 898 (2d Dept 1929). That duty does not include keeping the crossing free of snow and ice, *Silberstein v Houston, W. St. & P.F.R. Co.*, 117 NY 293, 22 NE 951 (1889); *Baltimore & O.R. Co. v Howard Sober, Inc.*, 276 App Div 818, 93 NYS2d 617 (4th Dept 1949). Liability exists, however, when the train cut ruts about a foot deep in the snow on the crossing, *Montfort v New York Cent. R. Co.*, 7 NY2d 936, 197 NYS2d 738, 165 NE2d 580 (1960). Railroad Law § 93 delineates the respective responsibilities of the railroad and the local municipality for the maintenance of bridges and approaches to them at overhead and underground crossings, see *Pennsylvania R. Co. v Rochester*, 37 NYS2d 471 (Sup 1942), *aff'd*, 267 App Div 801, 47 NYS2d 288 (4th Dept 1943), *aff'd*, 293 NY 813, 59 NE2d 178 (1944); *Koles v Penn Central Co.*, 55 AD2d 877, 390 NYS2d 613 (1st Dept 1977).

Obstruction of Crossing

Railroad Law § 53-c makes wilful obstruction of a crossing by a locomotive or train for longer than five minutes a violation, but excludes obstructions (1) over which the railroad has no control and (2) which occur because the train cannot be moved without endangering the safety of passengers, the public or freight. The statute does not impose strict liability, *Killen v New York Cent. R. Co.*, 225 App Div 8, 232 NYS 76 (4th Dept 1928). The question is whether, under all the circumstances, it was reasonable for the railroad to obstruct the highway, *id*; see Annot: 84 ALR2d 813. Ordinarily, this is a jury question, *Laible v New York Cent. & H.R.R. Co.*, 13 App Div 574, 43 NYS 1003 (4th Dept 1897), *aff'd*, 162 NY 621, 57 NE 1114 (1900). It may be held as a matter of law that there was no actionable negligence, *Killen v New York Cent. R. Co.*, *supra*; *Scott v Delaware, L. & W.R. Co.*, 222 App Div 409, 226 NYS 287 (3d Dept 1928). If the train is occupying the crossing for a lawful purpose there is no duty to give warning other than by the crossing signs required by Railroad Law §§ 53 and 53-a, *Muldoon v Lehigh Val. R. Co.*, 279 App Div 848, 109 NYS2d 773 (4th Dept 1952); *Pascal v Pascal*, 254 App Div 807, 4 NYS2d 781 (4th Dept 1938); *Scott v Delaware, L. & W.R. Co.*, *supra*.

A railroad may, however, incur liability where a permanent obstruction, such as a signal stanchion, is in the center of a grade crossing and is not properly lighted, *McGettigan v New York Cent. R. Co.*, 268 NY 66, 196 NE 745 (1935).

Obstruction of View at Crossing

Under Railroad Law § 53-a, the Commissioner of Transportation may require the railroad or municipality “wherever practicable to maintain its property at or near such grade crossing free of obstruction to vision.” Liability may be imposed on one with a duty to maintain a railroad crossing for its negligent failure to control vegetation at the crossing, see *Budik v CSX Transp., Inc.*, 88 AD3d 1097, 931 NYS2d 176 (3d Dept 2011).

State law requires that a common carrier give notice to the Commissioner of Transportation (Transportation Law § 117) of accidents happening upon its line. The former prohibition against admitting such reports in evidence in an action against the carrier was eliminated by the 1980 amendment to Transportation Law § 117.

**PJI 2:176. Common Carrier—Duty to Public—Persons
On or Near Tracks**

A railroad owes a duty to persons on or near its tracks to exercise reasonable care in the movement of its trains for the safety of such persons. Reasonable care means that degree of care that a reasonably prudent railroad operator would exercise under the same circumstances.

In determining whether the defendant railroad exercised reasonable care, you must consider the circumstances surrounding the plaintiff's presence (on the tracks, near the tracks), and whether the railroad had reason to foresee that someone might (cross the tracks, walk along the tracks) at the point where this accident happened.

[In a case in which the train is on an "open run" between stations or stops, insert the following paragraph:]
(In deciding whether the railroad exercised due care, you should bear in mind that a train engineer who sees a person on or near the track [*insert where applicable: in broad daylight*] is not bound to stop the train immediately, but has the right to assume that the person will see and hear the train, heed the danger, and leave the track. In such a situation, the engineer has no duty to make an emergency stop until he or she determines that the person cannot or will not leave the area on the track).

If under all the circumstances, you find that the railroad's conduct was unreasonable and that its conduct was a proximate cause of plaintiff's injuries, you must find for plaintiff. If you find either that the railroad's conduct was reasonable, or that its conduct was not a proximate cause of plaintiff's injuries, you must find for the defendant.

Comment

Caveat: In *Kunнемeyer v Long Island Railroad*, 202 AD3d 74, 161 NYS3d 133 (2d Dept 2021), the Court held that the “open run” defense is applicable not only “in broad daylight” but under any circumstances in which an oncoming train would be readily observable to a person on or near the tracks making reasonable use of his or her senses. In such a case, the words “in broad daylight” may be omitted from the charge.

The decisions in *Scurti v New York*, 40 NY2d 433, 387 NYS2d 55, 354 NE2d 794 (1976), and *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868 (1976), abolished the rule that the duty owed by the possessor of land varies with the status of plaintiff as a licensee, invitee or trespasser, see Introductory Statement preceding PJI 2:90; *Carpino v Baker*, 75 AD2d 540, 427 NYS2d 225 (1st Dept 1980) (the court directed a new trial because the jury was instructed that if it found that the deceased had violated Railroad Law § 83 and Penal Law § 140.05 “plaintiff may recover only if you find that the defendant’s wantonly, wilfully or intentionally harmed him.”); see also *Forde v New York City Transit Authority*, 80 AD2d 825, 436 NYS2d 354 (2d Dept 1981); *Skelka v Metropolitan Transit Authority*, 76 AD2d 492, 430 NYS2d 840 (2d Dept 1980); *Juiditta v Bethlehem Steel Corp.*, 75 AD2d 126, 428 NYS2d 535 (4th Dept 1980) The pattern charge was approved as an accurate statement of applicable law in *Norfleet v New York City Transit Authority*, 124 AD2d 715, 508 NYS2d 468 (2d Dept 1986). The paragraph in parenthesis in the pattern charge is based on *Fierro v New York Cent. R. Co.*, 256 NY 446, 176 NE 834 (1931); *Chrystal v Troy & B.R. Co.*, 105 NY 164, 11 NE 380 (1887); *Alba v Long Island R.R.*, 204 AD2d 143, 611 NYS2d 196 (1st Dept 1994); see *Guller v Consolidated Rail Corp.*, 242 AD2d 283, 661 NYS2d 42 (2d Dept 1997).

Railroad Law § 83 provides: “No person other than those connected with or employed upon the railroad shall walk upon or along its track or tracks, except when the same shall be laid across or along streets or highways, in which case he shall not walk upon the track unless necessary to cross the same,” and Penal Law § 140.05 provides that one “is guilty of trespass when he knowingly enters or remains unlawfully on premises.” Although violation of § 83 is negligence *per se*, *Carpino v Baker*, 66 AD2d 201, 412 NYS2d 617 (1st Dept 1979), such violation would not reduce plaintiff’s recovery unless it is also a proximate cause of the plaintiff’s injuries, see PJI 2:49; and as *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868 (1976), holds, the fact that the plaintiff is a trespasser is one factor to be considered on the question of the reasonableness of the defendant’s conduct, see also PJI 2:36 (comparative negligence).

Pre-*Scurti-Basso* decisions applied Railroad Law § 83 and former Penal Law § 1990(4) to preclude recovery (with some exceptions) by one walking *along* the tracks, but recognized a distinction as to those walking *across* the tracks, see *Zambardi v South Brooklyn R. Co.*, 281 NY 516, 24 NE2d 312 (1939); *Danna v Staten Island Rapid Transit Ry. Co.*, 252 App Div 776, 300 NYS 437 (2d Dept 1937), *aff’d*, 277 NY 714, 14 NE2d 817 (1938).

The earlier cases that held the railroad to a duty of reasonable care continue to be applicable under Scurti-Basso standards. Thus long continued acquiescence by the railroad in the constant public use of a path across its track as a short cut between streets or at an alley or right of way results in a public passageway or "crossing by user" at which the railroad owes a duty of reasonable care in the movement of its trains, *Lamphear v New York Cent. & H.R.R. Co.*, 194 NY 172, 86 NE 1115 (1909); *Swift v Staten Island R.T.R. Co.*, 123 NY 645, 25 NE 378 (1890); *Byrne v New York Cent. & H.R.R. Co.*, 104 NY 362, 10 NE 539 (1887); *Barry v New York Cent. & H.R.R. Co.*, 92 NY 289 (1883); *Skzypek v Long Island R. Co.*, 245 App Div 309, 280 NYS 422 (2d Dept 1935); see *Coger v Long Island R. Co.*, 296 NY 978, 73 NE2d 561 (1947). Note, however, that under these cases the railroad was said to be responsible only for active negligence, see *Byrne v New York Cent. & H.R.R. Co.*, *supra*; *Keller v Erie R. Co.*, 183 NY 67, 75 NE 965 (1905), a rule that cannot survive under *Scurti v New York*, 40 NY2d 433, 387 NYS2d 55, 354 NE2d 794 (1976). On the other hand, the rule continues to be that when there exists a dangerous condition along or in proximity to the passageway there is a duty to give reasonable warning of the condition or otherwise exercise reasonable care to prevent injury to persons using the passageway, *Danna v Staten Island Rapid Transit Ry. Co.*, 252 App Div 776, 300 NYS 437 (2d Dept 1937), *aff'd*, 277 NY 714, 14 NE2d 817 (1938); *Skzypek v Long Island R. Co.*, 245 App Div 309, 280 NYS 422 (2d Dept 1935); *Jarvis v Long Island R. Co.*, 50 Misc2d 769, 271 NYS2d 799 (Sup 1965), *aff'd*, 25 AD2d 617, 268 NYS2d 963 (1st Dept 1966) (all third rail cases); see PJI 2:90, 2:91, 2:96.

As to persons walking along the tracks, it was held that as trespassers they were owed no greater duty than the obligation to refrain from inflicting wilful or wanton injury, see *Scurti v New York*, 40 NY2d 433, 387 NYS2d 55, 354 NE2d 794 (1976), and recovery was said to be limited, even to those to whom the railroad had rented a house, to the last clear chance doctrine, *Klimtzak v Pennsylvania R. Co.*, 292 NY 680, 56 NE2d 103 (1944); *Gleason v Central New England R. Co.*, 261 NY 333, 185 NE 401 (1933); *Keller v Erie R. Co.*, 183 NY 67, 75 NE 965 (1905); *Kline v Long Island R.R. Co.*, 17 AD2d 988 (2d Dept 1962), *aff'd*, 13 NY2d 773, 242 NYS2d 67, 192 NE2d 33 (1963); *Karlson v Long Island Rail Road Company*, 274 App Div 890, 83 NYS2d 218 (2d Dept 1948); *Mattern v Lehigh Val. R. Co.*, 257 App Div 916, 12 NYS2d 103 (4th Dept 1939); Annot: 63 ALR2d 1226. There were two exceptions to this rule, and since these exceptions made the railroad liable for failure to use due care, they are still good law. The first exception, for "those connected with or employed upon the railroad," is provided for by the statute. That phrase covers employees of the railroad or of an independent contractor working on the tracks, as to whom there is a duty to give warning of the approach of a train, *Blanchard v Delaware, L. & W.R. Co.*, 211 NY 79, 105 NE 90 (1914); *Conrad v New York Cent. & H.R.R. Co.*, 137 App Div 372, 121 NYS 774 (4th Dept 1910), *aff'd*, 201 NY 514, 94 NE 1093 (1911); *Froehlich v Interborough Rapid Transit Co.*, 120 App Div 474, 104 NYS 910 (2d Dept 1907); *Wells v Brooklyn Heights R. Co.*, 67 App Div 212, 74 NYS 196 (2d Dept 1901); see *Juiditta*

v Bethlehem Steel Corp., 75 AD2d 126, 428 NYS2d 535 (4th Dept 1980) (duty of reasonable care owed to plaintiff who entered railyard for purposes of transporting its employees at their instance to their work place). It also covers one who comes into a freight yard seeking employment by the consignees of freight in the cars in the yard, Antonio v Long Island R. Co., 265 App Div 874, 38 NYS2d 42 (2d Dept 1942), aff'd, 290 NY 718, 49 NE2d 1002 (1943). The second exception grows out of the affirmative act of the railroad in blocking the crossing, Kurt v Lake Shore & M.S. Ry. Co., 127 App Div 838, 111 NYS 859 (4th Dept 1908), aff'd, 194 NY 598, 88 NE 1122 (1909), in permitting a passenger to alight between stations, Luther v Fonda, J. & G.R. Co., 160 App Div 366, 145 NYS 407 (3d Dept 1914), or in failing to provide a proper passageway from the depot to the street or highway, Hoffman v New York Cent. & H.R.R. Co., 75 NY 605 (1878); Reid v New York, N.H. & H.R. Co., 17 NYS 801 (Gen Term 1892), aff'd, 136 NY 638, 32 NE 1014 (1892). In all of the excepted cases, the duty of the railroad is to exercise reasonable care.

Pursuant to the so-called "open run" defense, a train engineer is entitled to assume that a person on the tracks will observe the oncoming train through the exercise of ordinary care and leave the tracks in time to avoid an accident, Fierro v New York Cent. R. Co., 256 NY 446, 176 NE 834 (1931); Kunнемeyer v Long Island Railroad, 202 AD3d 74, 161 NYS3d 133 (2d Dept 2021) (citing PJI); Guller v Consolidated Rail Corp., 242 AD2d 283, 661 NYS2d 42 (2d Dept 1997); see Kawacz v Delaware, L. & W. R. Co., 259 NY 166, 181 NE 87 (1932); Bragg v Central New England R. Co., 228 NY 54, 126 NE 253 (1920); Polk v New York Cent. R. Co., 10 AD2d 703, 198 NYS2d 84 (1st Dept 1960), aff'd, 8 NY2d 1106, 209 NYS2d 786, 171 NE2d 873 (1960). However, an engineer is duty bound to stop the train upon ascertaining that the person on the tracks is heedless or helpless, Chrystal v Troy & B.R. Co., 105 NY 164, 11 NE 380 (1887); Spooner v Delaware, L. & W.R. Co., 115 NY 22, 21 NE 696 (1889); Alba v Long Island R.R., 204 AD2d 143, 611 NYS2d 196 (1st Dept 1994), or where an employee known to the railroad is working on the tracks and the circumstances are such that the employee could not be expected to see or hear the train, Conrad v New York Cent. & H.R.R. Co., 137 App Div 372, 121 NYS 774 (4th Dept 1910), aff'd, 201 NY 514, 94 NE 1093 (1911). Although some case law spoke of the applicability of the defense where a train is operating "in broad daylight," Chrystal v Troy & B.R. Co., *supra*; Guller v Consolidated Rail Corp., *supra*, in Kunнемeyer v Long Island Railroad, *supra*, the court clarified that the defense is not so limited and is applicable under any circumstances in which an oncoming train would be readily observable to a person on or near the tracks making reasonable use of his or her senses. The failure to instruct the jury of the "open run" defense in a case where it is warranted constitutes reversible error, O'Brien v Erie R. Co., 210 NY 96, 103 NE 895 (1913); Alba v Long Island R.R., 204 AD2d 143, 611 NYS2d 196 (1st Dept 1994).

Limitation of the duty to use due care is found in GOL § 9-103, which provides that as to certain recreational users of property the

uncompensated owner/possessor of the property is liable only upon proof of a wilful or malicious failure to warn of a dangerous condition on the premises, see *Albright v Metz*, 88 NY2d 656, 649 NYS2d 359, 672 NE2d 584 (1996) (GOL § 9-103 barred recovery for operator of a motorbike injured while riding in defendant's landfill); *Bragg v Genesee County Agr. Soc.*, 84 NY2d 544, 620 NYS2d 322, 644 NE2d 1013 (1994) (GOL § 9-103 barred recovery for operator of motor bike injured while riding on abandoned railway bed); *Iannotti v Consolidated Rail Corp.*, 74 NY2d 39, 544 NYS2d 308, 542 NE2d 621 (1989) (GOL § 9-103 barred recovery for operator of motor trail bike injured while riding on railroad right-of-way); *Merriman v Baker*, 34 NY2d 330, 357 NYS2d 473, 313 NE2d 773 (1974) (Railroad Law § 83 and GOL § 9-103 barred recovery by plaintiff who was injured when she fell from abandoned railroad platform and was run over by defendant's train).

State and Federal law requires that a common carrier give notice, e.g., to the Commissioner of Transportation (Transportation Law § 117), of accidents happening upon its line. Such reports may be admitted in evidence in an action against the carrier, see Transportation Law § 117.

**PJI 2:177. Common Carrier—Railroad—Duty to Public—
Fencing Statutes**

The railroad has a duty to erect and “maintain fences on the sides of its road of height and strength sufficient to prevent cattle, horses, sheep and hogs from going upon its road” unless existing buildings or natural barriers were a sufficient protection against such domestic animals going upon the tracks. If you find that existing buildings or natural barriers were sufficient protection against animals going on the tracks to make it unnecessary for the railroad to fence its tracks, you will find that the railroad was not negligent and proceed no further (on this issue). If you find that the existing buildings or natural barriers were not sufficient protection and that the railroad (1) failed to erect a fence or erected a fence which was not of sufficient height or strength to prevent such animals from going on the tracks; or (2) erected a fence of sufficient height and strength to prevent such animals from going on the tracks, but that at the time of the injury to plaintiff's animals the fence was not in good repair and that the railroad had actual knowledge that the fence was not in good repair and had a reasonable opportunity to put it in good repair, or the defective condition of

the fence had existed for a sufficient length of time that the railroad in the use of reasonable care should have discovered it and could have repaired it, then you will find that the railroad was negligent. If you find that the railroad was negligent, then you will find that the railroad was at fault if plaintiff's animals were on the tracks when struck by defendant's train and that the (absence of a, condition of the) fence was a substantial factor in bringing about the injury to plaintiff's animals. If you further find that plaintiff with knowledge of the (absence of a, condition of the) fence voluntarily permitted (his, her) animals to stray upon the tracks, then you will find that plaintiff was also at fault.

Comment

The quotation in the first sentence of the charge is from Railroad Law § 52. At common law a railroad was under no duty to fence its tracks, *Snack v New York Cent. R. Co.*, 223 App Div 192, 227 NYS 739 (3d Dept 1928). The duty arises from Railroad Law §§ 52, 52-a, 52-b and 52-c. The term "substantial factor" is used in the pattern charge to incorporate the element of proximate cause and should be defined and expanded upon as indicated in PJI 2:70 and Comment.

Section 52 requires every railroad to erect and maintain fences of sufficient height and strength to prevent cattle, horses, sheep and hogs from going on the road, but provides that the railroad need not be fenced "when not necessary to prevent horses, cattle, sheep and hogs from going upon its track from the adjoining lands." The natural barriers exception refers to rivers, lakes, rocks or other obstructions that would make a fence unnecessary, *Shepard v Buffalo, N.Y. & E.R. Co.*, 35 NY 641 (1866). Whether a river or other barrier is sufficient protection to make fencing unnecessary is a question for the jury, *Klock v New York Cent. & H.R.R. Co.*, 17 NYS 120 (Gen Term 1891); see *Kelver v New York, C. & St. L.R. Co.*, 126 NY 365, 27 NE 553 (1891). The statute also requires cattle guards at all road crossings.

The section specifically provides: "So long as such fences and cattle guards are not made, or are not in good repair, the corporation, its lessee or other person in possession of its road, shall be liable for all damages done by their agents or engines or cars to any domestic animal thereon. When made and in good repair, they shall not be liable for any such damages, unless negligently or wilfully done." The duty imposed by the statute is absolute, *Kelver v New York, C. & St. L.R. Co.*, 126 NY 365, 27 NE 553 (1891); *Shepard v Buffalo, N.Y. & E.R. Co.*, 35 NY 641 (1866), subject to two important exceptions.

First, during the contributory negligence era, it was held that, notwithstanding the absolute nature of the duty imposed by statute, a plaintiff who voluntarily and knowingly incurred damage could not recover, *Shepard v Buffalo, N.Y. & E.R. Co.*, 35 NY 641 (1866); *Dolan v Newburgh, D. & C.R. Co.*, 120 NY 571, 24 NE 824 (1890); see *Poler v New York Cent. R. Co.*, 16 NY 476 (1857). As the result of the adoption of comparative negligence, plaintiff may recover, but damages will be diminished, see CPLR 1401; PJI 2:36.

Second, the landowner's agreement with the railroad that the landowner will build and maintain a fence relieves the railroad of liability to the landowner or to his or her lessee, *Bell v Erie R. Co.*, 183 App Div 608, 171 NYS 341 (2d Dept 1918); see also *Corwin v New York & E.R. Co.*, 13 NY 42 (1855).

Notwithstanding the absolute nature of the statute and the fact that its language admits of no distinction between erection and maintenance in good repair, there are cases holding that when liability is predicated on failure properly to maintain the fence, notice, actual or constructive, is required, *Hodge v New York Cent. & H.R.R. Co.*, 27 Hun 394 (NY Gen Term 1882); *Wheeler v Erie Ry. Co.*, 2 Thomp & C 634 (NY Gen Term 1874). While the pattern charge follows the cases requiring notice, it should be noted that the Court of Appeals has not passed on the question, though it has, in two cases involving erection rather than maintenance, characterized the statute as "absolute," *Kelver v New York, C. & St. L.R. Co.*, 126 NY 365, 27 NE 553 (1891); *Shepard v Buffalo, N.Y. & E.R. Co.*, 35 NY 641 (1866).

As the second quoted sentence makes clear, the statute imposes strict liability only as to the erection and maintenance in good repair of the fence; the railroad, therefore, incurs no liability when a farm crossing gate is left open, unless the gate was left open through the negligence of a railroad employee, *Whaley v Erie R. Co.*, 181 NY 448, 74 NE 417 (1905). However, even where a railroad employee left the gate open, recovery may be diminished by plaintiff's own negligence, CPLR 1401; see as to comparative negligence generally, PJI 2:36; and see the following cases decided during the contributory negligence era: *Poler v New York Cent. R. Co.*, 16 NY 476 (1857); *Magilton v New York Cent. & H.R.R. Co.*, 11 App Div 373, 42 NYS 231 (3d Dept 1896); *Diamond Brick Co. v New York Cent. & H.R.R. Co.*, 12 NYS 22 (Gen Term 1890).

Railroad Law § 52 protects animals on the tracks, whether they belong to the adjoining or a more remote landowner, *Corwin v New York & E.R. Co.*, 13 NY 42 (1855). It also protects persons on trains who are injured by reason of animals being upon the tracks, *Donegan v Erhardt*, 119 NY 468, 23 NE 1051 (1890); see *Tracy v Troy & B.R. Co.*, 38 NY 433 (1868), though not persons who themselves go upon the tracks, *DiCaprio v New York Cent. R. Co.*, 231 NY 94, 131 NE 746 (1921); *Clarke v New York Cent. & H.R.R. Co.*, 104 App Div 167, 93 NYS 525 (2d Dept 1905); *Lefler v Pennsylvania R.R.*, 203 Misc 887, 118 NYS2d

389 (Sup 1952). Limitation of the railroad's liability to damage done by its "agents, engines or cars" does not necessitate physical contact; it is enough that injury results from fright caused by an approaching train, *Gonsenhauser v New York Cent. R. Co.*, 8 AD2d 483, 188 NYS2d 901 (4th Dept 1959). There must, however, be some activity on the part of the railroad; recovery cannot be had when the animal without any activity by the railroad falls through a bridge, *Jimerson v Erie R. Co.*, 203 NY 518, 97 NE 48 (1911); *Snack v New York Cent. R. Co.*, 223 App Div 192, 227 NYS 739 (3d Dept 1928).

Section 52-a requires fencing of a railroad operating in a city containing a population in excess of one million deriving its motive power in whole or in part from an electrified third rail when the Commissioner of Transportation so directs. Section 52-b requires every railroad to fence when the Commissioner of Transportation so directs. Section 52-c requires every railroad operating in Queens County to fence when the Commissioner of Transportation so directs. In each case the Commissioner must determine that the fencing is "necessary for the public welfare," after a public hearing on notice to the railroad. Presumably, unless the Commissioner's order expressly states otherwise, an order requiring fencing, protects persons as well as animals on the tracks.

Nevertheless, in a common law negligence action, it is unreasonable to charge a railroad to erect a barrier capable of stopping a negligently operated automobile which left the roadway and traversed an 11 1/2-foot wide adjacent sidewalk, *Parks v Hutchins*, 162 AD2d 666, 557 NYS2d 389 (2d Dept 1990), *aff'd*, 78 NY2d 1049, 576 NYS2d 84, 581 NE2d 1339 (1991).

The law requires that a common carrier give notice, e.g., to the Commissioner of Transportation (Transportation Law § 117), of accidents happening upon its line.

c. DUTY UNDER FEDERAL STATUTES

PJI 2:180. Common Carrier—Duty Under Federal Employer's Liability Act—Negligent Injury or Death of Employee

As you have heard, the plaintiff AB claims that (he, she was injured) (EF was killed) because [*state basis of plaintiff's claim or claims*]. The defendant CD claims that it is not liable because [*state defendant's claim or claims*].

The law requires a railroad to use reasonable care to provide its employees with a reasonably safe place in which to work. That duty includes the obligations to maintain the workplace in a reasonably safe condition and to provide employees with reasonably safe and sufficient [*state as appropriate: tools, appliances, equipment*]. Reasonable care means that degree of care which a reasonably prudent railroad would use under the same circumstances, having due regard for the nature of the work and the dangers that might reasonably be anticipated.

In order to recover in this case, AB has to prove, first, that ([he, she] was injured, EF was killed) while (he, she) was working at (his, her) job as an employee of CD; second, that CD was negligent, that is, that an officer, agent or employee of CD failed to use reasonable care under the circumstances in that [*state plaintiff's claim*]; and third, that the negligence played a part—no matter how small—in bringing about (AB's injury or EF's death). A person is working and may be considered to be acting within the course of (his, her) employment when (he, she) is doing anything that (he, she) was employed or authorized to do or that is reasonably related to (his, her) employment.

I will be giving you a verdict sheet containing — questions. The burden of proof on Questions 1 through 3 is on AB.

Question 1 is: Was (AB, EF) working as an em-

ployee of CD when the incident occurred? If the answer to Question 1 is “yes,” you should go on to answer Question 2. If the answer to Question 1 is “no,” omit Questions 2 through 6.

Question 2 is: Was CD negligent [*specify basis of negligence*]? If the answer to Question 2 is “yes,” you should go on to answer Question 3. If the answer to Question 2 is “no,” omit Questions 3 through 6.

Question 3 is: Did CD’s negligence play a part—no matter how small—in bringing about (AB’s injury, EF’s death)?

[Where defendant has asserted that plaintiff was comparatively negligent, state]

If the answer to Question 3 is “yes,” you should go on to answer Question 4. If the answer to Question 3 is “no,” omit Questions 4 through 6. Questions 4 through 6 require you to consider whether (AB, EF) was also negligent and, if so, whether (AB’s, EF’s) conduct contributed to causing (his, her) (injuries, death). The burden of proof on Questions 4 through 6 is on CD.

CD claims that (AB, EF) was comparatively at fault in that [*state defendant’s claim*]. The burden is on CD prove that (AB, EF) was also negligent and that (his, her) negligence played a part—no matter how small—in bringing about (his, her) (injuries, death).

Question 4 is: Was (AB, EF) negligent in that [*specify basis of comparative negligence on which evidence has been introduced*]? If the answer to Question 4 is “yes,” you should go on to answer Question 5. If the answer to Question 4 is “no,” omit Questions 5 and 6.

Question 5 is: Did (AB’s, EF’s) negligence play a part—no matter how small—in bringing about (AB’s injury, EF’s death)? If the answer to Question 5 is “yes,” you should go on to answer Ques-

tion 6. If the answer to Question 5 is “no,” omit Question 6.

Question 6 requires you to apportion the fault between (AB, EF) and CD [*substitute, where appropriate: among (AB, EF), CD and GH, a third person*]. Weighing all the facts and circumstances, you must consider the total negligence, that is, the negligence of both (AB, EF) and CD [*add where appropriate: and GH*] that contributed to causing (AB’s injuries, EF’s death) and you must further determine what percentage of fault is chargeable to each.

Question 6 is: State the percentages of fault that you have attributed to each party. The total of these percentages must equal one hundred percent.

Comment

Based on *CSX Transp., Inc. v McBride*, 131 SCt 2630 (2011); *Norfolk Southern Ry. Co. v Sorrell*, 549 US 158, 127 SCt 799 (2007); *Rogers v Missouri Pac. R. Co.*, 352 US 500, 77 SCt 443 (1957); *Turner v CSX Transp., Inc.*, 72 AD3d 1597, 899 NYS2d 500 (4th Dept 2010).

The above charge is for use in cases arising under the Federal Employer’s Liability Act (FELA), 45 USC §§ 51 through 60, and may also be used in Jones Act cases, 45 USC § 688. Except as otherwise expressly provided (see PJI 2:181), the cause of action it recognizes is one for negligence (45 USC § 51).

Where a safety statute is involved, such as the Federal Safety Appliance Acts (45 USC §§ 1–16) and the Boiler Inspection Act (45 USC §§ 22–34), liability is absolute and this charge should not be used. As to the proper charge in a case involving application of a safety statute, see PJI 2:181.

FELA, which provides a cause of action to a railroad employee who is injured in the course of employment, *CSX Transp., Inc. v McBride*, 131 SCt 2630 (2011), admits of a broader recovery than may be obtained under common law negligence. Under FELA, the plaintiff must still prove the traditional common-law elements of negligence, *Stephney v MTA Metro–North Railroad*, 173 AD3d 572, 103 NYS3d 397 (1st Dept 2019), but those elements are “substantially relaxed” and negligence is “liberally construed to effectuate the statute’s broadly remedial intended function,” *Stephney v MTA Metro–North Railroad*, *supra*; *Hyatt v Metro–North Commuter R.R.*, 16 AD3d 218, 792 NYS2d 391 (1st Dept 2005). Plaintiff’s FELA cause of action must be determined by a jury “if

there is any question as to whether employer negligence played a part, however small, in producing plaintiff's injury," *Stepheny v MTA Metro-North Railroad*, *supra*; *Hairston v Metro-North Commuter R.R.*, 2 AD3d 127, 768 NYS2d 453 (1st Dept 2003). Summary judgment will not be granted to an employer unless the evidence of negligence is so insubstantial that the only conclusion that could be drawn is that any such negligence by the employer could have played no part in an employee's injury, *Stepheny v MTA Metro-North Railroad*, *supra*; *Hairston v Metro-North Commuter R.R.*, *supra*; see *Robinson v CSX Transp.*, 40 AD3d 1384, 838 NYS2d 203 (3d Dept 2007); *Swartout v Consolidated Rail Corp.*, 294 AD2d 785, 742 NYS2d 721 (3d Dept 2002); *Pilarski v Consolidated Rail Corp.*, 269 AD2d 821, 702 NYS2d 485 (4th Dept 2000); see also *CSX Transp., Inc. v McBride*, 131 SCt 2630 (2011). The federal law is more restrictive than New York law as to when a plaintiff's verdict may be set aside, see generally *Curley v Consolidated Rail Corp.*, 81 NY2d 746, 593 NYS2d 772, 609 NE2d 125 (1992).

The rights created by the statute are federal and are governed by federal rather than state principles of law, *Bailey v Central Vermont Ry.*, 319 US 350, 63 SCt 1062 (1943); *Sadowski v Long Island R. Co.*, 292 NY 448, 55 NE2d 497 (1944). This does not require application of federal procedural rules in every circumstance; thus the five-sixths verdict rule governs in FELA cases tried in New York courts, *Minneapolis & St. L.R. Co. v Bombolis*, 241 US 211, 36 SCt 595 (1916); see Annot: 96 L Ed 408. However, whether a case should be taken from the jury or a verdict set aside is considered substantive rather than procedural, see Annot: 79 ALR2d 553. Thus for the plaintiff to recover it is not necessary that he or she establish that the defendant's negligence was a substantial factor in bringing about the injury. Rather the test is whether the railroad's negligence played a part—no matter how small—in bringing about the injury (or death) for which damages are sought, *CSX Transp., Inc. v McBride*, 131 SCt 2630 (2011); see *Rogers v Missouri Pac. R. Co.*, 352 US 500, 77 SCt 443 (1957); *Turner v CSX Transp., Inc.*, 72 AD3d 1597, 899 NYS2d 500 (4th Dept 2010); *Prata v National R. R. Passenger Corp.*, 70 AD2d 114, 420 NYS2d 276 (1st Dept 1979); *Licitra v New York Cent. R. Co.*, 26 AD2d 539, 271 NYS2d 549 (1st Dept 1966). While jury verdicts in FELA cases have been set aside, *New York, N. H. & H. R. Co. v Henagan*, 364 US 441, 81 SCt 198 (1960); *Curley v Consolidated Rail Corp.*, 81 NY2d 746, 593 NYS2d 772, 609 NE2d 125 (1992), they should be permitted to stand unless there is a "complete absence of probative facts to support the jury's finding," *Horton v New York Cent. R. Co.*, 14 AD2d 817, 221 NYS2d 361 (2d Dept 1961); see *Basham v Pennsylvania R. Co.*, 372 US 699, 83 SCt 965 (1963); *Rogers v Missouri Pac. R. Co.*, *supra*; *Lavender v Kurn*, 327 US 645, 66 SCt 740 (1946); *Heater v Chesapeake & O. Ry. Co.*, 497 F2d 1243 (7th Cir 1974), and Annot: 4 LEd2d 1787.

Liability under the FELA is based on negligence and is not based solely on the fact that an employee was injured, *Bready v CSX Transp., Inc.*, 89 AD3d 1386, 933 NYS2d 787 (4th Dept 2011), *aff'd*, 19 NY3d 834, 946 NYS2d 93, 969 NE2d 209 (2012). However, negligence within

the meaning of the Act is much broader than the common law concept of the term. Most of the cases arising under the Act concern the common law duty to provide a safe place to work and to furnish reasonably safe tools with which to work, *Sadowski v Long Island R. Co.*, 292 NY 448, 55 NE2d 497 (1944); *Horton v New York Cent. R. Co.*, 14 AD2d 817, 221 NYS2d 361 (2d Dept 1961); Annot: 80 ALR2d 836, or the sudden starting or stopping of a train, Annot: 60 ALR2d 637. However, injury or death resulting from assault is within the statute, if the carrier was negligent in failing to provide proper protection or in retaining the aggressor-employee after knowledge of his or her vicious disposition or propensity for horseplay, *Harrison v Missouri Pac. R. Co.*, 372 US 248, 83 S Ct 690 (1963); *Lillie v Thompson*, 332 US 459, 68 S Ct 140 (1947); *Shepard v New York, N. H. & H. R. Co.*, 300 F2d 129 (2d Cir 1962), see *Asadorian v New York Cent. R. Co.*, 7 AD2d 789, 181 NYS2d 63 (3d Dept 1958). Liability is also imposed for injury resulting from the railroad's lax enforcement of its own safety rules, *Mileski v Long Island R. Co.*, 499 F2d 1169 (2d Cir 1974). False arrest has also been held to be negligence within the meaning of the Act, *Slaughter v Atlantic Coast Line R. Co.*, 302 F2d 912 (DC Cir 1962). Liability may also be imposed if the intentional tort was committed in furtherance of the employer's objectives, *Lancaster v Norfolk and Western Ry. Co.*, 773 F2d 807 (7th Cir 1985). *Res ipsa loquitur* may apply, see Annot: 35 ALR2d 475; 8 ALR3d 442.

Causes of action for negligent infliction of emotional distress are cognizable under FELA, see *Consolidated Rail Corp. v Gottshall*, 512 US 532, 114 S Ct 2396 (1994), as are claims for intentional infliction of emotional distress, *Higgins v Metro-North R. Co.*, 318 F3d 422 (2d Cir 2003); see *Goodrich v Long Island Rail Road Co.*, 654 F3d 190 (2d Cir 2011). The Supreme Court has limited recovery to those plaintiffs who meet the common law zone of danger test, that is, "those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct," *Consolidated Rail Corp. v Gottshall*, *supra*; *Marchica v Long Island R. Co.*, 31 F3d 1197 (2d Cir 1994) (AIDS phobia). *Goodrich v Long Island Rail Road Co.*, *supra*, interpreted *Consolidated Rail Corp. v Gottshall* as imposing the zone of danger test to claims of intentional infliction of emotional distress thus requiring physical contact or immediate risk of physical harm. A FELA plaintiff suffering from asbestosis may recover damages arising from a resulting fear of developing cancer, *Norfolk & Western Ry. Co. v Ayers*, 538 US 135, 123 S Ct 1210 (2003). When a fear-of-cancer damages claim is interposed, the jury must be instructed, upon request, that the plaintiff must prove that his or her fear is "genuine and serious," *CSX Transp., Inc. v Hensley*, 556 US 838, 129 S Ct 2139 (2009). There is no need, however, to prove a physical manifestation of the emotional distress, *id.* For a pattern instruction on this issue, see PJI 2:180.1.

The employing carrier will not escape liability because the injury occurs off the premises, see *Payne v Baltimore & O. R. Co.*, 309 F2d 546, 21 Ohio Ops 2d 228 (6th Cir 1962), or in the use of the equipment

of a carrier other than the employer, see *Shenker v Baltimore & O. R. Co.*, 374 US 1, 83 SCt 1667 (1963). When the employee's work requires him or her to be on such premises or use such equipment, the employer has a duty to inspect the property or equipment and, therefore, is liable for injury resulting from any defect in it, *id.* Notice is an element which should be charged when the claimed negligence is in failing to maintain the safety of a place to work, *McClinchy v National R.R. Passenger Corp.*, 198 AD2d 126, 603 NYS2d 321 (1st Dept 1993); *O'Hara v Long Island R. Co.*, 665 F2d 8 (2d Cir 1981); *Sano v Pennsylvania R. Co.*, 282 F2d 936 (3d Cir 1960); *Dobson v Grand Trunk Western R. Co.*, 248 F2d 545 (7th Cir 1957), or the insufficiency of the carrier's own equipment used, *Urie v Thompson*, 337 US 163, 69 SCt 1018 (1949).

The railroad may not delegate its duty under the statute and, therefore, is responsible for the negligence of an independent contractor performing an "operational activity" for the railroad, *Sinkler v Missouri Pac. R. Co.*, 356 US 326, 78 SCt 758 (1958). Within this rule a YMCA providing lodging for railroad linemen is performing an operational activity and is an "agent" for the negligence of which the railroad is responsible, *Carney v Pittsburgh & L. E. R. Co.*, 316 F2d 277 (3d Cir 1963). However, a hotel that rented a room to a railroad employee who was visiting a manufacturing plant was not involved in performing operational activities for the railroad and was, therefore, not an "agent" of the railroad for FELA purposes, *Vann v Long Island R. Co.*, 133 AD2d 624, 519 NYS2d 732 (2d Dept 1987).

For the statute to be applicable, the plaintiff must be an employee of the carrier and the carrier must be engaged in interstate or foreign commerce. when it performed the negligent action that caused plaintiff's injury, *Zuckerberg v Port Authority of New York and New Jersey*, 75 AD3d 503, 906 NYS2d 282 (2d Dept 2010). Where that requirement is satisfied, FELA will apply regardless of whether plaintiff was engaged in interstate commerce at the moment of injury, *id.* Thus, in the proper circumstances, FELA may apply to negligence by the Port Authority of New York and New Jersey, since that entity operates an interstate railway transit system, *id.*

FELA applies only to common carriers by railroad and does not extend to trucking companies, *Ronecker v Consolidated Rail Corp.*, 133 AD2d 531, 520 NYS2d 91 (4th Dept 1987). The test of employment is the power of direction and control, *Ward v Atlantic Coast Line R. Co.*, 362 US 396, 80 SCt 789 (1960); *Mazzucola v Pennsylvania R. Co.*, 281 F2d 267 (3d Cir 1960); see Restatement, Second, Agency § 220; Annot: 1 ALR2d 302; and PJI 2:238. The employer-employee relationship does not include one who, having completed his or her work, voluntarily embarks on one of the employer's trains to reach home where other routes and means of travel are available, *Warner v New York Cent. R. Co.*, 34 AD2d 275, 311 NYS2d 351 (1st Dept 1970). Seldom will the "commerce" issue present a jury question, however, in view of the broad provisions of the Act (45 USC § 51): "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of inter-

state or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce . . . shall . . . be considered as being employed by such carrier in such commerce”; see *Baird v New York Cent. R. Co.*, 299 NY 213, 86 NE2d 567 (1949); *Wright v New York Cent. R.R. Co.*, 288 NY 719, 43 NE2d 97 (1942); Annot: 10 ALR2d 1279. It should be noted that a refrigerator car company is not a common carrier under the statute, *Edwards v Pacific Fruit Exp. Co.*, 390 US 538, 88 Sct 1239 (1968).

Causal relation, in view of the statutory imposition of liability for “injury or death resulting in whole or in part from negligence” (45 USC § 51), exists if “employer negligence played a part—no matter how small—in bringing about the injury or death,” *CSX Transp., Inc. v McBride*, 131 Sct 2630 (2011); see *Rogers v Missouri Pac. R. Co.*, 352 US 500, 506, 77 Sct 443 (1957); accord: *Basham v Pennsylvania R. Co.*, 372 US 699, 83 Sct 965 (1963); *Gallick v Baltimore & O. R. Co.*, 372 US 108, 83 Sct 659 (1963); *Lavender v Kurn*, 327 US 645, 66 Sct 740 (1946); *Prata v National R. R. Passenger Corp.*, 70 AD2d 114, 420 NYS2d 276 (1st Dept 1979); *Richards v South Buffalo Ry. Co.*, 54 AD2d 310, 388 NYS2d 479 (4th Dept 1976); *Sydnor v Bond*, 52 AD2d 665, 381 NYS2d 905 (3d Dept 1976). Moreover, under that rule, if the jury finds that defendant’s negligence played a part, even the slightest, in producing the subsequent injuries, remoteness of damages resulting from a second accident will not prevent recovery, *Ammar v American Export Lines, Inc.*, 326 F2d 955 (2d Cir 1964). Reasonable foreseeability is an essential ingredient of FELA liability, *Gallick v Baltimore & O. R. Co.*, supra; see *CSX Transp., Inc. v McBride*, supra. If on the facts an issue of foreseeability is raised, the pattern charge must be modified accordingly, *New York, N.H. & H.R. Co. v Leary*, 204 F2d 461 (1st Cir 1953); see PJI 2:12; see also *CSX Transp., Inc. v McBride*, supra.

The fellow servant rule has been abolished in cases subject to FELA, *Jamison v Encarnacion*, 281 US 635, 50 Sct 440 (1930); *Cott v Erie R. Co.*, 231 NY 67, 131 NE 737 (1921). Assumption of risk is also abolished as a defense, 45 USC § 54; *Hotaling v CSX Transp.*, 5 AD3d 964, 773 NYS2d 755 (3d Dept 2004), although the conduct involved may be considered on the issue of plaintiff’s negligence, *Anisowicz v Long Island Railroad Co.*, 291 AD2d 469, 739 NYS2d 157 (2d Dept 2002); see *Hotaling v CSX Transp.*, supra. Generally in a FELA case based on negligence, there is no reason to charge on assumption of risk, *Clark v Pennsylvania R. Co.*, 328 F2d 591 (2d Cir 1964); *Blundell v Atchison, T. & S.F. Ry. Co.*, 157 Cal App 2d 797, 322 P2d 66 (2nd Dist 1958), and such an instruction should not be given as a matter of routine, *Kiger v Terminal R. Ass’n of St. Louis*, 311 SW2d 5 (Mo 1958). In *Siciliano v Denver & R.G.W.R. Co.*, 12 Utah 2d 183, 364 P2d 413 (1961), it was held prejudicial error so to charge. A number of cases, including *Siciliano* and *Kiger*, have indicated, however, that when the evidence raises the issue, it is not an abuse of discretion to advise the jury that the defense is not available, *Kelley v Great Northern Ry. Co.*, 59 Wash 2d 894, 371 P2d 528 (1962); *Wantland v Illinois Cent. R. Co.*, 237 F2d 921 (7th Cir 1956); *Atlantic Coast Line R. Co. v Burkett*, 192 F2d 941

(5th Cir 1951). However, the Second Department, in *Anisowicz v Long Island Railroad Co.*, supra, determined that the jury should be instructed on the doctrine of assumption of risk and its inapplicability in FELA cases, where either the evidence adduced at trial or the arguments of counsel create the danger that the jury may reduce a plaintiff's recovery based upon the doctrine of assumption of risk. The pattern charge omits reference to the issue on the ground that generally it will not be directly involved. When it is, it would appear sufficient to advise the jury simply, paraphrasing the language of the statute, that the employee shall not be held to have assumed the risk of his or her employment if the (injury, death) resulted in whole or in part from the negligence of any officer, agent or employee of the railroad.

Plaintiff's negligence is not a bar to recovery but will diminish the damages recoverable, 45 USC § 53; see Annot: 58 ALR2d 1232, 1254, except where the carrier violated a safety statute. There is no diminishment of plaintiff's damages "in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee," 45 USC § 53. Such absolute liability for a railroad violation of an employee safety statute has most commonly been applied regarding violation of the Federal Safety Appliance Act (45 USC §§ 1 through 16) and the Federal Boiler Inspection Act (45 USC §§ 22 through 34). However, absolute liability has also been imposed where the carrier violated regulations promulgated under the Federal Occupational Safety and Health Act (OSHA), 29 USC §§ 651 et seq., *Pratico v Portland Terminal Co.*, 783 F2d 255 (1st Cir 1985).

Violations of Federal Occupational Safety and Health Act (OSHA) regulations are admissible at trial as some evidence of negligence, *Ganci v Port Authority Trans-Hudson Corp.*, 258 AD2d 386, 686 NYS2d 9 (1st Dept 1999); *Robertson v Burlington Northern R. Co.*, 32 F3d 408 (9th Cir 1994); *Ries v National R.R. Passenger Corp.*, 960 F2d 1156 (3d Cir 1992); but see *Pratico v Portland Terminal Co.*, 783 F2d 255 (1st Cir 1985) (court held that violations of OSHA constitute negligence per se). The Second Circuit, in an action under the Jones Act and general maritime law, held that a violation of an OSHA regulation is admissible at trial as evidence of negligence, *Jones v Spentonbush-Red Star Co.*, 155 F3d 587 (2d Cir 1998).

Where plaintiff's negligence is a defense, the burden of proving plaintiff's negligence and its causal relation to the injury is, as a matter of federal law, upon defendant, *Central Vermont R. Co. v White*, 238 US 507, 35 Sct 865 (1915); *Page v St. Louis Southwestern Ry. Co.*, 312 F2d 84 (5th Cir 1963); *Hotaling v CSX Transp.*, 5 AD3d 964, 773 NYS2d 755 (3d Dept 2004); *Martin v Pennsylvania R. Co.*, 20 AD2d 636, 246 NYS2d 264 (1st Dept 1964). When comparative negligence is an issue, all the incidents of an act of negligence, as well as the act itself, are relevant, *Sears v Southern Pac. Co.*, 313 F2d 498 (9th Cir 1963). Thus plaintiff is entitled to show that a letter had been written to the railroad prior to the accident advising it of the unsafe condition, *id.*, to have

every act of negligence on which there is evidence submitted to the jury, *Katila v Baltimore & O.R. Co.*, 104 F2d 842 (6th Cir 1939). When the employee suffers subsequent injuries that are sufficiently related to defendant's negligence to be considered, plaintiff's negligence in the subsequent accident must be taken into consideration by the jury, *Ammar v American Export Lines, Inc.*, 326 F2d 955 (2d Cir 1964); see Annot: 30 ALR3d 735; 122 ALR Fed 45.

The Supreme Court held in *Norfolk Southern Ry. Co. v Sorrell*, 549 US 158, 127 SCt 799 (2007), that, in cases arising under FELA, the standard for determining whether the employee's negligence was a proximate cause of the injuries is the same as the standard for assessing the causal relationship between defendant's negligence and the injuries. Thus, where the employee's comparative fault is in issue, the jury must be told that it must determine whether the employee was negligent and, if so, whether that negligence played any part in the injuries, *id.*

If the facts are such that the court can, as a matter of law, rule out plaintiff's negligence, the charge and special verdict sheet will have to be modified accordingly, see *Inglut v Consolidated Rail Corp.*, 185 AD2d 614, 586 NYS2d 41 (4th Dept 1992) (trial court erred in submitting the issue of plaintiff's negligence to jury where defense was neither pleaded nor proven); see also *Hotaling v CSX Transp.*, 5 AD3d 964, 773 NYS2d 755 (3d Dept 2004).

The injury for which the statute provides a cause of action need not be accidental. An occupational disease, such as silicosis, if incurred through the negligence of the railroad, is actionable, *Urie v Thompson*, 337 US 163, 69 SCt 1018 (1949). As to liability under FELA for asbestos related diseases, see *Schweitzer v Consolidated Rail Corp.*, 758 F2d 936 (3d Cir 1985).

When an employee sues an employer for both negligence and violation of a safety statute, the charge must, in view of the differing rules of law applicable, clearly separate the two kinds of actions, *O'Donnell v Elgin, J. & E. Ry. Co.*, 338 US 384, 70 SCt 200 (1949).

FELA wholly preempts state law remedies for railway employees injured in the course of employment, *Ganci v Port Authority Trans-Hudson Corp.*, 258 AD2d 386, 686 NYS2d 9 (1st Dept 1999). Therefore, if plaintiff's claim is governed by FELA, plaintiff may not assert causes of action under Labor Law §§ 240(1) and 241(6), *id.* While FELA is the employee's exclusive right against the employer, it does not touch the liability of other parties to the wrong, even though one of them be another carrier, *Cott v Erie R. Co.*, 231 NY 67, 131 NE 737 (1921). When the employee sues the employer and a third person, the charge must distinguish between the FELA rules as to liability and damages applicable to the employer, and the common law principles applicable to the third person. State substantive and procedural rules on negligence and comparative negligence will apply to the employee's action against

the third person and should be charged accordingly. It would appear that New York law will be applied regarding contribution or indemnification between the railroad and any joint tortfeasor, *Alabama Great Southern R. Co. v Chicago & N. W. Ry. Co.*, 493 F2d 979 (8th Cir 1974).

Section 56 of the FELA states that no cause of action may be maintained under the statute “unless commenced within three years from the day the cause of action accrued.” Accrual is defined for statute of limitations purposes in terms of two components, the injury and its cause, *Lechowicz v Consolidated Rail Corp.*, 190 AD2d 998, 594 NYS2d 484 (4th Dept 1993). In cases involving latent occupational diseases where the specific date of injury cannot be determined because the injury results from continual exposure to a harmful condition over a period of time, a plaintiff’s cause of action under FELA accrues when a reasonable person knows or in the exercise of reasonable diligence should know of both the injury and its governing cause, *Ashby v Long Island Rail Road Co.*, 7 AD3d 651, 777 NYS2d 177 (2d Dept 2004); *Lechowicz v Consolidated Rail Corp.*, *supra*. The rule imposes on the injured plaintiff an affirmative duty to investigate the potential cause of his or her injury upon experiencing symptoms or once the injury manifests itself, *Lechowicz v Consolidated Rail Corp.*, *supra*. The defendant has the burden of establishing that the claimed injury was barred by the statute of limitations, *Guiher v South Buffalo Ry. Co.*, 190 AD2d 997, 594 NYS2d 486 (4th Dept 1993). In an action under FELA, the continuing tortious conduct of the defendant does not stop the running of the statute of limitations, and upon discovering an injury and its cause, a claimant must choose to sue or forego that remedy, *Briggs v Consolidated Rail Corp.*, 190 AD2d 1047, 594 NYS2d 481 (4th Dept 1993). A plaintiff in a FELA action is, however, entitled to seek damages for aggravation of an injury occurring within the three year period preceding the commencement of the action, even though the claim for the initial injury is time barred, *id*.

A FELA plaintiff suffering from asbestosis may recover damages arising from a resulting fear of developing cancer, *Norfolk & Western Ry. Co. v Ayers*, 538 US 135, 123 SCt 1210 (2003). However, the Supreme Court has held that, in a FELA case, the plaintiff must prove that the fear of cancer was genuine and serious, *CSX Transp., Inc. v Hensley*, 556 US 838, 129 SCt 2139 (2009). There is no need, however, to prove a physical manifestation of the emotional distress, *id*. When a fear-of-cancer damages claim is interposed, the following instruction, if requested, must be inserted after the third paragraph of PJI 2:180.

PJI 2:180.1

As you have heard, the plaintiff AB claims that (he, she) suffers from asbestosis and that, as a result, (he, she) is afraid of developing cancer. If you find that defendant CD was negligent, that AB suffers from asbestosis and that CD’s negligence played a part, however slight, in causing AB’s

asbestosis condition, you may include in your verdict damages for any mental suffering, emotional and psychological injury and any physical consequences resulting from AB's fear of developing cancer. However, damages arising from a claimed fear of cancer may be awarded only if AB has proven that (his, her) fear is genuine and serious.

The Act (45 USC § 51) authorizes recovery for injury or death. Damages are a matter of federal rather than state law, *Chesapeake & O. Ry. Co. v Kelly*, 241 US 485, 36 S Ct 630 (1916); see *St. Louis Southwestern Ry. Co. v Dickerson*, 470 US 409, 105 S Ct 1347 (1985); *Hotaling v CSX Transp.*, 5 AD3d 964, 773 NYS2d 755 (3d Dept 2004). In a personal injury action the federal rules are essentially the same as New York common law standards, see *Zimmerman v Montour R. Co.*, 191 F Supp 433 (WDPa 1961), *aff'd*, 296 F2d 97 (3d Cir 1961); see also *Mileski v Long Island R. Co.*, 499 F2d 1169 (2d Cir 1974), except that there is no right of action for loss of consortium, *Prata v National R. R. Passenger Corp.*, 70 AD2d 114, 420 NYS2d 276 (1st Dept 1979); *Spinola v New York Cent. R. R.*, 33 AD2d 74, 305 NYS2d 437 (2d Dept 1969). In reviewing the excessiveness of awards of damages in FELA actions, state courts must apply the federal standard of whether the damages awarded are so excessive as to shock judicial conscience, *Hotaling v CSX Transp.*, *supra*.

Future earnings are to be reduced to present cash value, *Monessen Southwestern Ry. Co. v Morgan*, 486 US 330, 108 S Ct 1837 (1988); *St. Louis Southwestern Ry. Co. v Dickerson*, 470 US 409, 105 S Ct 1347 (1985); *McWeeney v New York, New Haven & Hartford Co.*, 282 F2d 34 (2d Cir 1960). Furthermore, the carrier is allowed to set off "any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee," 45 USC § 55. Pension benefits paid under the Railroad Retirement Act may not be so set off since the carrier does not directly contribute to such benefits, *Eichel v New York Cent. R. Co.*, 375 US 253, 84 S Ct 316 (1963). Evidence concerning receipt by the employee of benefits paid under the Railroad Retirement Act may not be admitted to prove that plaintiff is a malingerer, *Eichel v New York Cent. R. Co.*, *supra*; *Caughman v Washington Terminal Co.*, 345 F2d 434 (DC Cir 1965).

PJI 2:277, PJI 2:280 through PJI 2:307, and PJI 2:325 may be used in charging personal injury damages, with appropriate modification as to present value and for any setoff claimed. A Federal District Court sitting in a diversity case reviewing compensation awards for excessiveness or inadequacy should apply the review standards set out in CPLR 5501(c) when New York supplies the substantive law, *Gasperini v Center for Humanities, Inc.*, 518 US 415, 116 S Ct 2211 (1996). The Federal Court of Appeals should then review the District Court's determination under an abuse of discretion standard, *id.* If it does not appear

that the Federal District Court applied the proper standard in such cases, the case should be remanded to the District Court so that the trial judge may test the jury's verdict against CPLR 5501(c)'s "deviates materially" standard, *id.*

The personal injury action survives, but "there shall be only one recovery for the same injury," 45 USC § 59. The quoted language does not prevent recovery of damages for conscious pain and for pecuniary loss, but bars recovery in separate actions, *St. Louis, I.M. & S. Ry. Co. v Craft*, 237 US 648, 35 Sct 704 (1915). No recovery for conscious pain is allowed, however, if death is substantially contemporaneous, *id.*; *Great Northern R. Co. v Capital Trust Co.*, 242 US 144, 37 Sct 41 (1916); see *Gillespie v United States Steel Corp.*, 379 US 148, 85 Sct 308 (1964).

The rules for measuring damages for wrongful death in a FELA action substantially accord with New York law, *Michigan Cent. R. Co. v Vreeland*, 227 US 59, 33 Sct 192 (1913). There are, however, the following principles to be specifically noted:

(1) funeral expenses are not allowed, *Dubose v Kansas City Southern Ry. Co.*, 729 F2d 1026 (5th Cir 1984); *Heffner v Pennsylvania R. Co.*, 81 F2d 28 (2d Cir 1936); see *Hanley v Erie R. Co.*, 273 App Div 257, 77 NYS2d 153 (2d Dept 1948), *aff'd*, 298 NY 816, 83 NE2d 861 (1949);

(2) prejudgment interest is not allowed, *Murmann v New York, N. H. & H. R. Co.*, 258 NY 447, 180 NE 114 (1932); see *Powers v Delaware and Hudson R. Corp.*, 13 NY2d 712, 241 NYS2d 844, 191 NE2d 902 (1963);

(3) the setoff provision (45 USC § 55) quoted above applies;

(4) the jury must be instructed to reduce awards for future damages to present value, *Chesapeake & O. Ry. Co. v Kelly*, 241 US 485, 36 Sct 630 (1916); see *St. Louis Southwestern Ry. Co. v Dickerson*, 470 US 409, 105 Sct 1347 (1985); *Norfolk & W. Ry. Co. v Liepelt*, 444 US 490, 100 Sct 755 (1980), but it has been held the jury need not be given an instruction on the method of computing present value unless the defense presents evidence on the question and requests such instruction, *Heater v Chesapeake & O. Ry. Co.*, 497 F2d 1243 (7th Cir 1974); but see *Ballantine v Central R. of New Jersey*, 460 F2d 540 (3d Cir 1972);

(5) absent evidence of a reasonable expectation that support of a surviving child will continue beyond minority, the jury should be instructed to compute the child's loss only to the majority of the child, *Thompson v Camp*, 163 F2d 396 (6th Cir 1947); *Boller v Pennsylvania R. Co.*, 185 F Supp 505 (NDInd 1960); see *Kozar v Chesapeake & O. Ry. Co.*, 449 F2d 1238 (6th Cir 1971);

(6) upon request the court must charge that the award is not subject to tax, *Norfolk & W. Ry. Co. v Liepelt*, 444 US 490, 100 Sct 755 (1980);

Fritz v Consolidated Rail Corp., 68 NY2d 877, 508 NYS2d 422, 501 NE2d 30 (1986). In event of such a request, PJI 2:180.2, may be adopted.

The allocation of damages among the beneficiaries is generally not submitted to the jury, Central Vermont R. Co. v White, 238 US 507, 35 Sct 865 (1915), although it is not error to do so, see Chesapeake & O. Ry. Co. v Kelly, 241 US 485, 36 Sct 630 (1916).

If a present value charge is to be given, the court may use the following charge:

PJI 2:180.2

A lump sum of money received today is worth more than the same amount paid in installments over a period of time, because the lump sum received today can be invested to earn interest. Your award must be made now though the earnings from which AB would have contributed to the support of [*list the distributees by name*] would have been payable in the future. Thus, the amount which you find AB would have contributed each year from (his, her) earnings to the support of [*list the distributees by name*] must be reduced to present cash value in order to make allowance for the earning power of money. You will determine present cash value by deciding a discount rate for each year and using the discount rate to deduct from your award a reasonable allowance for the earning power of money. In deciding what discount rate to use for each year, you must consider the rate of interest which is fairly to be expected from reasonably safe investments made by a person of ordinary prudence but who does not have any special financial skill or experience. On the other hand, you must also consider that inflation may reduce the value of the dollar in the future. For example, if I invest \$1 today, I will earn interest on that dollar but I will not actually come out ahead unless the interest rate that I earn is greater than the inflation rate. Therefore, the discount rate you use will be the interest rate you selected as affected by the inflation rate you find appropriate.

In a FELA case, written interrogatories or a special verdict are preferable, Fried v New York, N.H. & H.R. Co., 183 App Div 115, 170

NYS 697 (2d Dept 1918), *aff'd*, 230 NY 619, 130 NE 917 (1921); *McAuliffe v New York Cent. & H.R.R. Co.*, 172 App Div 597, 158 NYS 922 (2d Dept 1916). Generally as to special verdicts, see PJI 1:26. The various special verdict forms set out in this volume may be adopted for use in FELA cases.

For a general discussion of FELA see *Richter & Forer*, *Federal Employers' Liability Act*, 12 FRD 13. For a complete charge in a FELA case, see Appendix E to *Smith*, *Effective Instructions to the Federal Jury in Civil Cases—A Consideration in Microcosm*, 18 *Syracuse L R* 559, 580–581.

Under the Jones Act (46 USC Appx § 688) injured seamen's rights are governed by the provisions of FELA, including the survival provision, *Gillespie v United States Steel Corp.*, 379 US 148, 85 SCt 308 (1964); see Annot: 4 LEd2d 1777; 81 ALR2d 1170; 92 ALR Fed 733. The pattern charge and this comment, therefore, apply to an action brought under the Jones Act. Note that assumption of risk may not be asserted as a defense in a Jones Act case and may not be raised under the guise of contributory negligence, *Mazzella v Metro North Commuter R. Co.*, 213 AD2d 254, 624 NYS2d 15 (1st Dept 1995); *Fijal v American Export Isbrandtsen Lines, Inc.*, 127 AD2d 167, 514 NYS2d 6 (1st Dept 1987).

The law requires that a common carrier give notice, e.g., to the Commissioner of Transportation (Transportation Law § 117), of accidents happening upon its line.

A judgment against a public authority, even if rendered in an action under FELA, bears interest at the rate of 4% per annum, *Public Authorities Law* § 1276(5); *Montgomery v Long Island R. Co.*, 151 AD2d 731, 542 NYS2d 794 (2d Dept 1989). However, prejudgment interest may not be awarded in an action based on FELA, *Monessen Southwestern Ry. Co. v Morgan*, 486 US 330, 108 SCt 1837 (1988); *Paniccia v Long Island Rail Road Co.*, 297 AD2d 366, 746 NYS2d 607 (2d Dept 2002). Prejudgment interest may not be awarded under the Jones Act, though such interest may be awarded where plaintiff prevails on a cause of action based on the vessel's unseaworthiness under general maritime law principles, *Haggerty v Moran Towing & Transp. Co., Inc.*, 162 AD2d 189, 556 NYS2d 314 (1st Dept 1990).

PJI 2:181. Common Carrier—Duty under Federal Safety Statute—Absolute Liability to Employee and Others

This claim is brought under a federal law which imposes upon a railroad an absolute duty to have any car which it (hauls, uses, permits to be (hailed, used)) on its line equipped with (secure grab irons or handholds (on the ends and sides of the car, on the roof at the top of each ladder on

the car), couplers coupling automatically by impact and which can be uncoupled without the necessity of going between the cars, efficient handbrakes). The law does not make the railroad the guarantor of the safety of its employees, however, and plaintiff is not entitled to an award of damages simply because (he or she was injured, his or her decedent was killed). In order to recover, plaintiff must prove that there was a violation of the law by defendant and that the (injury, death) was caused, in whole or in part, by that violation. If plaintiff proves that the railroad violated the law and that the violation contributed to the (injury, death), plaintiff is entitled to recover even if the railroad used care and was not negligent and even if (plaintiff, decedent) was negligent and contributed to the occurrence or continued to work on the car with knowledge of the violation.

The law is violated when (a car does not have grab irons or handholds in the required places, a grab iron or handhold on a car is not secure), when (a coupler fails, the handbrakes fail to perform properly when operated in the usual and customary manner). [*With respect to couplers or handbrakes add:*] The question is whether the (coupler, handbrakes) effectively performed (its, their) function when operated or used in the manner intended.

If you find that the law was not violated or that, although it was, such violation played no part whatsoever in causing plaintiff's (injury, decedent's death), you will find for the defendant on this claim. If, on the other hand, you find that the law was violated and that (plaintiff's injury, decedent's death) was caused, in whole or in part, by such violation, you will find for plaintiff on this claim [*add where appropriate:*] and you will proceed to consider the question of damages.

Comment

The Federal Safety Appliance Acts (45 USC §§ 1-16), the Boiler Inspection Act (45 USC §§ 22-34), and the rules promulgated by the Interstate Commerce Commission impose safety requirements for the ben-

efit of employees, and, as indicated below, also measure the carrier's duty to passengers and the public as well. The pattern charge is intended for use in an action by an employee injured while engaged in interstate or foreign commerce. It covers the requirements of grab irons and handholds (45 USC §§ 4, 11), automatic couplers (45 USC § 2), and efficient handbrakes (45 USC § 11). While the language of 45 USC § 2 does not specifically so provide, the section has been construed to require couplers which, after a secure coupling is effected, will remain coupled until set free by some purposeful act of control, *O'Donnell v Elgin, J. & E. Ry. Co.*, 338 US 384, 70 Sct 200 (1949); *Saxton v Delaware & H. Co.*, 256 NY 363, 176 NE 425 (1931).

The Acts also require that there be secure sill steps, ladders and running boards (45 USC § 11); that the locomotive be equipped with a power driving wheel brake and appliances for operating the train brake, and that a sufficient number of cars be equipped with power or train brakes so that the engineer can control its speed without requiring brakemen to use handbrakes (45 USC § 1), the number of cars so equipped to be not less than 50%, the Secretary of Transportation being given authority to increase the percentage (45 USC § 9); and that the locomotive, its boiler, tender, parts and appurtenances be in proper condition and safe to operate in the service to which put and without unnecessary peril to life or limb (45 USC § 23).

The duty imposed is absolute, *Carter v Atlanta & St. A.B. Ry. Co.*, 338 US 430, 70 Sct 226 (1949) (coupler); *O'Donnell v Elgin, J. & E. Ry. Co.*, 338 US 384, 70 Sct 200 (1949) (coupler); *Coray v Southern Pac. Co.*, 335 US 520, 69 Sct 275 (1949) (brakes); *Myers v Reading Co.*, 331 US 477, 67 Sct 1334 (1947) (brakes); *Lilly v Grand Trunk Western R. Co.*, 317 US 481, 63 Sct 347 (1943) (locomotive); *New York Cent. R. Co. v U.S.*, 265 US 41, 44 Sct 436 (1924) (brakes), and once a violation is established, only causation is in issue, *Carter v Atlanta & St. A.B. Ry. Co.*, *supra*. As to causation, see Comment to PJI 2:180; Annot: 30 ALR2d 1192.

Violation may be shown by proving the absence of a required device or that such device was either defective or failed to function properly when operated in the usual manner, *Myers v Reading Co.*, 331 US 477, 67 Sct 1334 (1947); *Jeffries v Long Island R. Co.*, 15 AD2d 356, 224 NYS2d 497 (1st Dept 1962); *Berben v New York-Cent. R.*, 9 AD2d 998, 194 NYS2d 702 (3d Dept 1959). Thus, the failure of railroad cars to couple automatically because the drawbars were misaligned imposes absolute liability on the railroad, *Eschberger v Consolidated Rail Corp.*, 174 AD2d 983, 572 NYS2d 539 (4th Dept 1991). The power brake requirement is violated even when one car connected on the air brake line does not have its air brakes operative, *New York Cent. R. Co. v U.S.*, 265 US 41, 44 Sct 436 (1924). The requirements of the Boiler Inspection Acts with respect to condition of the locomotive and tender extend beyond mechanical defects in view of the reference in 45 USC § 23 to unnecessary perils to life or limb and is violated if ice or other foreign substance is permitted to accumulate under foot, *Lilly v Grand*

Trunk Western R. Co., 317 US 481, 63 SCt 347 (1943); *Whelan v Penn Central Co.*, 503 F2d 886 (2d Cir 1974); see Annot: 90 ALR2d 596. Violation of a rule or regulation promulgated by the ICC within its statutory authority is a violation of the statute itself, *Urie v Thompson*, 337 US 163, 69 SCt 1018 (1949); *Lilly v Grand Trunk Western R. Co.*, supra; *Atchison, T. & S.F. Ry. Co. v Scarlett*, 300 US 471, 57 SCt 541 (1937). Generally as to violation of the Federal Safety Appliance Acts or the Boiler Inspection Acts, see *Richter & Forer, Federal Employers' Liability Act*, 12 FRD 13, 41, 46; Annot: 16 ALR2d 654; 30 ALR2d 1192; 90 ALR2d 596. In an action by a non-employee the pattern charge must be modified as to (1) the status of the plaintiff, (2) proximate cause, (3) plaintiff's culpable conduct.

Violations of Federal Occupational Safety and Health Act (OSHA) regulations are admissible at trial as some evidence of negligence, *Ganci v Port Authority Trans-Hudson Corp.*, 258 AD2d 386, 686 NYS2d 9 (1st Dept 1999); *Robertson v Burlington Northern R. Co.*, 32 F3d 408 (9th Cir 1994); *Ries v National R.R. Passenger Corp.*, 960 F2d 1156 (3d Cir 1992); but see *Pratico v Portland Terminal Co.*, 783 F2d 255 (1st Cir 1985) (court held that violations of OSHA constitute negligence per se). The Second Circuit, in an action under the Jones Act and general maritime law, held that a violation of an OSHA regulation is admissible at trial as evidence of negligence, *Jones v Spentonbush-Red Star Co.*, 155 F3d 587 (2d Cir 1998). However, monthly injury and illness reports generated by a railroad carrier and submitted to the United States Department of Transportation pursuant to 49 USC § 20901 are inadmissible in civil actions to recover damages resulting from matter mentioned in such reports, *Adamy v South Buffalo Ry. Co.*, 294 AD2d 801, 742 NYS2d 459 (4th Dept 2002), amended on reargument, 298 AD2d 999, 751 NYS2d 798 (4th Dept 2002).

The pattern charge assumes that no fact question exists concerning whether the carrier is engaged in interstate commerce within the meaning of the statutes, whether the equipment is a train, locomotive, tender, car or similar vehicle within the statutory meaning, or whether it is being hauled, used or permitted to be hauled or used on the line within the meaning of the statutes. Fact questions may exist on each of these issues. As to any such question, the exact language of the governing section of the statute should be consulted. As to what is a train or train movement, see Annot: 17 ALR3d 283; as to what is a locomotive, tender, etc., see Annot: 91 ALR2d 523. As to when equipment is being hauled, used, etc., see *Bardin v Consolidated Rail Corp.*, 270 AD2d 696, 704 NYS2d 710 (3d Dept 2000); Annot: 96 ALR2d 419.

The Federal Safety Appliance Act (FSAA), 49 USC §§ 20301–20306, requires, among other things, that a railroad vehicle be equipped with “efficient handbrakes,” 49 USC § 20302(a)(1)(B). Although the FSAA is to be liberally construed in light of its prime purpose of safety, absolute liability will attach only if the train is “in use” at the time of the accident, *Bardin v Consolidated Rail Corp.*, 270 AD2d 696, 704 NYS2d 710 (3d Dept 2000). The purpose of the “in use” limitation is to give rail

car operators the opportunity to inspect for and correct safety appliance defects before the FSAA exposes the operators to strict liability for such defects, *id.* Therefore, case law construing the FSAA excludes those injuries directly resulting from the inspection, repair, or servicing of railroad equipment located at a maintenance facility, *id.* A train may still be considered “in use” even though it is motionless and not yet on the main track, *id.* In determining whether a train is “in use,” the courts focus on the location of the train at the time of the accident and the activity of the injured party, *id.* In *Bardin*, the court applied these factors to determine that the train was “in use” at the time of the plaintiff’s accident because the train was not awaiting or undergoing repairs, had been fully assembled with the engines “tied on,” had been approved for departure and was on the departure track. The plaintiff was not performing any maintenance function but was merely making a final visual inspection to ascertain that nothing was out of the ordinary and that the car’s handbrakes had been released, *id.* Furthermore, as a conductor, plaintiff was part of the transportation crew and not part of the repair crew, *id.*

The foregoing discussion considers the duty that the statutes create, and it is important to note that by whomever or in whatever court or tribunal redress for breach of the statutes is sought, the scope and construction of the statutes remain a federal question subject to review by the Supreme Court, *Moore v Chesapeake & O. Ry. Co.*, 291 US 205, 54 SCt 402 (1934); Note: 66 Harv L Rev 1499. However, neither the Safety Appliance Acts nor the Boiler Inspection Acts prescribes the measure or governs the enforcement of liability arising from such breach, *Breisch v Central R. R. of New Jersey*, 312 US 484, 61 SCt 662 (1941); *Fairport, P. & E.R. Co. v Meredith*, 292 US 589, 54 SCt 826 (1934); *Gilvary v Cuyahoga Valley Ry. Co.*, 292 US 57, 54 SCt 573 (1934). Where and in what form redress should be sought may depend on the status of the person harmed by the breach.

FELA governs actions by persons employed in interstate or foreign commerce as that term is defined by that Act, 45 USC § 51 (see Comment to PJI 2:180), for it is now well settled that the Safety Appliance Acts and the Boiler Inspection Acts are supplemental to, and substantively if not in form, amendments of, FELA, *O'Donnell v Elgin, J. & E. Ry. Co.*, 338 US 384, 70 SCt 200 (1949); *Urie v Thompson*, 337 US 163, 69 SCt 1018 (1949); *Lilly v Grand Trunk Western R. Co.*, 317 US 481, 63 SCt 347 (1943). These Acts dispense with the necessity of proving negligence, *Lilly v Grand Trunk Western R. Co.*, *supra*, and by express provisions of FELA where violation by the carrier of any statute enacted for the safety of employees contributed to the injury or death of the employee, he or she may not be charged with contributory negligence (45 USC § 53) or charged with having assumed the risks of the employment (45 USC § 54). Moreover, the Safety Appliance Acts contain a separate provision (45 USC § 7) barring assumption of risk as a defense. Thus, the Comment to PJI 2:180, other than those portions dealing with negligence, notice and comparative and contributory negligence, applies to an action by an employee injured while engaged in interstate com-

merce to recover for violation of the Safety Appliance or Boiler Inspection Acts. Unlike a FELA charge (PJI 2:180), the present charge, since it deals with an absolute duty, expressly informs the jury that prior knowledge (i.e., assumption of risk) will not bar recovery, *Clark v Pennsylvania R. Co.*, 328 F2d 591 (2d Cir 1964). Since the employee's negligence in no way affects recovery in an action under FELA for violation of the Safety Appliance and Boiler Inspection Acts, care must be taken in a case involving both a negligence cause of action and one for violation of a duty imposed by the statutes or regulation promulgated under them to differentiate the elements of the two counts for the jury. It is suggested that special verdicts be used in such cases, see PJI 1:26.

Even where an employee is injured while engaged in intrastate commerce, if the employing carrier is engaged in interstate commerce, its duty to the employee is governed by the Safety Appliance and the Boiler Inspection Acts, *Tipton v Atchison, T. & S.F. Ry. Co.*, 298 US 141, 56 SCt 715 (1936); *Moore v Chesapeake & O. Ry. Co.*, 291 US 205, 54 SCt 402 (1934); *Texas & P. Ry. Co. v Rigsby*, 241 US 33, 36 SCt 482 (1916) (abrogation on other grounds recognized by, *Chavez v Freshpict Foods, Inc.*, 456 F2d 890 (10th Cir)). In such case, an action cannot be maintained under FELA, *Gilvary v Cuyahoga Valley Ry. Co.*, 292 US 57, 54 SCt 573 (1934). The remedy is within the state's discretion; if the state workers' compensation act applies, its provisions may be exclusive, *id.* If not, then the remedy will be by state common law action or, in case of death, according to applicable state law, *id.*; *Breisch v Central R. R. of New Jersey*, 312 US 484, 61 SCt 662 (1941); *Moore v Chesapeake & O. Ry. Co.*, *supra*; and the availability of comparative negligence as a defense will also be determined by state law, *Minneapolis, St. P. & S. S. M. R. Co. v Popplar*, 237 US 369, 35 SCt 609 (1915). In view of the broad language of FELA, 45 USC § 51, little activity of an interstate carrier is outside the scope of interstate commerce, *Baird v New York Cent. R. Co.*, 299 NY 213, 86 NE2d 567 (1949); *Wright v New York Cent. R. Co.*, 263 App Div 461, 33 NYS2d 531 (3d Dept 1942), *aff'd*, 288 NY 719, 43 NE2d 97 (1942); *Fabregas v Staten Island Rapid Transit Ry. Co.*, 7 AD2d 948, 182 NYS2d 188 (3d Dept 1959). As to any work held to be intrastate, however, workers' compensation appears to be the exclusive remedy in New York, *Workers' Compensation Law* § 3 Group 7, § 113; see *Taylor v New York Cent. R. Co.*, 294 NY 397, 62 NE2d 777 (1945). The holding in *Ward v Erie R. Co.*, 230 NY 230, 129 NE 886 (1921), that compensation was not exclusive and that a common law action could be maintained was based upon a misconception of the effect of the Safety Appliance Acts and is not regarded as controlling in view of the holdings of the Supreme Court in the *Tipton* and *Breisch* cases, *supra*.

Non-employees are within the protection of the Federal Safety Appliance Acts, see *Shields v Atlantic Coast Line R. Co.*, 350 US 318, 76 SCt 386 (1956) (plaintiff employed by consignee); *Fairport, P. & E.R. Co. v Meredith*, 292 US 589, 54 SCt 826 (1934) (plaintiff driver of automobile); *Jacobson v New York, N.H. & H.R. Co.*, 206 F2d 153 (1st Cir 1953), *aff'd*, 347 US 909, 74 SCt 474 (1954) (plaintiff passenger on

train); *Barney v Staten Island Rapid Transit Ry. Co.*, 316 F2d 38 (3d Cir 1963) (plaintiff employed by consignee); *Mazzucola v Pennsylvania R. Co.*, 281 F2d 267 (3d Cir 1960) (plaintiff a stevedore foreman); *Ander sen v Bingham & G. Ry. Co.*, 169 F2d 328 (10th Cir 1948) (plaintiff driver of automobile); *Boyer v Atchison, T. & S. F. Ry. Co.*, 34 Ill App 2d 330, 181 NE2d 372 (1st Dist 1962) (plaintiff a passenger on train); see *U.S. v Seaboard Air Line R. Co.*, 361 US 78, 80 SCt 12 (1959); *Baltimore & O. Ry. Co. v Jackson*, 353 US 325, 77 SCt 842 (1957); *Coray v Southern Pac. Co.*, 335 US 520, 69 SCt 275 (1949); *Brady v Terminal R. Ass'n of St. Louis*, 303 US 10, 58 SCt 426 (1938). It has been suggested that passengers and the public at large, as well as employees, are within the protection of the Boiler Inspection Acts, see *Urie v Thompson*, 337 US 163, 69 SCt 1018 (1949).

As in the case of an employee in intrastate commerce, the remedy of a non-employee is determined by state law, *Crane v Cedar Rapids & I. C. Ry. Co.*, 395 US 164, 89 SCt 1706 (1969); *Fairport, P. & E.R. Co. v Meredith*, 292 US 589, 54 SCt 826 (1934); *Jacobson v New York, N.H. & H.R. Co.*, 206 F2d 153 (1st Cir 1953), *aff'd*, 347 US 909, 74 SCt 474 (1954); *Andersen v Bingham & G. Ry. Co.*, 169 F2d 328 (10th Cir 1948); see *Barney v Staten Island Rapid Transit Ry. Co.*, 316 F2d 38 (3d Cir 1963). In such an action, state law governs the issues of comparative negligence, assumption of risk, proximate cause, and measure of damages, *Crane v Cedar Rapids & I. C. Ry. Co.*, *supra*; *Fairport, P. & E.R. Co. v Meredith*, *supra*; *Jacobson v New York, N.H. & H.R. Co.*, *supra*.

The Locomotive Inspection Act (49 USC § 20701 *et seq.*) (formerly the Boiler Act) preempts state common law duties and standards of care directed to the subject of locomotive equipment, *Kurns v Railroad Friction Products Corp.*, 132 SCt 1261 (2012); *Napier v Atlantic Coast Line R. Co.*, 272 US 605, 47 SCt 207 (1926).

Note that a crossing accident may require use of not only the pattern charge but of PJI 2:175, as well.

The law requires that a common carrier give notice to the Commissioner of Transportation (Transportation Law § 117), of accidents happening upon its line.

A judgment against a public authority, even if rendered in an action under FELA, bears interest at the rate of 4% per annum, Public Authorities Law, § 1276(5); *Montgomery v Long Island R. Co.*, 151 AD2d 731, 542 NYS2d 794 (2d Dept 1989). However, prejudgment interest may not be awarded in an action based on FELA, *Eschberger v Consolidated Rail Corp.*, 181 AD2d 1073, 583 NYS2d 65 (4th Dept 1992).

For a discussion of the Longshore and Harbor Workers' Act (33 USC § 901 *et seq.*), which pertains to maritime workers injured in the course of employment, see *Sutherland v New York*, 266 AD2d 373, 699 NYS2d 426 (2d Dept 1999); see also *Tsaropoulos v State*, 9 AD3d 1, 775 NYS2d 23 (1st Dept 2004).

6. PUBLIC UTILITIES

a. GAS COMPANIES

(1) STANDARD OF CARE—GENERALLY

PJI 2:185. Public Utilities—Gas Companies—Standard of Care—Company's Own Equipment

As you have heard, the plaintiff AB brings this action against defendant CD based on a claim that CD negligently [state plaintiff's claims]. The defendant CD denies [state allegations defendant denies] and contends [state defendant's contentions].

Negligence is the failure to use reasonable care. Reasonable care means that degree of care that a reasonably prudent gas company would use under the same circumstances.

Due to the dangerous and explosive character of gas and its tendency to escape, CD had the duty to use that degree of care reasonably necessary to prevent the escape or explosion of gas from its pipes and equipment. CD had a duty to use reasonable care in the installation of (its own pipes, the gas meters ~~which~~ that it supplies to consumers, the fittings, and the pipes between the gas main and the meter). CD also had a duty to use reasonable care to repair a leak or other dangerous condition in its equipment and, if necessary to avoid injury to persons or property, shut off the gas until repairs were made.

In order for AB to recover from CD, AB must prove: (1) CD was negligent in not using reasonable care in its (installation, repair) of the (pipes, fittings, meters, equipment); and (2) CD's failure to use reasonable care was a substantial factor in bringing about injury or damage to AB [*in bifurcated trial, substitute: gas leak, dangerous condition*].

In deciding whether CD was negligent, you

must decide whether CD created the (gas leak, dangerous condition) or either knew or, in the use of reasonable care, should have known, that the (gas leak, dangerous condition) existed. If CD did not create the (gas leak, dangerous condition) but knew or should have known about the (gas leak, dangerous condition), you must decide whether CD had sufficient time before the injury or damage to AB occurred to correct the (gas leak, dangerous condition), or take suitable precautions.

You will find CD was negligent if you decide that CD created the (gas leak, dangerous condition) or either knew, or in the use of reasonable care should have known, about the (gas leak, dangerous condition) with sufficient time before AB's injury or damages to have permitted CD, in the use of reasonable care, to correct it or to take suitable precautions, and failed to do so. On the other hand, you will find CD was not negligent if you find that CD did not create the (gas leak, dangerous condition) and, further, that CD did not know about or, in the use of reasonable care, would not have known about or been able to correct the (gas leak, dangerous condition) with sufficient time before AB's injury or damage occurred, or if you find that CD corrected the (gas leak, dangerous condition) or took suitable precautions.

If you find CD was negligent, you must next consider whether that negligence was a substantial factor in bringing about injury or damage to AB [*in bifurcated trial, substitute: gas leak, dangerous condition*]. An act or failure to act is a substantial factor in bringing about injury or damage to AB [*in bifurcated trial, substitute: gas leak, dangerous condition*] if a reasonable person would regard it as a cause of the injury or damage [*in bifurcated trial, substitute: gas leak, dangerous condition*]. If you find CD's negligence was not a substantial factor in bringing about injury or damage to AB [*in bifurcated trial, substitute: gas leak, dangerous condition*], then AB may not recover. If you find CD's negligence was a substantial factor in bring-

ing about injury or damage to AB [*in bifurcated trial, substitute: gas leak, dangerous condition*], **you will proceed to consider** [*state next appropriate step, e.g. comparative fault, damages, verdict*].

Comment

Caveat 1: The pattern charge assumes the gas company owned the equipment at issue. Where the gas company does not own the equipment, see PJI 2:185.3. If ownership is at issue, the charge must be tailored accordingly.

Caveat 2: The pattern charge assumes that the condition complained of existed and was dangerous. The charge must therefore be modified if a factual issue exists regarding whether the condition complained of existed, the condition was dangerous or both.

Based on *Ehret v Scarsdale*, 244 App Div 30, 277 NYS 353 (2d Dept 1935), mod on other grounds, 269 NY 198, 199 NE 56 (1935); *Ward v Iroquois Gas Corp.*, 233 App Div 127, 251 NYS 300 (4th Dept 1931), aff'd, 258 NY 124, 179 NE 317 (1932); *Chiplock v Niagara Mohawk Power Corp.*, 134 AD2d 96, 523 NYS2d 232 (3d Dept 1988); *Fullerton v Glens Falls Gas & Electric Light Co.*, 157 App Div 191, 141 NYS 838 (3d Dept 1913); see PJI 2:70; see also *New York Central Mut. Fire Ins. Co. v Glider Oil Co., Inc.*, 90 AD3d 1638, 936 NYS2d 815 (4th Dept 2011); *March v Carbide & Carbon Chemicals Corp.*, 265 App Div 1064, 39 NYS2d 493 (2d Dept 1943); *Siebrecht v East River Gas Co.*, 21 App Div 110, 47 NYS 262 (2d Dept 1897).

A gas company is not an insurer and is not liable without fault for injuries resulting from gas leaks or explosions, see *Ward v Iroquois Gas Corp.*, 233 App Div 127, 251 NYS 300 (4th Dept 1931), aff'd, 258 NY 124, 179 NE 317 (1932); *Torem v 564 Cent. Ave. Rest., Inc.*, 133 AD2d 25, 518 NYS2d 620 (1st Dept 1987).

A gas company has a duty to exercise reasonable care in the installation of its pipes, fittings, gas meters and other distribution equipment, see *Fullerton v Glens Falls Gas & Electric Light Co.*, 157 App Div 191, 141 NYS 838 (3d Dept 1913).

Where a leak or break in a gas pipe owned by the gas company is not created by it but is due to an act or omission of a third party or natural causes, the gas company may be held liable for the resulting damage if it had actual notice of the leak or break, or in the exercise of reasonable care it should have known of the leak or break, and had a reasonable opportunity to make the necessary repair, see *Ehret v Scarsdale*, 244 App Div 30, 277 NYS 353 (2d Dept 1935), mod on other grounds, 269 NY 198, 199 NE 56 (1935); *Ward v Iroquois Gas Corp.*, 233 App Div 127, 251 NYS 300 (4th Dept 1931), aff'd, 258 NY 124, 179

NE 317 (1932); *Gabriel v Johnston's L.P. Gas Service, Inc.*, 143 AD3d 1228, 39 NYS3d 560 (4th Dept 2016); *Chiplock v Niagara Mohawk Power Corp.*, 134 AD2d 96, 523 NYS2d 232 (3d Dept 1988); *Ratomski v Quittner*, 214 App Div 186, 212 NYS 53 (1st Dept 1925); *Siebrecht v East River Gas Co.*, 21 App Div 110, 47 NYS 262 (2d Dept 1897) (imposing post-commencement-of-service duty to inspect equipment on gas company).

The gas company may also be liable in those instances in which it delegates to the homeowner its obligation to install a meter and connect the gas fixtures to be served, *Hayes v Cohoes Gaslight Co.*, 183 App Div 182, 170 NYS 312 (3d Dept 1918), or when the gas company assumes an obligation to disconnect a homeowner's gas fixtures, *Bastian v Keystone Gas Co.*, 27 App Div 584, 50 NYS 537 (4th Dept 1898). Likewise, when a gas company undertakes to locate or repair gas leaks, it may be liable for failing to exercise due care in the location and repair of such leaks, *Bell v Brooklyn Union Gas Co.*, 193 App Div 669, 184 NYS 807 (2d Dept 1920); *Bastian v Keystone Gas Co.*, *supra*. Once a gas company undertakes repairs, it may be liable for injuries resulting from faulty or negligent work, *Bastian v Keystone Gas Co.*, *supra*; see *Pernick v Central Union Gas Co.*, 183 App Div 543, 170 NYS 245 (1st Dept 1918), *aff'd*, 228 NY 594, 127 NE 920 (1920).

A gas company has an obligation to odorize its product as a warning, and a plaintiff may assert as a theory of negligence that the company failed to do so, see *Van Slyke v Pargas, Inc.*, 69 AD2d 927, 415 NYS2d 307 (3d Dept 1979); 16 NYCRR 255.625.

When gas service is discontinued, the gas company has a duty to shut off the gas at or ahead of the meter and to cap any open pipes, *Lanigan v New York Gas-Light Co.*, 71 NY 29 (1877); *Bastian v Keystone Gas Co.*, 27 App Div 584, 50 NYS 537 (4th Dept 1898).

(2) DUTY RE INSTALLATION

2:186. Public Utilities—Gas Companies—Standard of Care—Reasonable Care Prior to Providing Service

As you have heard, the plaintiff AB brings this action against defendant CD based on a claim that CD negligently [state plaintiff's claims]. Defendant CD denies [state allegations defendant denies] and contends [state defendant's contentions].

Negligence is the failure to use reasonable care. Reasonable care means that degree of care that a reasonably prudent gas company would use under the same circumstances. Due to the dangerous and explosive character of gas and its tendency to escape, prior to furnishing gas to AB, CD had a duty to use that degree of reasonable care necessary to ensure that gas would not escape from the (pipes, fittings, equipment).

In order for AB to recover from CD, AB must prove: (1) CD was negligent in not using reasonable care to ensure that gas would not (escape from the [pipes, fittings, equipment], explode); and (2) CD's negligence in not using reasonable care was a substantial factor in bringing about injury or damage to AB [*in bifurcated trial, substitute: escape of gas or explosion*].

If you find that: (1) CD was negligent in not using reasonable care to ensure that gas would not (escape from the [pipes, fittings, equipment], explode); and (2) CD's failure to use reasonable care was a substantial factor in bringing about injury or damage to AB [*in bifurcated trial, substitute: escape of gas or explosion*], then you will find for AB on this claim.

On the other hand, if you find: (1) CD was not negligent in that it used ~~not using~~ reasonable care to ensure that gas would not (escape from the [pipes, fittings, equipment], explode); or (2) CD's failure to use reasonable care was not a substantial factor in bringing about injury or damage to AB

[in bifurcated trial, substitute: escape of gas or explosion], then you will find for CD and go no further (state where appropriate: on this claim).

Comment

Caveat 1: The duty imposed on a gas company to use reasonable care prior to providing service to ensure that gas would not escape or explode applies regardless of who owns the relevant equipment, see this Comment, *infra*.

Caveat 2: A gas company does not necessarily need to inspect the relevant equipment prior to providing service to discharge its duty to exercise reasonable care, see this Comment, *infra*.

Based on *Schmeer v Gaslight Co. of Syracuse*, 147 NY 529, 42 NE 202 (1895); *Lockwood v Berardi*, 135 AD2d 881, 522 NYS2d 279 (3d Dept 1987); see *Reid v Westchester Lighting Co.*, 236 NY 322, 140 NE 712 (1923); PJI 2:70.

A gas company has a duty to use reasonable care prior to the commencement of service, *Reid v Westchester Lighting Co.*, 236 NY 322, 140 NE 712 (1923); *Schmeer v Gaslight Co. of Syracuse*, 147 NY 529, 42 NE 202 (1895); *Hayes v Cohoes Gaslight Co.*, 183 App Div 182, 170 NYS 312 (3d Dept 1918). Thus, before turning on gas to be supplied to a tenant in a multiple-use building, a gas company has the duty to exercise reasonable care to ascertain that all gas pipes in the building are in such condition that gas, when supplied to that tenant, will not escape into other portions of the building, even if it may not have the right to enter upon those other areas, *Schmeer v Gaslight Co. of Syracuse*, *supra*; see *Lockwood v Berardi*, 135 AD2d 881, 522 NYS2d 279 (3d Dept 1987) (single family dwelling).

(3) DUTY TO INSPECT AND MAINTAIN OWN FACILITIES

2:187. Public Utilities—Gas Companies—Standard of Care—Equipment Not Owned By Company

As you have heard, the plaintiff AB brings this action against defendant CD based on a claim that CD negligently [state plaintiff's claims]. Defendant CD denies [state allegations defendant denies] and contends [state defendant's contentions].

Negligence is the failure to use reasonable care. Reasonable care means that degree of care that a reasonably prudent gas company would use under the same circumstances.

Due to the dangerous and explosive character of gas and its tendency to escape, in furnishing gas to AB, CD had a duty to use that degree of care reasonably necessary to ensure that gas would not escape from the (pipes, fittings, equipment). If CD knew, or in the exercise of reasonable care should have known, of a leak or other dangerous condition in the (pipes, fittings, equipment) then it had a duty to shut off service until repairs were made and gas could be safely furnished.

In order for AB to recover from CD, AB must prove: (1) CD knew, or in the exercise of reasonable care should have known, that a leak or dangerous condition existed in the (pipes, fittings, equipment); and (2) CD negligently failed to use reasonable care by not shutting off service of to the (pipes, fittings, equipment); and (3) CD's negligent failure to use reasonable care was a substantial factor in bringing about injury or damage to AB [*in bifurcated trial, substitute: gas leak, dangerous condition*].

If you find: (1) CD knew or should have known that a leak or other dangerous condition existed in the (pipes, fittings, equipment); and (2) CD failed to use reasonable care by not shutting off service to the (pipes, fittings, equipment); and (3) CD's failure to use reasonable care was a substantial factor

in bringing about injury or damage to AB [*in bifurcated trial, substitute: gas leak, dangerous condition*], then you will find for AB on this claim.

On the other hand, if you find: (1) CD neither knew nor should have known that a leak or other dangerous condition existed in the (pipes, fittings, equipment); or (2) CD's continuation of servied to the (pipes, fitinngs, equipement) was not unreasonable; or (3) CD's failure to use reasonable care was not a substantial factor in bringing about injury or damage to AB [*in bifurcated trial, substitute: gas leak, dangerous condition*], then you will find for CD and go no further (*state where appropriate: on this claim*).

Comment

Based on *Reid v Westchester Lighting Co.*, 236 NY 322, 140 NE 712 (1923); *Gabriel v Johnston's L.P. Gas Service, Inc.*, 143 AD3d 1228, 39 NYS3d 560 (4th Dept 2016) (citing PJI); *Ratomski v Quittner*, 214 App Div 186, 212 NYS 53 (1st Dept 1925); *Bell v Brooklyn Union Gas Co.*, 193 App Div 669, 184 NYS 807 (2d Dept 1920); see *Jackson v Gas Co.*, 2 AD3d 1104, 769 NYS2d 638 (3d Dept 2003); *Jacques v Fleuren*, 136 AD2d 850, 523 NYS2d 694 (3d Dept 1988).

When a gas company has notice of leaks in gas pipes it does not own, it may be liable for furnishing gas through the unsafe or defective gas pipes, *Bell v Brooklyn Union Gas Co.*, 193 App Div 669, 184 NYS 807 (2d Dept 1920).

In the absence of notice of a defect in gas pipes it does not own, or knowledge that would suggest that the pipes are leaking or are otherwise unsafe, a gas company that did not install or control the gas pipes on the premises beyond the gas meter is not responsible for their maintenance and has no duty to inspect, *Reid v Westchester Lighting Co.*, 236 NY 322, 140 NE 712 (1923); *Romano v Brooklyn Union Gas Co.*, 250 AD2d 663, 672 NYS2d 771 (2d Dept 1998). Nor is a gas company under a duty to inspect a furnace and heating system where the company did not install or service either apparatus, see *Jacques v Fleuren*, 136 AD2d 850, 523 NYS2d 694 (3d Dept 1988). Where, however, a gas company installed a stopcock in a customer's pipes that constituted the only means by which the gas could be turned off in an emergency, the court declined to find that the gas company did not have a duty to inspect the stopcock, *Metropolitan Life Ins. Co. v Rochester Gas & Elec. Corp.*, 271 App Div 367, 65 NYS2d 560 (4th Dept 1946). Even where there is no obligation to inspect a gas range, if the gas company responds to a complaint and sends an employee to make

repairs, it may be liable for faulty or negligent work, *Pernick v Central Union Gas Co.*, 183 App Div 543, 170 NYS 245 (1st Dept 1918), *aff'd*, 228 NY 594, 127 NE 920 (1920).

After a gas company has removed its meter, it has no right to enter a former consumer's premises to inspect the condition of the gas pipes therein, *Reid v Westchester Lighting Co.*, 236 NY 322, 140 NE 712 (1923).

Notice

Whether a gas company has notice of a leak or defect is generally a question of fact for the jury, *Ratomski v Quittner*, 214 App Div 186, 212 NYS 53 (1st Dept 1925). However, installing and reading a meter in a home at a time when there was a gas leak in a pipe in the middle of an adjacent street is insufficient to charge the company with constructive notice of the leak, *Hammerschmidt v Municipal Gas Co.*, 114 App Div 290, 99 NYS 890 (3d Dept 1906).

A gas company is entitled to summary judgment where it establishes that it did not create the leak and did not have actual or constructive notice of the leak, *Algood v 2160-2164 Caton, LLC*, 4 AD3d 442, 772 NYS2d 365 (2d Dept 2004); *Clarke v Brooklyn Union Gas Co.*, 297 AD2d 779, 747 NYS2d 581 (2d Dept 2002); *Famularo v Havasi*, 221 AD2d 587, 635 NYS2d 495 (2d Dept 1995); *Mittendorf v Brooklyn Union Gas Co.*, 195 AD2d 449, 600 NYS2d 123 (2d Dept 1993).

Res Ipsa Loquitur

Generally, the doctrine of *res ipsa loquitur* has not been applied in actions against gas companies stemming from escaped gas, see *Lancaster Silo & Block Co. v Northern Propane Gas Co.*, 75 AD2d 55, 427 NYS2d 1009 (4th Dept 1980); *Cooke v Bernstein*, 45 AD2d 497, 359 NYS2d 793 (1st Dept 1974); *Metropolitan Life Ins. Co. v Rochester Gas & Elec. Corp.*, 271 App Div 367, 65 NYS2d 560 (4th Dept 1946); but see *March v Carbide & Carbon Chemicals Corp.*, 265 App Div 1064, 39 NYS2d 493 (2d Dept 1943).

Comparative Negligence

Comparative negligence should be charged where there is evidence the consumer had actual or constructive notice of a gas leak and failed to provide notice to the gas company, *Lockwood v Berardi*, 135 AD2d 881, 522 NYS2d 279 (3d Dept 1987); see *Lanigan v New York Gas-Light Co.*, 71 NY 29 (1877); *Regalado v Independent Welding Supply Corp.*, 289 AD2d 124, 735 NYS2d 40 (1st Dept 2001); *Sancimino v Brooklyn Union Gas Co.*, 204 AD2d 298, 611 NYS2d 289 (2d Dept 1994). For a charge and comment on comparative fault, see PJI 2:36.

(4) DUTY RE CONSUMER'S FACILITIES

b. ELECTRIC COMPANIES

(1) STANDARD OF CARE—GENERALLY

**PJI 2:195. Public Utilities—Electric Companies—
Standard of Care—Generally**

Defendant is an electric power company. In its business of generating and distributing electricity it is required to use reasonable care. In view of the dangerous and subtle character of electricity and the ease of its escape from transmission lines, an electric power company has the duty to use that degree of care which is reasonably necessary to prevent persons from coming into contact with its transmission lines and to prevent the dangerous escape of electricity therefrom.

Comment

Based on *Miner v Long Island Lighting Co.*, 40 NY2d 372, 386 NYS2d 842, 353 NE2d 805 (1976); *Bennett v New York & Queens Electric Light & Power Co.*, 294 NY 334, 62 NE2d 219 (1945); *Van Leet v Kilmer*, 252 NY 454, 169 NE 644 (1930); *Braun v Buffalo General Electric Co.*, 200 NY 484, 94 NE 206 (1911); *Alesi v New York*, 9 AD2d 236, 192 NYS2d 929 (1st Dept 1959), *aff'd*, 12 NY2d 703, 233 NYS2d 481, 185 NE2d 916 (1962); *Russell v New York State Elec. & Gas Corp.*, 276 App Div 44, 93 NYS2d 3 (3d Dept 1949), *aff'd*, 301 NY 593, 93 NE2d 493 (1950); *Holtz v Niagara Mohawk Power Corp.*, 147 AD2d 857, 538 NYS2d 80 (3d Dept 1989); *Holden v Boyle*, 80 AD2d 281, 439 NYS2d 534 (4th Dept 1981); *French v Central New York Power Corporation*, 275 App Div 238, 89 NYS2d 543 (4th Dept 1949); *Krastel v Long Island Lighting Co.*, 272 App Div 833, 70 NYS2d 617 (2d Dept 1947); 53A NYJur2d, *Energy*, §§ 334, 336, 337, 372, 376; Annot: 33 ALR4th 809; 82 ALR3d 113. See the definition of negligence contained in PJI 2:10.

An electric power company is not a guarantor, and it is not liable without fault for injuries resulting from the transmission of electricity, *Van Leet v Kilmer*, 252 NY 454, 169 NE 644 (1930); *Beck v FMC Corp.*, 53 AD2d 118, 385 NYS2d 956 (4th Dept 1976), *aff'd*, 42 NY2d 1027, 398 NYS2d 1011, 369 NE2d 10 (1977); *Nicholas v New York State Elec. & Gas Corp.*, 283 App Div 291, 127 NYS2d 490 (4th Dept 1954), *aff'd*, 308 NY 930, 127 NE2d 84 (1955), nor does it incur liability to one whose employment is disrupted because of a power failure, *Beck v FMC Corp.*, *supra*.

While there is a duty to exercise reasonable care in the operation

and maintenance of power lines, there is a correspondingly higher duty of care owed as higher voltages are transported, *Miner v Long Island Lighting Co.*, 40 NY2d 372, 386 NYS2d 842, 353 NE2d 805 (1976); *Pomichter v Niagara Mohawk Power Corp.*, 296 AD2d 837, 744 NYS2d 280 (4th Dept 2002); *Holtz v Niagara Mohawk Power Corp.*, 147 AD2d 857, 538 NYS2d 80 (3d Dept 1989).

An electric company is liable to its customer for interruption of service due to its wilful misconduct or gross negligence, *Food Pageant, Inc. v Consolidated Edison Co., Inc.*, 54 NY2d 167, 445 NYS2d 60, 429 NE2d 738 (1981); see *Koch v Consolidated Edison Co. of New York, Inc.*, 62 NY2d 548, 479 NYS2d 163, 468 NE2d 1 (1984) (regarding the extent of the damages recoverable). For a charge on wilful misconduct or gross negligence, see PJI 2:10A. As a matter of public policy, despite its gross negligence, an electric company owes no duty to an apartment house tenant with whom it is not in privity so far as lighting of common areas of the building is concerned, *Strauss v Belle Realty Co.*, 65 NY2d 399, 492 NYS2d 555, 482 NE2d 34 (1985); *O'Connor v Metro Management Development, Inc.*, 130 AD3d 698, 15 NYS3d 59 (2d Dept 2015). Likewise, an electric company owes no duty to a tenant stockholder in a cooperative apartment house where the agreement for the supply of electricity was made with the apartment house corporation, *O'Connor v Metro Management Development, Inc.*, *supra*; *Goldstein v Consolidated Edison Co. of New York, Inc.*, 115 AD2d 34, 499 NYS2d 47 (1st Dept 1986). A utility company also owes no duty of care to commercial tenants who did not have service contracts with the utility, but who are obligated under their leases to reimburse their landlords for an apportioned share of electricity costs, *Milliken & Co. v Consolidated Edison Co. of New York, Inc.*, 84 NY2d 469, 619 NYS2d 686, 644 NE2d 268 (1994). The public policy goals articulated in *Strauss* also apply to bar contribution claims against electric companies, *Crane v New York*, 65 NY2d 859, 493 NYS2d 292, 482 NE2d 1208 (1985) (no contribution allowed municipality for injuries of plaintiff sustained by fall on irregular cobblestones in street during power blackout); *Goldstein v Consolidated Edison Co. of New York, Inc.*, *supra* (no contribution allowed landlord from utility company for injuries of plaintiff sustained by fall on staircase during power blackout).

An electric company may not by tariff limit its liability for gross negligence of its officers, agents or servants, or its own negligence in connection with property of the customer or property rented by the customer from third persons, or its negligence in connection with supplying or use of electricity or the operation of the company's equipment on the customer's premises, 16 NYCRR § 218.1; *Flex-O-Vit USA, Inc. v Niagara Mohawk Power Corp.*, 292 AD2d 764, 739 NYS2d 785 (4th Dept 2002); *Bowen v Niagara Mohawk Power Corp.*, 183 AD2d 293, 590 NYS2d 628 (4th Dept 1992); *Zoller v Niagara Mohawk Power Corp.*, 137 AD2d 947, 525 NYS2d 364 (3d Dept 1988) (tariff may not exempt from liability for ordinary negligence in connection with the supply or use of electricity, as distinguished from an interruption in service).

Utility companies are not absolved from liability for ordinary

negligence in the supply or use of electricity, as opposed to damages caused by interruption of service, *Flex-O-Vit USA, Inc. v Niagara Mohawk Power Corp.*, 292 AD2d 764, 739 NYS2d 785 (4th Dept 2002); *Bowen v Niagara Mohawk Power Corp.*, 183 AD2d 293, 590 NYS2d 628 (4th Dept 1992); *Zoller v Niagara Mohawk Power Corp.*, 137 AD2d 947, 525 NYS2d 364 (3d Dept 1988). New York courts have held that the provision of electricity is a service, not the sale of a product, *Bowen v Niagara Mohawk Power Corp.*, supra; *Farina v Niagara Mohawk Power Corp.*, 81 AD2d 700, 438 NYS2d 645 (3d Dept 1981). Therefore, New York courts have declined to impose strict products liability against electric utilities for damages caused by abnormally high voltage, *Bowen v Niagara Mohawk Power Corp.*, supra.

Strong public policy considerations militate against the recovery of consequential damages such as lost profits and lost revenues as a result of the adverse effects caused by a blackout and the inevitability of power interruptions is a factor to be considered, *Koch v Consolidated Edison Co. of New York, Inc.*, 62 NY2d 548, 479 NYS2d 163, 468 NE2d 1 (1984); *Grow Tunneling Corp. v Consolidated Edison Co. of New York, Inc.*, 195 AD2d 325, 600 NYS2d 30 (1st Dept 1993). The loss suffered by the public at large due to a power interruption is not compensable, *Koch v Consolidated Edison Co. of New York, Inc.*, supra. To be compensable, the harm suffered must be of a different kind from that suffered by other persons, see *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 464 NYS2d 712, 451 NE2d 459 (1983); see also *532 Madison Ave. Gourmet Foods, Inc. v Finlandia Center, Inc.*, 96 NY2d 280, 727 NYS2d 49, 750 NE2d 1097 (2001).

As to a public utility operated by a municipality, see *Introductory Statement to Municipal Liability* section, *infra*.

As to the liability of a telephone company for interruption of service, see *Long Island Central Station, Inc. v New York Tel. Co.*, 54 AD2d 893, 387 NYS2d 897 (2d Dept 1976).

(2) INSTALLATION**PJI 2:200. Public Utilities—Electric
Companies—Installation—Wires**

In its business of distributing electricity an electric power company has the duty to use reasonable care to place its transmission wires in such location, and install them in such condition, that no (person, property) is endangered by any reasonably foreseeable use of the premises (over, through, adjacent to) which they pass.

Comment

Based on *Miner v Long Island Lighting Co.*, 40 NY2d 372, 386 NYS2d 842, 353 NE2d 805 (1976); *Buell v Utica Gas & Electric Co.*, 259 NY 443, 182 NE 77 (1932); *Casualty Co. of America v A.L. Swett Electric Light & Power Co.*, 230 NY 199, 129 NE 653 (1920); *Braun v Buffalo General Electric Co.*, 200 NY 484, 94 NE 206 (1911); 53A NYJur2d, Energy, §§ 354, 372, 377, 382, 383.

Electric power lines may be dangerous because they are not insulated; and they and telephone and telegraph lines may be dangerous because of their mere physical location at a given time.

An electric power company is required to place its transmission lines so that they are not in close proximity to buildings. In applying this principle, the issue is whether the company reasonably should have anticipated that the location of the line constituted or could in the future constitute a danger to persons upon the premises, *Miner v Long Island Lighting Co.*, 40 NY2d 372, 386 NYS2d 842, 353 NE2d 805 (1976); *Braun v Buffalo General Electric Co.*, 200 NY 484, 94 NE 206 (1911); *Burrows v Livingston-Niagara Power Co.*, 217 App Div 206, 216 NYS 516 (4th Dept 1926), *aff'd*, 244 NY 548, 155 NE 892 (1926); *Holtz v Niagara Mohawk Power Corp.*, 147 AD2d 857, 538 NYS2d 80 (3d Dept 1989); see *Wilks v New York Tel. Co.*, 243 NY 351, 153 NE 444 (1926); 53A NYJur2d, Energy, §§ 108–110, 368, 369; Annot: Liability of power company for injury or death resulting from contact of radio or television antenna with electric line, 82 ALR3d 113; Liability for injury or death resulting when object is manually brought into contact with, or close proximity to, electric line, 33 ALR4th 809. It is negligence for a power company to place its transmission wires so near to telephone wires that it is reasonably foreseeable that injury may result therefrom, *Lee v Stillwater & M. St. Ry. Co.*, 140 App Div 779, 125 NYS 840 (3d Dept 1910); see *Troidle v Adirondack Power & Light Corp.*, 225 App Div 444, 233 NYS 545 (3d Dept 1929), *rev'd* on other grounds, 252 NY 483, 169 NE 654 (1930); *Holden v Boyle*, 80 AD2d 281, 439 NYS2d 534 (4th Dept 1981), or to permit a telephone company to place its lines near the

power company's lines, *Fox v Manchester*, 183 NY 141, 75 NE 1116 (1905).

A telephone company that places its service wire or guy wire near an electric power wire without insulating its wire, so that current from the power wire enters its facilities and injures a telephone user, *Lee v Stillwater & M. St. Ry. Co.*, 140 App Div 779, 125 NYS 840 (3d Dept 1910), or one foreseeably near its facilities, *Magee v New York Telephone Co.*, 213 NY 232, 107 NE 493 (1914), will be liable for such injury, see Annot: Liability for injury or death from electrification of guy wire, 55 ALR2d 129. It is also an unsafe practice for a telephone company to string its wires above an uninsulated electric wire; and if such a telephone wire drops onto the electric wire, resulting in injury to a firefighter who attempts to move it so that a fire engine can get through to a fire, the telephone company will be liable, *Horning v Hudson River Telephone Co.*, 111 App Div 122, 97 NYS 625 (3d Dept 1906), *aff'd*, 186 NY 552, 79 NE 1107 (1906). *Res ipsa loquitur* has been applied when plaintiff was injured by an electrically charged telephone receiver, *Seeley v New York Tel. Co.*, 281 App Div 285, 120 NYS2d 262 (3d Dept 1953); *Hanaman v New York Tel. Co.*, 278 App Div 875, 104 NYS2d 315 (3d Dept 1951); compare *Manley v New York Tel. Co.*, 303 NY 18, 100 NE2d 113 (1951).

In cases involving moveable equipment, including a crane or a derrick that comes in contact with overhead electric transmission wires that for normal conditions are sufficiently high not to be a source of danger, an electric power company is not liable for resulting damage, unless it should have foreseen the likelihood of such contact, and frequently the question is one of actual or constructive notice, *Pike v Consolidated Edison Co. of New York*, 303 NY 1, 99 NE2d 885 (1951); *Bennett v New York & Queens Electric Light & Power Co.*, 294 NY 334, 62 NE2d 219 (1945); *Ward v New York State Electric & Gas Corporation*, 290 NY 325, 49 NE2d 159 (1943); *Buell v Utica Gas & Electric Co.*, 259 NY 443, 182 NE 77 (1932); *Zasada v Niagara Mohawk Power Corp.*, 50 AD2d 1011, 376 NYS2d 715 (3d Dept 1975); see Annot: 14 ALR4th 913.

An electric power company's duty to insulate its transmission wires is not absolute, but is measured by the danger reasonably to be anticipated to persons reasonably to be expected to come within the area of such wires, *Miner v Long Island Lighting Co.*, 40 NY2d 372, 386 NYS2d 842, 353 NE2d 805 (1976); *Troidle v Adirondack Power & Light Corp.*, 252 NY 483, 169 NE 654 (1930); *Casualty Co. of America v A.L. Swett Electric Light & Power Co.*, 230 NY 199, 129 NE 653 (1920); *Hickok v Auburn Light, Heat & Power Co.*, 200 NY 464, 93 NE 1113 (1911); *White v Niagara Mohawk Power Corp.*, 197 AD2d 906, 602 NYS2d 263 (4th Dept 1993) (power company met its burden of establishing as a matter of law that it maintained its facility with reasonable care by installing two fences enclosing lead line).

When it is impracticable to insulate high voltage lines, an electric

power company is required to place such lines below ground or sufficiently high above the ground as to avoid the likelihood of contact with persons who may reasonably be expected to be in the area, *Holden v Boyle*, 80 AD2d 281, 439 NYS2d 534 (4th Dept 1981). Where in the nature of the use of electric power, the transmission wires or rails may not practicably be insulated, such as by electric trolleys and trains, a failure to insulate them does not constitute negligence, *Adams v Bullock*, 227 NY 208, 125 NE 93 (1919); *Stearns v Postal Telegraph-Cable Co.*, 224 App Div 775, 230 NYS 143 (4th Dept 1928). In such situations, however, the company maintaining the uninsulated wires or rails must use other reasonable means, so far as practicable, to afford protection to persons reasonably to be anticipated in the area. It is often a question for the jury whether it was feasible for the company to have insulated its wires, *Krastel v Long Island Lighting Co.*, 272 App Div 833, 70 NYS2d 617 (2d Dept 1947). The fact that the electric power company located an uninsulated power line in accordance with national safety standards constitutes only some evidence of due care and does not conclusively negate negligence, *Miner v Long Island Lighting Co.*, 40 NY2d 372, 386 NYS2d 842, 353 NE2d 805 (1976); *Holtz v Niagara Mohawk Power Corp.*, 147 AD2d 857, 538 NYS2d 80 (3d Dept 1989).

**PJI 2:201. Public Utilities—Electric
Companies—Installation—Poles**

A public utility which installs a utility pole within the highway limits must use reasonable care to place the pole so as not to constitute a danger to highway users and the failure to do so is negligence. You must determine whether the location of the pole under the circumstances in this case constituted an unreasonable danger to highway users.

Comment

Based on *Trabisco v New York*, 280 NY 776, 21 NE2d 615 (1939); *McGettigan v New York Cent. R. Co.*, 268 NY 66, 196 NE 745 (1935); *Koehler v New York*, 262 NY 74, 186 NE 208 (1933); *Stern v International Ry. Co.*, 220 NY 284, 115 NE 759 (1917); see *Hayes v Malkan*, 26 NY2d 295, 310 NYS2d 281, 258 NE2d 695 (1970); *Ward v Atlantic & P. Tel. Co.*, 71 NY 81 (1877); *Ray v New York Tel. Co.*, 260 App Div 405, 23 NYS2d 508 (3d Dept 1940). The fact that the Public Service Commission has granted general permission for placement of poles is irrelevant, see *McGettigan v New York Cent. R. Co.*, *supra*.

Where the pole is located on private property, the utility company is not liable for injury resulting from collision therewith, no matter how close to the traveled portion of the highway the pole may be, *Hayes v Malkan*, 26 NY2d 295, 310 NYS2d 281, 258 NE2d 695 (1970); see *Tomassi*

v Union, 46 NY2d 91, 412 NYS2d 842, 385 NE2d 581 (1978); Ingoglia v Leshaj, 1 AD3d 482, 769 NYS2d 40 (2d Dept 2003); Kirtoglou v Fogarty, 235 AD2d 1019, 653 NYS2d 432 (3d Dept 1997); Guy v Rochester Gas & Elec. Corp., 168 AD2d 965, 564 NYS2d 915 (4th Dept 1990).

As to the quality of poles erected, a public utility must use reasonable care in their selection, Ward v Atlantic & P. Tel. Co., 71 NY 81 (1877). As to maintenance of poles, see PJI 2:207.

(3) MAINTENANCE**PJI 2:205. Public Utilities—Electric Companies—
Maintenance—Fallen, Hanging or Sagging
Lines**

An electric power company must use reasonable care to keep its transmission lines from falling or sagging. Where one of its lines has fallen or sagged so as to be dangerous to persons reasonably to be anticipated in the area, whether or not such condition was caused by the fault of the company, an electric power company has the duty to repair the condition or cut off the power, or both, as safety requires, within a reasonable time after it knows or in the use of reasonable care should have known of the dangerous condition and had an opportunity to remove or correct the cause of danger.

Comment

Based on *Huscher v New York & Queens Electric Light & Power Co.*, 223 NY 615, 119 NE 1050 (1918); *Russell v New York State Elec. & Gas Corp.*, 276 App Div 44, 93 NYS2d 3 (3d Dept 1949), *aff'd*, 301 NY 593, 93 NE2d 493 (1950); *Keith v Payne*, 164 App Div 642, 150 NYS 37 (3d Dept 1914); 53A NYJur2d, *Energy*, §§ 335, 372, 373.

The above charge may be adapted for use in a case against an electric, telephone or telegraph company where the mere presence of fallen or sagging wires presents a dangerous condition and there is no power in the wires.

When an electric power company has knowledge that one of its transmission lines has fallen, broken or sagged, it has a duty promptly to shut off the power to the damaged transmission line or to make the necessary repairs with the dispatch required in light of the danger to public safety, *Russell v New York State Elec. & Gas Corp.*, 276 App Div 44, 93 NYS2d 3 (3d Dept 1949), *aff'd*, 301 NY 593, 93 NE2d 493 (1950); 53A NYJur2d, *Energy* § 373; *Liability of electric company to one other than employee, arising from its failure to shut off current*, 32 ALR2d 244, 269. A telephone company has the same duty with respect to its lines, *Ray v New York Tel. Co.*, 260 App Div 405, 407, 23 NYS2d 508 (3d Dept 1940), but in the latter case less haste may be required.

**PJI 2:206. Public Utilities—Electric Companies—
Maintenance—Lines Generally**

An electric power company has the duty to use

reasonable care in maintaining proper insulation of its transmission lines so that such lines do not become a source of danger to those foreseeably near them, and this duty requires continuing and adequate inspection to prevent and correct decay or impairment of the insulation.

Comment

Based on *Braun v Buffalo General Electric Co.*, 200 NY 484, 94 NE 206 (1911); *Ferrari v New York Cent. R. Co.*, 224 App Div 182, 230 NYS 60 (4th Dept 1928), *aff'd*, 250 NY 527, 166 NE 311 (1928); *Olm v New York & Queens Electric Light & Power Co.*, 188 App Div 19, 176 NYS 370 (2d Dept 1919); 53A NYJur2d, *Energy*, §§ 319–329, 375; see *Miner v Long Island Lighting Co.*, 40 NY2d 372, 386 NYS2d 842, 353 NE2d 805 (1976) (duty to use insulated wires and to trim trees); *Tormey v Consolidated Edison Co. of New York, Inc.*, 184 AD2d 299, 585 NYS2d 33 (1st Dept 1992) (utility and company hired to trim tree growth around wire found negligent for not properly trimming and inspecting tree that caused wire to fall).

The principle of the pattern charge may be used in a case involving other failures of the company in the maintenance of its wires and poles; see Annot: 40 ALR2d 1299.

In a proper case the court must charge the doctrine of *res ipsa loquitur*, *Russell v New York State Elec. & Gas Corp.*, 276 App Div 44, 93 NYS2d 3 (3d Dept 1949), *aff'd*, 301 NY 593, 93 NE2d 493 (1950); *O'Flaherty v Nassau Electric R. Co.*, 34 App Div 74, 54 NYS 96 (2d Dept 1898), *aff'd*, 165 NY 624, 59 NE 1128 (1900); *Weiss v Brooklyn Edison Co.*, 253 App Div 746, 300 NYS 756 (2d Dept 1937). For a *res ipsa* charge, see PJI 2:65.

PJI 2:207. Public Utilities—Electric Companies—Maintenance—Poles

A public utility using poles to support its lines is required to use reasonable care in maintaining such poles so that they are strong enough to withstand the stresses which may reasonably be anticipated.

Comment

Based on *Atkins v New York State Electrical & Gas Corporation*, 14 NY2d 534, 248 NYS2d 395, 197 NE2d 782 (1964); *Ward v Atlantic & P. Tel. Co.*, 71 NY 81 (1877); *Ray v New York Tel. Co.*, 260 App Div 405, 23 NYS2d 508 (3d Dept 1940).

The poles must be strong enough to support the wires during storms

that may be reasonably anticipated, see *Ward v Atlantic & P. Tel. Co.*, 71 NY 81 (1877).

A company that owns, maintains and controls a pole has a duty to do whatever is reasonably necessary to prevent objects from falling from the pole and injuring nearby persons, *Weiss v Brooklyn Edison Co.*, 253 App Div 746, 300 NYS 756 (2d Dept 1937). It has been held, however, that such owner and user of a pole that gratuitously permits another company to use the pole for the other's purposes, is not liable, without more, for damages caused by objects falling from the pole by reason of the neglect of the other company, *Quill v Empire State Tel. & Tel. Co.*, 159 NY 1, 53 NE 679 (1899); *Holmes v Union Tel. & Tel. Co.*, 16 NYS 563 (Gen Term 1891), *aff'd*, 139 NY 651, 35 NE 207 (1893); see *Heskell v Auburn Light, Heat & Power Co.*, 209 NY 86, 102 NE 540 (1913).

(4) OPERATION

**PJI 2:210. Public Utilities—Electric
Companies—Operation**

Before turning on the electric current, a power company has the duty to give reasonable notice to those persons who will be endangered by the unexpected commencement of service and whose presence in the area of danger should reasonably be anticipated.

Comment

See *Seeberger v Putnam & Co.*, 244 NY 545, 155 NE 891 (1926).

As to liability arising from failure to cut off current, see Annot: Liability of electric company to one other than employee, arising from its failure to shut off current, 32 ALR2d 244.

7. INJURED EMPLOYEE'S RIGHTS**Introductory Statement**

It would unduly extend this book to attempt to cover every type of situation that may arise in an injured employee's action. Pattern charges are, therefore, provided covering (1) common law negligence, (2) statutory negligence, (3) statutory negligence and violation of an industrial rule, (4) absolute liability imposed by statute, and (5) certain situations involving workers' compensation. It is left to the trial judge to adapt the charge to the particular common law or statutory duty involved in the case if it does not happen to be the one covered by the pattern charge.

I. The Effect of the Workers' Compensation Law on the Rights of Injured Employees

For an employee who is covered by workers' compensation insurance, the exclusive remedy against the employer, WCL § 11, or a co-employee, WCL § 29(6), is under that statute, *Macchirole v Giamboi*, 97 NY2d 147, 736 NYS2d 660, 762 NE2d 346 (2001). An injured employee may bring an action against a tortfeasor other than the employer, including the owner of property on which the employee is working or the general contractor on the job. In certain situations, such as where the employer committed an intentional tort against the employee, the injured employee may have the option of bringing a civil damage action against the employer, *Quizhpi v Tjernlund Products, Inc.*, 309 AD2d 670, 766 NYS2d 342 (1st Dept 2003).

Although administrative agency findings of fact are generally entitled to preclusive effect in subsequent civil proceedings, the findings of the Workers' Compensation Board are not necessarily preclusive in a subsequent personal injury action, since the issues decided in the former may not be identical to those in the latter, *Auqui v Seven Thirty One Ltd. Partnership*, 22 NY3d 246, 980 NYS2d 345, 3 NE3d 682 (2013) (reversing upon reargument *Auqui v Seven Thirty One Ltd. Partnership*, 20 NY3d 1035, 962 NYS2d 579, 985 NE2d 889 (2013)). Thus, an administrative finding regarding the duration of a claimant's work-related disability was not binding in the claimant's subsequent plenary personal injury action, since the focus of the workers' compensation inquiry is the claimant's inability to work while the focus of the negligence action is broader, encompassing all of the enduring consequences of the accident (including lost income and future medical expenses), *id*; see also *Balcerak v Nassau*, 94 NY2d 253, 701 NYS2d 700, 723 NE2d 555 (1999) (no identity of issue between Workers' Compensation Board's determination that injury was work-related and application for enhanced benefits under General Municipal Law § 207-c); *Lemiszko v Mosovich* 2014 Family Trust, 191 AD3d 1363, 141 NYS3d 605 (4th Dept 2021) (Workers' Compensation Board's determination that defendant was not liable for plaintiff's accident did not preclude plaintiff from seeking to

establish that defendant was liable under Labor Law as general contractor); but see *Douglas v Tishman Construction Corporation*, 205 AD3d 570, 169 NYS3d 277 (1st Dept 2022) (worker estopped from litigating allegation he sustained traumatic brain injury where allegation was conclusively decided against him in Workers' Compensation proceeding). Thus, where the Workers' Compensation Board found that the plaintiff did not have post-concussion syndrome or a concussion condition causally related to the accident, he was barred from seeking damages related to that specific syndrome or condition, but could seek damages related to headaches or the concussion itself, *Szymkowiak v New York Power Authority*, 203 AD3d 1618, 166 NYS3d 759 (4th Dept 2022).

A. Exclusive Remedy Against Employer

When a worker is injured or killed in the course of employment, Workers' Compensation Law §§ 11 and 29(6) make compensation benefits the employer's exclusive liability to the employee or survivors, *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 432 NYS2d 879, 412 NE2d 934 (1980); see *Weiner v New York*, 19 NY3d 852, 947 NYS2d 404, 970 NE2d 427 (2012); *Macchirole v Giamboi*, 97 NY2d 147, 736 NYS2d 660, 762 NE2d 346 (2001), except as to injuries intentionally inflicted, *Jones v State*, 33 NY2d 275, 352 NYS2d 169, 307 NE2d 236 (1973); *Morris v United Parcel Service*, 134 AD2d 840, 521 NYS2d 591 (4th Dept 1987); Annot: 96 ALR3d 1064; see *DeMarco v Federal Ins. Co.*, 99 AD2d 114, 472 NYS2d 464 (3d Dept 1984); *Deutsch v Great Atlantic & Pacific Tea Co., Inc.*, 89 AD2d 597, 452 NYS2d 469 (2d Dept 1982); see also *Burlew v American Mut. Ins. Co.*, 63 NY2d 412, 482 NYS2d 720, 472 NE2d 682 (1984); *Martin v Casagrande*, 159 AD2d 26, 559 NYS2d 68 (4th Dept 1990). Notwithstanding the Immigration Reform and Control Act of 1986 (IRCA), see 8 USC § 1324a, et seq, an employee's status as an undocumented worker does not preclude him or her from collecting workers' compensation benefits, even if the employee used fraudulent paperwork to obtain the employment, *Amoah v Mallah Management, LLC*, 57 AD3d 29, 866 NYS2d 797 (3d Dept 2008). The workers' compensation defense is available to employers of undocumented workers, *New York Hosp. Medical Center of Queens v Microtech Contracting Corp.*, 22 NY3d 501, 982 NYS2d 830, 5 NE3d 993 (2014). The Court of Appeals has expressly reserved decision on whether IRCA preempts state workers' compensation law on this issue, *New York Hosp. Medical Center of Queens v Microtech Contracting Corp.*, supra (expressly reserving decision on preemption).

Once a worker files a workers' compensation claim and the Workers' Compensation Board determines that a particular entity is the employer, the worker is thereafter estopped from asserting in a civil action that he was employed by a different entity, *Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 (1st Dept 2003); *Zabava v 178 East 78, Inc.*, 212 AD2d 406, 622 NYS2d 42 (1st Dept 1995). Similarly, a worker who elects to receive workers' compensation benefits from his or her general employer is barred from maintaining personal injury action against an alleged special employer, see *Graziano v 110 Sand Co.*, 50

AD3d 635, 855 NYS2d 203 (2d Dept 2008). For a discussion of what constitutes a special employee, see *Graziano v 110 Sand Co.*, *supra* and PJI 2:218 and 2:238.

It has been held that an employer may assert workers' compensation as an affirmative defense even though another party, such as the general contractor who retained the employer, paid for the injured worker's benefits, *Joyce v McKenna Associates, Inc.*, 2 AD3d 592, 768 NYS2d 358 (2d Dept 2003). However, in *Boles v Dormer Giant, Inc.*, 4 NY3d 235, 792 NYS2d 375, 825 NE2d 590 (2005), the Court of Appeals held that the law shielding employers from third-party actions is not available to employers who have not secured workers' compensation coverage for the injured worker, see *Naula v Utokilen, LLC*, 180 AD3d 1058, 120 NYS3d 166 (2d Dept 2020) (employer who failed to secure workers' compensation insurance not entitled to protections of Workers' Compensation § 11); *Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 87 NYS3d 189 (2d Dept 2018) (plaintiff's employer not entitled to workers' compensation bar where plaintiff maintained his own workers' compensation policy). The effect of the holding in *Boles* on the analysis in *Joyce* has yet to be resolved.

As a general rule, the availability of the Workers' Compensation bar is not determined by the title of the purported "employer," but rather by the actual working relationship between the purported "employer" and the injured worker, *Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 850 NYS2d 359, 880 NE2d 845 (2007). A third party claiming to be immune from common-law liability under the Workers' Compensation Law because of its status as agent of the injured plaintiff's employer must show "a working relationship with the injured plaintiff sufficient in kind and degree so that the third party, or the third-party's employer, may be deemed plaintiff's employer," *id.* Thus, absent such a showing, an entity retained by the injured plaintiff's employer, allegedly as the employer's agent responsible for parking lot maintenance and lighting fixtures, could not interpose the Workers' Compensation Law as an affirmative defense in an action assertedly arising from the plaintiff's fall on an icy patch in a poorly lit section of the parking lot, *id.* The Workers' Compensation bar was inapplicable because the agent did not have a working relationship with the plaintiff and there was no special employment relationship. A critical factor in a special employment relationship is the purported "special employer's" direction, supervision and control of all aspects of the employee's work, *id.* For a more detailed description of the test for "special employees," see Comment to PJI 2:218, *infra*; see also PJI 2:238 (employer's vicarious liability to third parties injured by acts of special employee).

The workers' compensation law bars an action founded upon a claim against the employer in some other capacity, e.g., as property owner or manufacturer of equipment used on the job site, *Weiner v New York*, 19 NY3d 852, 947 NYS2d 404, 970 NE2d 427 (2012); *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 432 NYS2d 879, 412 NE2d 934 (1980); *Molinari v Kar-San Development, Ltd.*, 117 AD2d 194, 502 NYS2d 552

(3d Dept 1986), *aff'd*, 69 NY2d 910, 516 NYS2d 457, 509 NE2d 56 (1987); *Matter of New York City Asbestos Litigation*, 170 AD3d 611, 96 NYS3d 565 (1st Dept 2019) (defendant, owner of property where decedent was exposed to asbestos, barred pursuant to CPLR 1602(4) from allocating liability to plaintiff's employer, which manufactured asbestos products, since plaintiff could not sue employer in its capacity as manufacturer); *Sylfa v Stupnick*, 239 AD2d 570, 658 NYS2d 69 (2d Dept 1997). This also applies even if the employee suffers some loss for which the employee cannot be compensated under the statute, *Thompson v Maimonides Medical Center*, 86 AD2d 867, 447 NYS2d 308 (2d Dept 1982). In addition, a worker who is injured during the course of employment cannot maintain an action to recover damages for personal injuries against the owner of the premises where the accident occurred when the owner was also an officer of the corporation that employed the worker, *Lovario v Vuotto*, 266 AD2d 191, 697 NYS2d 685 (2d Dept 1999). There is no workers' compensation coverage where the injury was sustained in, or caused by, voluntary participation in an off duty athletic activity not constituting part of the employee's work related duties unless, among other things, the employer sponsors the activity, Workers' Compensation Law § 10(1); see *Briand v New York State Dept. of Environmental Conservation*, 186 AD2d 308, 587 NYS2d 458 (3d Dept 1992) (where picnic at which claimant was injured in a "tug of war" contest was organized during business hours and employee participation was overtly encouraged to promote morale, injury arose out of and in the course of employment); *Midey v Romulus Cent. School Dist.*, 184 AD2d 925, 584 NYS2d 948 (3d Dept 1992) (principal's overt encouragement of participation in donkey basketball game constituted "sponsoring" the activity). The Workers' Compensation Law does not extend to persons who engage laborers to perform work on their private homes, *Alejandro v Riportella*, 250 AD2d 556, 672 NYS2d 412 (2d Dept 1998); *Emmi v Emmi*, 186 AD2d 1025, 588 NYS2d 481 (4th Dept 1992). Conversely, where an employee was injured by a product manufactured by another division of his employer, and suit against the manufacturer would have been precluded by the Workers' Compensation Law, the sale of the manufacturer by the employer to a third party, even if prior to the accident, does not give the employee any right to sue the manufacturer, *Kubiszyn v Terex Div. of Terex Corp.*, 212 AD2d 93, 628 NYS2d 994 (4th Dept 1995). A successor corporation may not be subject to greater liability than that possessed by its predecessors solely by reason of the fortuitous fact that the injured party was not in the employ of the successor on the date of the accident, *id.*

An employee may not maintain an action against a different division of his or her corporate employer, except where the corporations have retained separate and distinct identities, *Levensen v Berkey Professional Processing, Inc.*, 122 AD2d 867, 505 NYS2d 913 (2d Dept 1986); see *Mertz v Seibel Realty, Inc.*, 265 AD2d 925, 696 NYS2d 598 (4th Dept 1999); *Richardson v Benoit's Elec., Inc.*, 254 AD2d 798, 677 NYS2d 855 (4th Dept 1998). This exception applies regardless of the degree of control by one corporate entity over the other separate entity, *Levensen v Berkey Professional Processing, Inc.*, *supra*, as long as the

corporate entities did not completely ignore the separate identities of the others, *Nelson v Shaner Cable, Inc.*, 2 AD3d 1371, 770 NYS2d 498 (4th Dept 2003). Indeed, the business structures defendant created are not to be lightly ignored in order to shield one of the entities from liability, *id.* Further, the exception applies where the claim against defendant corporation is predicated on its vicarious liability for the tortious conduct of an individual who is employed by both plaintiff's employer as well as by defendant, *Laudisio v Diamond "D" Const. Corp.*, 309 AD2d 1178, 765 NYS2d 720 (4th Dept 2003). However, where an employee had the right to maintain an action against a third-party corporate tortfeasor, the assumption of the liabilities of that tortfeasor by the employer in a corporate merger occurring before or after the accident does not defeat the employee's preexisting right to maintain the action, *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 432 NYS2d 879, 412 NE2d 934 (1980); *Kubiszyn v Terex Div. of Terex Corp.*, 212 AD2d 93, 628 NYS2d 994 (4th Dept 1995); *Lynn v McDonnell Douglas Corp.*, 134 AD2d 328, 520 NYS2d 804 (2d Dept 1987); see *Preston v APCH, Inc.*, 89 AD3d 65, 930 NYS2d 722 (4th Dept 2011).

A parent corporation may be deemed to be an employer of an employee of a subsidiary corporation for workers' compensation purposes if the subsidiary functions as the alter ego of the parent, *Len v State*, 74 AD3d 1597, 906 NYS2d 622 (3d Dept 2010); see *Coonjeberry v Altone Elec., LLC*, 94 AD3d 1306, 942 NYS2d 681 (3d Dept 2012). The standard for finding an alter ego relationship is high, requiring direct intervention by the parent in the management of the subsidiary to such an extent that the subsidiary's paraphernalia of incorporation, directors and officers are completely ignored, *Len v State*, *supra* (New York State Canal Corporation both a subsidiary and alter ego of New York State Thurway Authority); but see *Buckmann v State*, 64 AD3d 1137, 881 NYS2d 760 (4th Dept 2009).

In *Coley v Arnot Ogden Memorial Hosp.*, 107 AD2d 67, 485 NYS2d 876 (3d Dept 1985), it was held that workers' compensation does not preclude a common law action by an employee against an employer based, not on the compensable injury, but upon a separate cause of action resulting from the impairment of the employee's legal rights against a third party, see *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41, 682 NYS2d 452 (2d Dept 1998); *Vaughn v New York*, 201 AD2d 556, 607 NYS2d 726 (2d Dept 1994). Acceptance of compensation benefits does not bar a negligence action against an employer to recover for aggravation of work related injuries where the aggravation of the injuries does not arise out of or in the course of the plaintiff's employment, *Manswell v St. Luke's Hosp.*, 16 AD3d 182, 792 NYS2d 389 (1st Dept 2005); *Girit v Dogan*, 224 AD2d 660, 638 NYS2d 725 (2d Dept 1996).

Section 29(6) makes workers' compensation the exclusive remedy of an employee injured or killed by the negligence or wrong of another in the same employ, *Macchirole v Giamboi*, 97 NY2d 147, 736 NYS2d 660, 762 NE2d 346 (2001); *Heritage v Van Patten*, 59 NY2d 1017, 466 NYS2d

958, 453 NE2d 1247 (1983); *Sylfa v Stupnick*, 239 AD2d 570, 658 NYS2d 69 (2d Dept 1997); *Scimeca v Babylon*, 108 AD2d 848, 485 NYS2d 351 (2d Dept 1985). Parties are co-employees in all matters arising from and connected with their employment, *Macchirole v Giamboi*, supra. Pursuant to Workers' Compensation Law § 21(1), an assault that arose in the course of employment is presumed to have arisen out of the employment, absent substantial evidence that the assault was motivated by purely personal animosity, *Rosen v First Manhattan Bank*, 84 NY2d 856, 617 NYS2d 455, 641 NE2d 1073 (1994). However, even where an assault by a co-employee was intentional, suit against the employer is barred unless the employer participated in the assault, *Miller v Huntington Hosp.*, 15 AD3d 548, 792 NYS2d 88 (2d Dept 2005).

Workers' Compensation Law § 29(6) does not preclude a plaintiff who accepted workers' compensation benefits from the employer from recovery from a co-employee who acted beyond the scope of employment or for an intentional act, *Macchirole v Giamboi*, 97 NY2d 147, 736 NYS2d 660, 762 NE2d 346 (2001); *Maines v Cronomer Valley Fire Dept., Inc.*, 50 NY2d 535, 429 NYS2d 622, 407 NE2d 466 (1980); *Jacobsen v Amedio*, 218 AD2d 872, 629 NYS2d 863 (3d Dept 1995); *Cusano v Staff*, 191 AD2d 918, 595 NYS2d 248 (3d Dept 1993); *Ralph v Oliver*, 186 AD2d 977, 588 NYS2d 444 (4th Dept 1992) (citing PJI); *Jackman v Fisher*, 91 AD2d 602, 456 NYS2d 429 (2d Dept 1982); *Hirsch v Mastroianni*, 80 AD2d 633, 436 NYS2d 87 (2d Dept 1981); *Vercruysse v Alati*, 78 AD2d 1015, 433 NYS2d 694 (4th Dept 1980), see *Werner v State*, 53 NY2d 346, 441 NYS2d 654, 424 NE2d 541 (1981); *Jones v State*, 96 AD2d 105, 468 NYS2d 223 (4th Dept 1983).

To avoid the exclusivity of compensation under the intentional act exception, the employee must allege a deliberate act by the employer directed at causing harm to the employee, *Myloie v GAF Corp.*, 81 AD2d 994, 440 NYS2d 67 (3d Dept 1981), *aff'd*, 55 NY2d 893, 449 NYS2d 21, 433 NE2d 1269 (1982). Allegations that the employer exposed the employee to a substantial risk of injury amount, at most, to gross negligence and are not sufficient, *Miller v Huntington Hosp.*, 15 AD3d 548, 792 NYS2d 88 (2d Dept 2005); *Acevedo v Consolidated Edison Co. of New York, Inc.*, 189 AD2d 497, 596 NYS2d 68 (1st Dept 1993); *Nash v Oberman*, 117 AD2d 724, 498 NYS2d 449 (2d Dept 1986).

Section 29(6) bars a claim against a defendant landowner who was also a co-employee of one injured on the land while pursuing their common employment, *Macchirole v Giamboi*, 97 NY2d 147, 736 NYS2d 660, 762 NE2d 346 (2001) (defendant-owner of personal residence where injury occurred); *Heritage v Van Patten*, 59 NY2d 1017, 466 NYS2d 958, 453 NE2d 1247 (1983) (defendant-owner of commercial property where injury occurred); *Lamm v Lore*, 247 AD2d 878, 668 NYS2d 805 (4th Dept 1998); *Druiett v Brenner*, 193 AD2d 644, 598 NYS2d 3 (2d Dept 1993), and *Clarke v Americana House, Inc.*, 186 AD2d 531, 588 NYS2d 353 (2d Dept 1992) (suit barred against owners of premises upon which accident occurred where owners were also officers of corporation that employed injured worker); *Linney v Consistory of Belle-*

vue Reformed Church, 115 AD2d 209, 495 NYS2d 293 (3d Dept 1985); *St. Andrews v Lucarelli*, 115 AD2d 155, 495 NYS2d 506 (3d Dept 1985); see also *Seudath v Mott*, 202 AD2d 658, 609 NYS2d 319 (2d Dept 1994) (defendant who was co-owner of building and wife of employer was entitled to benefit of husband's immunity under Workers' Compensation Law). The fact that the sole shareholder of the plaintiff's employer was a member of the LLC that owned the subject property did not render the property owner the plaintiff's co-employee, *Ortega v 669 Meeker Avenue, LLC*, 191 AD3d 686, 140 NYS3d 271 (2d Dept 2021).

For purposes of Workers' Compensation exclusivity, a partnership and its partners are considered one entity when acting in furtherance of partnership business, *Kelsey v Hourigan*, 175 AD3d 918, 106 NYS3d 540 (4th Dept 2019). However, where the landowner was a partnership in which the president of plaintiff's employer was a partner and, hence, a co-employee, the statute barred suit only against the co-employee and the assertion of liability against the landowner based upon the acts of the co-employee, *Lindner v Kew Realty Co.*, 113 AD2d 36, 494 NYS2d 870 (2d Dept 1985). The statute did not preclude an action against the other members of the partnership who had no employment relationship with the injured plaintiff and the imposition of liability against the partnership was based upon the conduct of the other partners, *Lindner v Kew Realty Co.*, *supra*; see *O'Connor v Spencer* (1997) Inv. Ltd. Partnership, 2 AD3d 513, 769 NYS2d 276 (2d Dept 2003); *Rosenburg v Angiuli Buick, Inc.*, 220 AD2d 654, 632 NYS2d 658 (2d Dept 1995). But where the landowner was a general partnership with two partners, one being the corporation that employed plaintiff and the other being an officer of the employer, plaintiff was precluded from suing the landowner and its members, *Cipriano v FYM Associates*, 117 AD2d 770, 499 NYS2d 101 (2d Dept 1986). The statute barred suit against the employer directly, barred suit against the officer since he was a co-employee of plaintiff, and barred suit against the landowner since the breach of duty was directly connected to the employment relationship its members had with plaintiff, *Cipriano v FYM Associates*, *supra*. Where the employer is a joint venture consisting of more than one entity, the employee may be considered an employee of all of the entities, *Felder v Old Falls Sanitation Co., Inc.*, 39 NY2d 855, 386 NYS2d 214, 352 NE2d 131 (1976); *Mitchell v A.F. Roosevelt Ave. Corp.*, 207 AD2d 388, 615 NYS2d 707 (2d Dept 1994); see *Rossi v Mount Vernon Hosp.*, 265 AD2d 542, 697 NYS2d 164 (2d Dept 1999) (finding that two entities did not constitute joint venture as matter of law). A common law action may be maintained against a co-employee where neither plaintiff nor defendant was acting within the scope of employment at the time of injury, *Root v Sanger*, 133 AD2d 896, 520 NYS2d 252 (3d Dept 1987).

The Workers' Compensation Law defines "employee" in general terms, WCL § 2(4); see *White v Metropolitan Opera Ass'n, Inc.*, 148 AD3d 13, 44 NYS3d 412 (1st Dept 2017) (reviewing whether professional theater performer who negotiated terms of her appearance through corporation that employed her was employee of theater company under WCL § 2(4)). The courts have noted that the term "em-

ployee,” when used in social and labor legislation such as the Workers’ Compensation Law, must be interpreted in light of the remedial purposes of the law, *Liverpool v S.P.M. Environmental Inc.*, 189 AD2d 645, 592 NYS2d 339 (1st Dept 1993); *Commissioners of State Ins. Fund v Kaplan*, 89 Misc2d 610, 392 NYS2d 971 (NY City Civ Ct 1977). Thus, a defendant who is acting under the guise of “selling work” will not be insulated against the costs and bookkeeping inconvenience of the Workers’ Compensation Law and other social benefits designed for the benefit of employees, *id.*

Whether a particular person is an employee within the meaning of the workers’ compensation statutes is ordinarily a question of fact to be resolved by the Workers’ Compensation Board, *O’Rourke v Long*, 41 NY2d 219, 391 NYS2d 553, 359 NE2d 1347 (1976); *Vasquez ex rel. Vasquez v McGeever*, 1 AD3d 767, 766 NYS2d 625 (3d Dept 2003); *Santigate v Linsalata*, 304 AD2d 639, 759 NYS2d 100 (2d Dept 2003). It has been held that conclusive proof that another corporate entity maintained workers’ compensation benefits for plaintiff and filed the required reports was sufficient to defeat defendant’s claim that it was actually plaintiff’s employer, *Nelson v Shaner Cable, Inc.*, 2 AD3d 1371, 770 NYS2d 498 (4th Dept 2003).

In determining the validity of a defense based on the workers’ compensation laws, the court may decide the injured party’s eligibility for workers’ compensation benefits only where the applicable statutes are unambiguous and the question is one of pure law, *Santigate v Linsalata*, 304 AD2d 639, 759 NYS2d 100 (2d Dept 2003). In other cases, the appropriate course is to await a conclusive determination by the Workers’ Compensation Board, *O’Rourke v Long*, 41 NY2d 219, 391 NYS2d 553, 359 NE2d 1347 (1976).

The exclusivity of the workers’ compensation remedy is not altered by an illegality in the employment relationship, *New York Hosp. Medical Center of Queens v Microtech Contracting Corp.*, 22 NY3d 501, 982 NYS2d 830, 5 NE3d 993 (2014) (employment of undocumented worker); *Vasquez ex rel. Vasquez v McGeever*, 1 AD3d 767, 766 NYS2d 625 (3d Dept 2003) (employment of minor under fourteen).

It has been held that an employer/employee relationship is established where a defendant hospital selects its interns, retains the power to dismiss them, and controls and supervises their work, *Olsson v Nyack Hosp.*, 193 AD2d 1006, 598 NYS2d 348 (3d Dept 1993). Even where financial remuneration is not paid to an intern, when necessary training and experience gained at the hospital is required for graduation and licensure, training is a thing of value and the equivalent of wages, *id.* However, the analytical approach reflected in *Olsson v Nyack Hosp.*, *supra*, as well as in *Croston v Montefiore Hosp.*, 229 AD2d 330, 645 NYS2d 471 (1st Dept 1996), and *Galligan v St. Vincent’s Hospital of City of New York*, 28 AD2d 592, 279 NYS2d 886 (3d Dept 1967), has recently been rejected as inconsistent with *O’Rourke v Long*, 41 NY2d 219, 391 NYS2d 553, 359 NE2d 1347 (1976), see *Santigate v Linsalata*,

304 AD2d 639, 759 NYS2d 100 (2d Dept 2003). In *Santigate*, the Second Department stated that a court may not decide whether a person was an “employee” based on its own assessment of facts or balancing of factors rather than as a pure question of law. Instead, the court must defer to the Workers’ Compensation Board’s primary jurisdiction, see *Comment*, *infra*.

A person may obtain workers’ compensation benefits as a result of both an original injury and an aggravation of the injury as the result of a subsequent act of medical malpractice, *Parchefsky v Kroll Bros.*, 267 NY 410, 196 NE 308 (1935); see *Girit v Dogan*, 224 AD2d 660, 638 NYS2d 725 (2d Dept 1996). Acceptance of compensation benefits under these circumstances does not preclude the injured party from maintaining a common law action against the persons who caused the aggravation, *Firestein v Kingsbrook Jewish Medical Center*, 137 AD2d 34, 528 NYS2d 85 (2d Dept 1988). The common law action may be maintained against a co-employee, if the aggravating incident was not work-related.

Workers’ Compensation death benefits are available when a work-related injury or illness contributed to the death even though it was not the exclusive cause of death, *Hroncich v Con Edison*, 21 NY3d 636, 975 NYS2d 714, 998 NE2d 377 (2013); *Imbriani v Berkar Knitting Mills*, 277 AD2d 727, 716 NYS2d 149 (3d Dept 2000). Where a work-related injury or illness contributed to the death, the claimant is entitled to receive the full death benefit without apportionment between the work-related and non-work-related causes, *Hroncich v Con Edison*, *supra*; *Webb v Cooper Crouse Hinds Co.*, 62 AD3d 57, 874 NYS2d 316 (3d Dept 2009) (rejecting contrary dictum in *Rados v Woodlawn Water Supply Dist.*, 31 AD2d 879, 297 NYS2d 403 (3d Dept 1969)).

In *Firestein v Kingsbrook Jewish Medical Center*, 137 AD2d 34, 528 NYS2d 85 (2d Dept 1988), plaintiff, a hospital clerk, was injured at work and treated at her employer-hospital where her injuries were aggravated by the negligence of another hospital employee. *Firestein* held that, if an employee of a hospital is admitted as a patient, and is negligently treated at the hospital, the injuries that result from the treatment do not arise out of the injured person’s employment, at least where the treatment was provided as part of the medical service available to the public and was not exclusively available to employees, see also *Manswell v St. Luke’s Hosp.*, 16 AD3d 182, 792 NYS2d 389 (1st Dept 2005). Likewise, in *Hollingshed v Levine*, 307 AD2d 850, 763 NYS2d 595 (1st Dept 2003), the court held that WCL § 29(6) did not bar a suit on behalf of a hospital employee for the employer-hospital staff’s negligent failure to diagnose a pulmonary embolism. In so ruling, the court considered three factors: (1) the hospital’s professional services had been paid for by the employee rather than the hospital-employer; (2) the employee had been treated in an emergency room that was available to the general public; and (3) the services provided to the employee were identical to those available to the general public, *id.*, citing *Marange v Slivinski*, 257 AD2d 427, 684 NYS2d 199 (1st Dept 1999). Where a hospital employee is permitted to maintain a malpractice action against

her employer, the compensation payor is entitled to a lien on any recovery in the common law action for payment made in connection with the aggravated injuries, *Manswell v St. Luke's Hosp.*, *supra*; *Firestein v Kingsbrook Jewish Medical Center*, *supra*.

Recovery from a landowner based on the provisions of the Labor Law is not precluded by the Workers' Compensation Law in the absence of an employer/employee or co-employer/co-employee relationship, *Russo v Hilman*, 146 AD2d 690, 537 NYS2d 54 (2d Dept 1989). Likewise, the landowner is not precluded by the Workers' Compensation Law from seeking indemnification or contribution from plaintiff's employer, *id.* However, having identified the building owner as the employer and accepted workers' compensation benefits on that basis, an injured employee may not thereafter argue that the building manager was his employer, *Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 (1st Dept 2003).

On September 10, 1996, the Workers' Compensation Reform Bill became effective to restore the force of the exclusive remedy provisions of the Workers' Compensation Law by protecting employers and employees from suits other than those that are contract based. The law substantially curtails the rights of a third person tortfeasor who is sued by an employee, to commence a third-party action against the plaintiff's employer as illustrated in *Dole v Dow Chemical Co.*, 30 NY2d 143, 331 NYS2d 382, 282 NE2d 288 (1972) and codified in CPLR Art. 14. Employers may be held responsible, however, for contribution and indemnity arising from an employee's "grave injury." A "grave injury" is defined to "mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability," Workers' Compensation Law, § 11. The relevant provisions of the new amendments restricting the right to bring a third-party action do not apply to actions pending on the effective date of the amendments, September 10, 1996, *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 673 NYS2d 966, 696 NE2d 978 (1998). The amendments are to be applied prospectively to actions filed on or after September 10, 1996, irrespective of the date of the accident, *id.*

B. Primary Jurisdiction of Workers' Compensation Board

The Workers' Compensation Board has the primary jurisdiction to determine whether a claim comes within the exclusive remedy provided by the Workers' Compensation Law, *O'Rourke v Long*, 41 NY2d 219, 391 NYS2d 553, 359 NE2d 1347 (1976), see also *Shine v Duncan Petroleum Transport, Inc.*, 60 NY2d 22, 466 NYS2d 672, 453 NE2d 1089 (1983); *Botwinick v Ogden*, 59 NY2d 909, 466 NYS2d 291, 453 NE2d 520 (1983); *Murray v New York*, 43 NY2d 400, 401 NYS2d 773, 372

NE2d 560 (1977). The Board's primary jurisdiction extends to the question of the identity of the injured employee's employer, *Quizhpi v. Tjernlund Products, Inc.*, 309 AD2d 670, 766 NYS2d 342 (1st Dept 2003).

Where the Workers' Compensation Board determines that the employee's claim comes within workers' compensation, a spousal claim for loss of consortium is barred, *Lunsford v Schaffner*, 184 AD2d 625, 584 NYS2d 909 (2d Dept 1992); *Daniels v Zelco, Inc.*, 159 AD2d 538, 552 NYS2d 403 (2d Dept 1990). The Board's determination is subject to judicial review only by appeal as provided in WCL § 23 and unless vacated bars a common law action. An application for workers' compensation benefits, the filing of a notice of accident, or acceptance of benefits, also bars a common law action, *Cunningham v State*, 60 NY2d 248, 469 NYS2d 588, 457 NE2d 693 (1983); *Smith v State*, 59 NY2d 718, 463 NYS2d 439, 450 NE2d 245 (1983); *Carey v Lefrak Organization*, 106 AD2d 276, 482 NYS2d 286 (1st Dept 1984), as does a determination by the Board that the injury was covered by workers' compensation, even if the injured employee did not make a claim for compensation, *O'Connor v Midiria*, 55 NY2d 538, 450 NYS2d 455, 435 NE2d 1070 (1982); *Carey v Lefrak Organization*, 106 AD2d 276, 482 NYS2d 286 (1st Dept 1984); *Orzechowski v Warner-Lambert Co.*, 92 AD2d 110, 460 NYS2d 64 (2d Dept 1983). If the Board rejects the case, CPLR 205 applies, allowing plaintiff to sue at common law within six months from the date of the final disposition of the question by the Board, *Cunningham v State*, supra.

The Board's determination is binding upon the parties to the hearing, Workers' Compensation Law § 23; *Werner v State*, 53 NY2d 346, 441 NYS2d 654, 424 NE2d 541 (1981). The injured employee, the employer or its compensation carrier is generally bound, as is a judgment creditor of the employer, *Excelsior Ins. Co. v Antretter Contracting Corp.*, 262 AD2d 124, 693 NYS2d 100 (1st Dept 1999), but a person who did not have notice of the hearing or an opportunity to be heard is not bound, *Liss v Trans Auto Systems, Inc.*, 68 NY2d 15, 505 NYS2d 831, 496 NE2d 851 (1986); *Heifetz v Metropolitan Jewish Geriatric Center*, 135 AD2d 498, 521 NYS2d 739 (2d Dept 1987); see *Mitchell v A.F. Roosevelt Ave. Corp.*, 207 AD2d 388, 615 NYS2d 707 (2d Dept 1994).

Although administrative agency findings of fact are generally entitled to preclusive effect in subsequent civil proceedings, the findings of the Workers' Compensation Board are not necessarily preclusive in a subsequent personal injury action, since the issues decided in the former may not be identical to those in the latter, *Auqui v Seven Thirty One Ltd. Partnership*, 22 NY3d 246, 980 NYS2d 345, 3 NE3d 682 (2013) (reversing upon reargument *Auqui v Seven Thirty One Ltd. Partnership*, 20 NY3d 1035, 962 NYS2d 579, 985 NE2d 889 (2013)). Thus, an administrative finding regarding the duration of a claimant's work-related disability was not binding in the claimant's subsequent plenary personal injury action, since the focus of the workers' compensation in-

quiry is the claimant's inability to work while the focus of the negligence action is broader, encompassing all of the enduring consequences of the accident (including lost income and future medical expenses), *id*; see also *Balcerak v Nassau*, 94 NY2d 253, 701 NYS2d 700, 723 NE2d 555 (1999) (no identity of issue between Workers' Compensation Board's determination that injury was work-related and application for enhanced benefits under General Municipal Law § 207-c).

The Board's finding is not binding on a defendant who testified at the hearing where he had no control over the direction of his own testimony, no opportunity to cross-examine, and was not represented by counsel, *Liss v Trans Auto Systems, Inc.*, 68 NY2d 15, 505 NYS2d 831, 496 NE2d 851 (1986). In addition, a determination of the Board does not preclude a defendant from raising the Workers' Compensation defense if the defendant was not a party to the proceeding before the Board, *Marange v Slivinski*, 257 AD2d 427, 684 NYS2d 199 (1st Dept 1999).

The primary jurisdiction of the Workers' Compensation Board obtains where the issue of employment depends upon the resolution of issues of fact or mixed questions of fact and law, *O'Rourke v Long*, 41 NY2d 219, 391 NYS2d 553, 359 NE2d 1347 (1976); *Butler v N & M Contracting Co.*, 199 AD2d 590, 604 NYS2d 334 (3d Dept 1993). However, deference to the Board is not required where the issues, including whether the case involves an intentional tort, may be determined as a matter of law, *Quizhpi v Tjernlund Products, Inc.*, 309 AD2d 670, 766 NYS2d 342 (1st Dept 2003); *Acevedo v Consolidated Edison Co. of New York, Inc.*, 189 AD2d 497, 596 NYS2d 68 (1st Dept 1993); *Firestein v Kingsbrook Jewish Medical Center*, 137 AD2d 34, 528 NYS2d 85 (2d Dept 1988).

C. Raising Board's Jurisdiction in Common Law Action

O'Rourke v Long, 41 NY2d 219, 391 NYS2d 553, 359 NE2d 1347 (1976), and *Murray v New York*, 43 NY2d 400, 401 NYS2d 773, 372 NE2d 560 (1977), establish the basic rule governing actions which involve the exclusivity of the remedy under the Workers' Compensation Law: "[W]henever it appears or will appear from a plaintiff's pleading, bill of particulars or the facts that the plaintiff was an employee [or co-employee] of the defendant, the obligation of alleging and, in any event, of proving noncoverage falls on the plaintiff," *Murray v New York*, *supra*. Although *O'Rourke* and *Murray* place the burden of pleading on the plaintiff in the first instance, the cases indicate that plaintiffs often overlook or ignore that burden. In the absence of an allegation in the complaint addressing the workers' compensation issue, the defendant is expected to take some step to assert the exclusivity of workers' compensation as a bar to the suit. Thus, whether the plaintiff satisfies the burden of pleading the inapplicability of the Workers' Compensation Law, the defendant should move to dismiss the action by a pre-answer motion under CPLR 3211(a)(7) or raise the Workers' Compensation Law as a "defense" in the answer, CPLR 3018(b), and then move to dismiss under CPLR 3212 or for a stay under CPLR 2201.

Regardless of how the exclusivity question is presented, a judicial determination that the Workers' Compensation Law does not apply is appropriate only when the question can be decided as a matter of law, see *O'Rourke v Long*, 41 NY2d 219, 391 NYS2d 553, 359 NE2d 1347 (1976); *Schauder v Pfeifer*, 173 AD2d 598, 570 NYS2d 179 (2d Dept 1991). Otherwise, the case must be dismissed or stayed and the parties referred to the Workers' Compensation Board for a determination whether the plaintiff was an employee and whether the injury occurred in the course of employment, *Rohan v North Main Street Development Corp.*, 146 AD2d 687, 537 NYS2d 51 (2d Dept 1989); *Heifetz v Metropolitan Jewish Geriatric Center*, 135 AD2d 498, 521 NYS2d 739 (2d Dept 1987). Where compensation proceedings are pending but the Board has not made a final determination, a stay of the action, pending completion of the Board's proceedings, is appropriate, *Smalls v Kaufmann*, 112 AD2d 986, 492 NYS2d 644 (2d Dept 1985).

If neither the plaintiff nor the defendant follows the procedure outlined above, the exclusivity question may still be raised by a motion to amend the answer, CPLR 3025(b), (c); *Murray v New York*, 43 NY2d 400, 401 NYS2d 773, 372 NE2d 560 (1977), a motion that should ordinarily be granted, see *Shine v Duncan Petroleum Transport, Inc.*, 60 NY2d 22, 466 NYS2d 672, 453 NE2d 1089 (1983) ("leave to amend pleadings to include such defense should be freely granted, even in midtrial, in the absence of operative prejudice"). The court has discretion in determining whether to allow the answer to be amended so as to assert workers' compensation as a bar, *Caceres v Zorbas*, 74 NY2d 884, 547 NYS2d 834, 547 NE2d 89 (1989). However, plaintiff has the burden of proving that he or she was prejudiced by the failure to timely assert the statute and that such prejudice could have been avoided had the statute been timely asserted, *Caceres v Zorbas*, *supra*. In *Caceres*, the court held that defendant's motion to amend, made after a jury had been selected, was properly granted since plaintiff was aware of his employment status from the outset, had received workers' compensation benefits, and failed to demonstrate prejudice resulting from defendant's delay.

If the defendant moves to amend the answer without also requesting a stay of the action, the trial court may grant the amendment and allow the suit to continue, resolving the Workers' Compensation Law question as part of the trial, see *Shine v Duncan Petroleum Transport, Inc.*, 60 NY2d 22, 466 NYS2d 672, 453 NE2d 1089 (1983); *Murray v New York*, 43 NY2d 400, 401 NYS2d 773, 372 NE2d 560 (1977). Query, however, whether under these circumstances the trial court may, *sua sponte*, stay the action and refer the matter to the Board. Such a discretionary disposition of the case seems consistent with the strong policy reflected in *O'Rourke* and ensuing decisions by the Court of Appeals, and not inconsistent with the view that exclusivity of the Workers' Compensation Law approaches being a limitation on subject matter jurisdiction, see CPLR 3211(a)(2), (7), (e) (lack of subject matter jurisdiction [(a)(2)], may be raised by the court without the suggestion of any party); see also *Murray v New York*, 43 NY2d 400, 401 NYS2d 773, 372

NE2d 560 (1977) (“Although the issue may be waived . . ., such waiver is accomplished only by a defendant ignoring the issue to the point of final disposition itself and, in this sense, it is not the kind of subject matter jurisdiction deficiency which ousts a court of competence to decide the case”); *Levine v State*, 105 AD2d 289, 484 NYS2d 282 (3d Dept 1985).

If the defendant moves to add the workers’ compensation question, and requests a stay, the cases admit of only two dispositions if defendant’s motion is granted: *first*, grant of the stay, leaving the ultimate disposition of the case dependent on the outcome of proceedings before the Workers’ Compensation Board; *second*, denial of the stay, and resolution of the workers’ compensation question upon the trial. The second alternative is proper only when it can be said that a stay would work “operative prejudice” upon the plaintiff; *Shine v Duncan Petroleum Transport, Inc.*, 60 NY2d 22, 466 NYS2d 672, 453 NE2d 1089 (1983), and *Murray v New York*, 43 NY2d 400, 401 NYS2d 773, 372 NE2d 560 (1977), serve to illustrate the meaning of “operative prejudice.” In *Shine*, the defendant raised the Workers’ Compensation Law question as grounds for a stay on the very morning that the jury selection was to begin. In *Murray*, defendant raised the issue while on trial, immediately before the close of the plaintiff’s evidence in chief. In both cases, a proper exercise of discretion required resolution of the issue in the action, rather than, at so late a stage, a referral of the dispute to the Board.

The pattern charge, PJI 2:218, is meant to be used when it becomes appropriate to submit the Workers’ Compensation Law issue to the jury.

D. When Suit Against Employer Not Barred

There are certain instances in which an injured employee is not barred from maintaining a civil damage action against the employer. The principal exceptions are: (a) the employer committed an intentional tort; (b) the employer was not required to obtain compensation coverage and did not do so voluntarily; and (c) the employer was required to have compensation coverage but failed to obtain it. These exceptions, and other related issues, are discussed below. Note, further, that the Workers’ Compensation Law does not preclude suit against the employer where the employee was not injured in the course and scope of employment, see PJI 2:218 for charge and comment on this issue.

1. Intentional Torts

Workers’ compensation is not a bar to an action against the employer for an intentional and deliberate tort committed by or at the direction of the employer, *Werner v State*, 53 NY2d 346, 441 NYS2d 654, 424 NE2d 541 (1981); *Jones v State*, 33 NY2d 275, 352 NYS2d 169, 307 NE2d 236 (1973); *Finch v Swingly*, 42 AD2d 1035, 348 NYS2d 266

(4th Dept 1973). Where an intentional tort has been committed by the employer, the injured employee has the option to pursue either a civil damage remedy or workers' compensation, but not both, and voluntary acceptance of compensation benefits constitutes a bar to the maintenance of a civil damage action, *Cunningham v State*, 60 NY2d 248, 469 NYS2d 588, 457 NE2d 693 (1983); *Werner v State*, 53 NY2d 346, 441 NYS2d 654, 424 NE2d 541 (1981); see *Mylroie v GAF Corp.*, 81 AD2d 994, 440 NYS2d 67 (3d Dept 1981), *aff'd* for reasons in AD opinion, 55 NY2d 893, 449 NYS2d 21, 433 NE2d 1269 (1982). A finding by the Workers' Compensation Board that the injury was accidentally incurred is conclusive in any civil action under principles of collateral estoppel, *O'Connor v Midiria*, 55 NY2d 538, 450 NYS2d 455, 435 NE2d 1070 (1982).

The civil damage remedy is only available for intentional or deliberate tortious conduct by the employer. Even reckless or grossly negligent conduct is insufficient, *Bardere v Zafir*, 102 AD2d 422, 477 NYS2d 131 (1st Dept 1984), *aff'd*, 63 NY2d 850, 482 NYS2d 261, 472 NE2d 37 (1984); *Acevedo v Consolidated Edison Co. of New York, Inc.*, 189 AD2d 497, 596 NYS2d 68 (1st Dept 1993); *Orzechowski v Warner-Lambert Co.*, 92 AD2d 110, 460 NYS2d 64 (2d Dept 1983); see also *Briggs v Pymm Thermometer Corp.*, 147 AD2d 433, 537 NYS2d 553 (2d Dept 1989); *Ferrara v American ACMI*, 122 AD2d 930, 505 NYS2d 964 (2d Dept 1986). In order for a complaint to neutralize the Workers' Compensation Law's exclusivity of remedy, it must allege that the employer engaged in intentional or deliberate conduct "directed at causing harm to this particular employee," *Mylroie v GAF Corp.*, 81 AD2d 994, 995, 440 NYS2d 67 (3d Dept 1981), *aff'd*, 55 NY2d 893, 449 NYS2d 21, 433 NE2d 1269 (1982); *Patterson v Salvation Army*, 203 AD2d 87, 610 NYS2d 42 (1st Dept 1994); *Acevedo v Consolidated Edison Co. of New York, Inc.*, 189 AD2d 497, 596 NYS2d 68 (1st Dept 1993); *Bardere v Zafir*, *supra*.

2. Employment not Covered by Workers' Compensation Law

If the employment is one in which workers' compensation coverage is not required and the employer has not voluntarily obtained coverage, see WCL § 3(1), Group 19, 50–53, an injured employee may sue the employer for common law negligence, and be met with the comparative fault defense, see CPLR Art. 14-A; PJI 2:36. In addition to the common law action, the employee may also proceed under the Employers' Liability Law, which was enacted long before the adoption in 1975 of comparative fault principles in New York. Under the Employers' Liability Law the defense of assumption of the risk is limited and defined by § 4, and, as under CPLR 1412, the burden of pleading and proving the plaintiff's fault is placed on the defendant, ELL § 5. Although the Employers' Liability Law was passed in the era when the plaintiff's fault or assumption of the risk would have barred any recovery, it would appear that principles of comparative fault are applicable to suits governed by this statute.

3. Employment Covered by Workers' Compensation Law, but Employer Has Not Secured Coverage

If the employment is one in which workers' compensation coverage is required and the employer has failed to obtain it, the injured employee may elect to claim compensation under the Workers' Compensation Law or sue the employer for damages, *Terry v Maurice Pastries, Inc.*, 34 AD3d 328, 826 NYS2d 2 (1st Dept 2006). If the employee sues the employer, then WCL § 11 provides that "it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee." Pursuant to Workers' Compensation Law § 21(1), an assault which arose in the course of employment is presumed to have arisen out of the employment, absent substantial evidence that the assault was motivated by purely personal animosity, see *Rosen v First Manhattan Bank*, 84 NY2d 856, 617 NYS2d 455, 641 NE2d 1073 (1994). Thus, under WCL § 11 the defense of comparative fault is presently unavailable to the employer who has failed to provide workers' compensation insurance coverage. The employer's failure, however, does not open the door to suit against a co-employee, *Burke v Torres*, 120 AD2d 283, 509 NYS2d 11 (1st Dept 1986).

4. Impairment of Employee's Right to Sue Third Party

In *Coley v Arnot Ogden Memorial Hosp.*, 107 AD2d 67, 485 NYS2d 876 (3d Dept 1985), it was held that workers' compensation does not preclude a common law action by an employee against an employer based, not on the compensable injury, but upon a separate cause of action resulting from the impairment of the employee's legal rights against a third party; see *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41, 682 NYS2d 452 (2d Dept 1998); *Vaughn v New York*, 201 AD2d 556, 607 NYS2d 726 (2d Dept 1994).

5. Uniformed Public Servants

Firefighters

General Municipal Law § 205-a creates a cause of action "in addition to any other right of action or recovery" for the "injury or death or a disease that results in death" of "any officer, member, agent or employee of any fire department injured, or whose life is lost while in the discharge or performance of any duty" when the injury or loss of life "occurs directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city government or any and all of their departments, divisions and bureaus." Recovery is permitted under the statute only if the local law or regulation at issue either imposes clear legal duties or constitutes part of a

well-developed body of law and regulation with positive commands that mandate the performance or nonperformance of specific acts, *Galapo v New York*, 95 NY2d 568, 721 NYS2d 857, 744 NE2d 685 (2000). New York City Administrative Code §§ 27-127 and 27-128 (now codified together in § 28-301.1), which impose on owners the responsibility to keep all buildings maintained in safe condition and to keep all service equipment, means of egress, devices and safeguards that are required by law in good working order, are sufficient predicates for liability under General Municipal Law § 205-a, *Pirraglia v CCC Realty NY Corp.*, 35 AD3d 234, 828 NYS2d 6 (1st Dept 2006); *Brennan v New York City Housing Authority*, 302 AD2d 483, 756 NYS2d 73 (2d Dept 2003)); but see *Reddy v 369 Lexington Ave. Co., L.P.*, 31 AD3d 732, 819 NYS2d 776 (2d Dept 2006) (for purposes of common-law negligence action against property owner, New York City Administrative Code §§ 27-127 and 27-128 are nonspecific and reflect only general duty to maintain premises in safe condition); *Jang Hee Lee v Sung Whun Oh*, 3 AD3d 473, 771 NYS2d 134 (2d Dept 2004) (same). The Court of Appeals, however, has yet to pass on the issue of whether § 27-127 or § 27-128 (now codified together in § 28-301.1) is a sufficient independent predicate to support a General Municipal Law § 205-a claim, see *Cusumano v New York*, 15 NY3d 319, 910 NYS2d 410, 937 NE2d 74 (2010). The following cases discuss the use of other local laws and regulations as predicates for liability under General Municipal Law § 205-a: *Donna Prince L. v Waters*, 48 AD3d 1137, 850 NYS2d 803 (4th Dept 2008) (National Interagency Incident Management System-Incident-Command System, which was been adopted in New York by executive order, is proper predicate for liability under § 205-a); *Foiles v V.L.J. Const. Corp.*, 17 AD3d 297, 794 NYS2d 27 (1st Dept 2005) (New York City Administrative Code § 27-217, which prohibits changes in occupancy that are inconsistent with certificates of occupancy, and § 27-2081, which prohibits basement units absent approval from a specified agency, are proper predicates for liability under § 205-a); *Driscoll v Tower Associates*, 16 AD3d 311, 793 NYS2d 11 (1st Dept 2005) (provisions of former State Fire Prevention and Building Code, dealing with general precautions to be taken to prevent fires [9 NYCRR § 1191.1a] and the prohibition against maintaining fire hazards [9 NYCRR § 1191.1e], may serve as predicate to claim under § 205-a); *LoTempio v Buffalo*, 6 AD3d 1197, 775 NYS2d 717 (4th Dept 2004) (statute covers civilian employee of fire department) (abrogated on other ground by, *Weiner v New York*, 19 NY3d 852, 947 NYS2d 404, 970 NE2d 427 (2012)); *Brennan v New York City Housing Authority*, 302 AD2d 483, 756 NYS2d 73 (2d Dept 2003) (9 NYCRR 1196.1(b) [provision of State Uniform Fire Prevention and Building Code requiring prompt notification to fire department of gas leak] may serve as predicate to claim under GML § 205-a); *McGovern v New York*, 294 AD2d 148, 742 NYS2d 218 (1st Dept 2002) (OSHA regulations that require protective clothing for firefighter's head, body and extremities can serve as predicate to claim under GML § 205-a); *Hayes v New York*, 264 AD2d 610, 695 NYS2d 328 (1st Dept 1999) (Multiple Dwelling Law § 78 is valid predicate for GML § 205-a liability); *Scollin v Theater for New City Foundation, Inc.*, 229 AD2d 355, 646 NYS2d 323 (1st Dept 1996) (industrial code provision requiring "substantial cover fastened in

place” over every hazardous opening into which person may step or fall was sufficient predicate for liability under GML § 205-a); but see *Link v New York*, 34 AD3d 757, 825 NYS2d 518 (2d Dept 2006) (Occupational Safety and Health Administration [OSHA] regulations apply to environmental and construction hazards and therefore do not constitute “a well-developed body of law containing particularized mandates or imposing clear legal dut[ies]” on police officer’s municipal employer). The ordinances, rules or requirements allegedly violated must be specifically pleaded in the complaint, *Maisch v New York*, 181 AD2d 467, 581 NYS2d 181 (1st Dept 1992); *Brophy v Generoso*, 137 AD2d 478, 524 NYS2d 226 (2d Dept 1988), and separately submitted to the jury, see *Gannon v Royal Properties*, 285 App Div 131, 136 NYS2d 129 (1st Dept 1954), *aff’d*, 309 NY 819, 130 NE2d 616 (1955).

State agencies are subject to local laws and regulations when acting in a proprietary, as opposed to governmental, capacity and, their alleged failure to properly maintain premises in accordance with the New York City Administrative Code and Fire Department rules was proprietary in nature, *Dempsey v Manhattan and Bronx Surface Transit Operating Authority*, 214 AD2d 334, 625 NYS2d 133 (1st Dept 1995). Although Public Authorities Law § 1266(8) exempts the New York City Transit Authority’s facilities and operations from local jurisdiction and from application of the local laws that conflict with the Public Authorities Law, the statute does not preclude a General Municipal Law § 205-a action based on a violation of those laws, at least where no conflict exists, *Terranova v New York City Transit Authority*, 49 AD3d 10, 850 NYS2d 123 (2d Dept 2007). Thus, a firefighter was permitted to seek recovery from the Transit Authority under General Municipal Law § 205-a for a violation of New York City Administrative Code §§ 27-127 and 27-128, since those provisions require owners to maintain premises and facilities in safe condition and defendant owner did not cite any provision of the Public Authorities Law or related regulations that is inconsistent with that duty, *Terranova v New York City Transit Authority*, *supra*. In any event, by its terms, the exemption from local laws provided by Public Authorities Law § 1266 does not apply to facilities devoted to purposes other than transportation such as an ejector pump room at a bus depot, *Terranova v New York City Transit Authority*, *supra*.

Defendants are liable under General Municipal Law § 205-a when the alleged violation of a local law or regulation has a practical or reasonable connection to an injury sustained by a firefighter, *Terranova v New York City Transit Authority*, 49 AD3d 10, 850 NYS2d 123 (2d Dept 2007); *Malzacher v 100 Audubon Corp.*, 276 AD2d 402, 715 NYS2d 47 (1st Dept 2000); *Dempsey v Manhattan and Bronx Surface Transit Operating Authority*, 214 AD2d 334, 625 NYS2d 133 (1st Dept 1995); see *O’Grady v New York City Housing Authority*, 259 AD2d 442, 687 NYS2d 352 (1st Dept 1999) (violations of various provisions of title 27 of New York City Administrative Code provide basis for GML § 205-a liability). Further, recovery under General Municipal Law § 205-a does not require the same proof of actual or constructive notice as would be

required for a common-law negligence claim based upon an unsafe condition on the property, *Cusumano v New York*, 63 AD3d 5, 877 NYS2d 153 (2d Dept 2009), rev'd on other grounds, 15 NY3d 319, 910 NYS2d 410, 937 NE2d 74 (2010). Rather, the statute requires only that the circumstances surrounding the failure to comply with the local law or regulation indicate that it was a result of “neglect, omission, willful or culpable negligence[] on the defendant’s part,” *Terranova v New York City Transit Authority*, supra (quoting *Lusenskas v Axelrod*, 183 AD2d 244, 592 NYS2d 685 (1st Dept 1992)); see *Cusumano v New York*, supra. In *Malzacher v 100 Audubon Corp.*, supra, the court reversed a judgment for defendant on the ground that the verdict was against the weight of the evidence because defendant’s expert failed to clearly rebut the opinion of plaintiff’s expert that the absence of a self-closing door required by the Administrative Code of the City of New York was reasonably connected to plaintiff’s injury.

This section was amended in 1996 to provide that the violation of a statute, ordinance, rule or regulation gives rise to a cause of action regardless of whether the injury or death is caused by the violation of a provision that codifies a common law duty, and regardless of whether the injury or death is caused by a violation of a provision prohibiting activities that increase the dangers inherent in the work of firefighters, see *Farrington v New York*, 240 AD2d 697, 659 NYS2d 318 (2d Dept 1997); *Clow v Fisher*, 228 AD2d 11, 652 NYS2d 870 (3d Dept 1997); *Johnson v Jack*, 233 AD2d 807, 650 NYS2d 1017 (3d Dept 1996). In addition, the section was amended to apply to any injury or death “at any time or place,” (emphasis added), thus overruling the judicially created limitation to premises defects enunciated in *Kenavan v New York*, 70 NY2d 558, 523 NYS2d 60, 517 NE2d 872 (1987).

The firefighter’s rule does not apply to products liability actions sounding in negligence, breach of warranty and products liability brought by a volunteer firefighter against a manufacturer of firefighters’ safety equipment that failed to provide adequate protection against hazards foreseeably encountered by firefighters during rescue activities, *Shepard v Morning Pride Mfg., Inc.*, 217 AD2d 308, 636 NYS2d 173 (3d Dept 1996).

Plaintiff’s acceptance of workers’ compensation benefits precludes an action against his or her employer under General Municipal Law § 205-a, *Weiner v New York*, 19 NY3d 852, 947 NYS2d 404, 970 NE2d 427 (2012). The practical effects of *Weiner* may be narrow, at least in New York City, because City firefighters and police officers are not covered by the Workers’ Compensation Law, but by the more generous and non-exclusive provisions of the Administrative Code of the City of New York, *Weiner v New York*, 84 AD3d 140, 922 NYS2d 160 (2d Dept 2011), aff’d, 19 NY3d 852, 947 NYS2d 404, 970 NE2d 427 (2012).

Police Officers

General Municipal Law § 205-e creates a cause of action in favor of

“any officer, member, agent or employee of any police department injured, or whose life may be lost while in the discharge or performance at any time or place of any duty imposed by the police commissioner, police chief or other superior officers of the police department” as a result of “any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders or requirements of the federal, state, county, village, town or city governments or of any and all their departments, divisions and bureaus.” General Municipal Law § 205-e creates a cause of action for violations of federal law and the laws of New York State but does not create a cause of action solely for violations of the laws of other states, *Hurley v State of Conn.*, 226 AD2d 432, 640 NYS2d 602 (2d Dept 1996).

Section 205-e affords police officers a right of action that firefighters have long had under § 205-a, *Weiner v New York*, 84 AD3d 140, 922 NYS2d 160 (2d Dept 2011), *aff'd*, 19 NY3d 852, 947 NYS2d 404, 970 NE2d 427 (2012); see *Schiavone v New York*, 92 NY2d 308, 680 NYS2d 445, 703 NE2d 256 (1998); *Desmond v New York*, 88 NY2d 455, 646 NYS2d 492, 669 NE2d 472 (1996). Section 205-e does not “expand or restrict any right afforded to or any limitations imposed” by virtue of the Workers’ Compensation Law, see *Diegelman v Buffalo*, 28 NY3d 231, 43 NYS3d 803, 66 NE3d 673 (2016); *Weiner v New York*, 19 NY3d 852, 947 NYS2d 404, 970 NE2d 427 (2012). Thus, a police officer who receives workers’ compensation benefits is prohibited from suing his or her employer under GML § 205-e, see *Diegelman v Buffalo*, *supra*; *Weiner v New York*, 19 NY3d 852, 947 NYS2d 404, 970 NE2d 427 (2012). However, a police officer’s receipt of GML § 207-c benefits (available outside the New York), which afford an officer injured in the line of duty with, among other things, the payment of his or her full salary, does not bar an action under GML § 205-e against the employer, *Diegelman v Buffalo*, *supra*. A police officer’s estate was not entitled to recover under § 205-e for a shooting death caused by an allegedly improperly supervised probationer because the municipality owed no special duty to the officer, *Brinkerhoff v St. Lawrence*, 70 AD3d 1272, 897 NYS2d 269 (3d Dept 2010).

The statutory action is available to police officers; it is not available to peace officers, *Sierk v Frazon*, 32 AD3d 1153, 821 NYS2d 689 (4th Dept 2006) (peace officer employed by municipal housing authority); *Pane v New York*, 177 AD2d 688, 577 NYS2d 68 (2d Dept 1991) (court officers).

To make out a claim under section 205-e, a plaintiff must (1) identify the statute or ordinance with which the defendant failed to comply, (2) describe the manner in which the police officer was injured, and (3) set forth those facts from which it may be inferred that the defendant’s negligence directly or indirectly caused the harm, *Gammons v New York*, 24 NY3d 562, 2 NYS3d 45, 25 NE3d 958 (2014); *Williams v New York*, 2 NY3d 352, 779 NYS2d 449, 811 NE2d 1103 (2004); *Byrne v Nicosia*, 104 AD3d 717, 961 NYS2d 261 (2d Dept 2013).

The following cases have held statutory and regulatory provisions sufficient predicates for liability under General Municipal Law § 205-e: *Gonzalez v Iocovello*, 93 NY2d 539, 693 NYS2d 486, 715 NE2d 489 (1999) (VTL §§ 1104[b], [e]); *Ruotolo v State*, 83 NY2d 248, 609 NYS2d 148, 631 NE2d 90 (1994) (alleged violation of Exec. Law § 259-1[3][a][i] and 9 NYCRR § 8004.2[d][2] in failing to file detainer warrant for parole violator who fatally shot police officer); *Lewis v Palazzolo*, 143 AD3d 783, 40 NYS3d 138 (2d Dept 2016) (violation of 302.3 of the 2007 Property Maintenance Code of the State of New York [19 NYCRR 1226.1], which states that “[a]ll sidewalks, walkways, stairs, driveways, parking spaces and similar areas shall be kept in a proper state of repair, and maintained free from hazardous conditions,” and Hempstead Town Code § 181-11 and East Rockaway Village Code § 250-27, which require property owners to keep sidewalks in good and safe repair); *Mulham v New York*, 110 AD3d 856, 973 NYS2d 314 (2d Dept 2013) (§ 153.19 of the New York City Health Code, which requires owners, agents and occupants to keep building and lots clean and free of garbage, litter, offensive matter and accumulations of water); *Byrne v Nicosia*, 104 AD3d 717, 961 NYS2d 261 (2d Dept 2013) (violation of 302.3 of the 2007 Property Maintenance Code of the State of New York [19 NYCRR 1226.1]); *Jones v Fried*, 21 AD3d 1059, 803 NYS2d 593 (2d Dept 2005) (violations of 12 NYCRR §§ 23-1.7[e][2] and 23-2.1[b], which require that construction work areas be kept free of debris); *Kelly v New York*, 240 AD2d 709, 661 NYS2d 515 (2d Dept 1997) (violations of VTL §§ 1104 and 1144); *Gleavy v New York*, 240 AD2d 700, 659 NYS2d 504 (2d Dept 1997) (VTL § 1144[b]); *Hudson v Boutin*, 239 AD2d 624, 656 NYS2d 781 (3d Dept 1997) (violation of VTL provisions in general); *Alberti v Eastman Kodak Co.*, 204 AD2d 1022, 612 NYS2d 729 (4th Dept 1994) (violation of 6 NYCRR 211.2, which forbids emission of injurious air contaminants); *Malsky v Towner*, 196 AD2d 532, 601 NYS2d 310 (2d Dept 1993) (violation of VTL and Penal Law provisions in general); *Costantini v Benedetto*, 190 AD2d 888, 593 NYS2d 117 (3d Dept 1993) (violations of Highway Law § 103-a and 17 NYCRR part 131, requiring removal of obstructions from highways).

The New York City Police Department Patrol Guide and Police Department Administrative Guide are not duly enacted bodies of laws or regulations that give rise to civil liability under General Municipal Law § 205-e, *Galapo v New York*, 95 NY2d 568, 721 NYS2d 857, 744 NE2d 685 (2000); *Forster v New York*, 309 AD2d 578, 765 NYS2d 598 (1st Dept 2003); *Williams v New York*, 2 NY3d 352, 779 NYS2d 449, 811 NE2d 1103 (2004); *Brocato v New York*, 294 AD2d 281, 743 NYS2d 19 (1st Dept 2002) (neither Departmental Patrol Guide nor Interim Order can serve as basis for GML § 205-e claim); see *Capotosto v New York*, 288 AD2d 419, 734 NYS2d 102 (2d Dept 2001). Further, neither the Patrol Guide nor the Police Department training lessons and videos provides a predicate for alleging a Labor Law § 27-a(3) violation as a basis for a General Municipal Law § 205-e claim, *Forster v New York*, supra. A claim pursuant to General Municipal Law § 205-e cannot be predicated on an alleged violation of the New York City Fire Department’s All Units Circular, No. 180 (Revised), since that directive imposes

neither clear legal duties nor constitutes part of a well developed body of law and regulation with positive commands that mandate the performance or nonperformance of specific acts, *Von Ancken v New York*, 245 AD2d 286, 666 NYS2d 16 (2d Dept 1997). The rules and regulations of a public benefit corporation created by the state legislature cannot serve as a predicate for liability under General Municipal Law § 205-e because such rules and regulations are not included within the statute, *Stella v New York City Transit Authority*, 240 AD2d 167, 657 NYS2d 702 (1st Dept 1997). Therefore, the rules and regulations of the New York City Transit Authority, a public benefit corporation created by the State Legislature, not a department or division of the federal, state or city government, cannot serve as a predicate for a GML § 205-e cause of action, *id.* Section 7-201(c)(2) of the Administrative Code of the City of New York, known as the “Pothole Law,” cannot serve as the predicate for an action under GML § 205-e because it does not impose upon the city an affirmative duty to repair, *Jackson v New York*, 240 AD2d 708, 659 NYS2d 321 (2d Dept 1997).

General Municipal Law § 205-e contains no categorical exemption precluding lawsuits derived from fellow officer conduct, *id.* However, General Obligations Law § 11-106, which recognizes a distinct right of action for police officers and fire fighters injured by the negligence or intentional conduct of any person, does not allow for a right of action based on the negligence or intentional conduct of an employer or co-employee, *id.* This limitation has been extended to prevent a State Trooper working with municipal law enforcement officers as part of a joint task force from suing the municipality for injuries allegedly sustained as a result of the acts or omissions of the municipal officers, *Rodriguez v Rockland*, 43 AD3d 1026, 842 NYS2d 488 (2d Dept 2007); see *Connery v Albany*, 73 AD3d 198, 898 NYS2d 298 (3d Dept 2010) (General Obligations Law § 11-106 barred claim by city police officer working with Sheriff’s employees in drug interdiction operation).

Firefighters and Police Officers

In actions based on General Municipal Law §§ 205-a and 205-e, the pleadings must specify the statutes, ordinances, codes, rules, or regulations that defendant has allegedly violated, describe the manner in which the plaintiff’s injuries occurred and set forth facts from which it may be inferred that the defendant’s negligence directly or indirectly caused the harm to the plaintiff, see *Williams v New York*, 2 NY3d 352, 779 NYS2d 449, 811 NE2d 1103 (2004); *Giuffrida v Citibank Corp.*, 100 NY2d 72, 760 NYS2d 397, 790 NE2d 772 (2003); *Byrne v Nicosia*, 104 AD3d 717, 961 NYS2d 261 (2d Dept 2013); *Link v New York*, 34 AD3d 757, 825 NYS2d 518 (2d Dept 2006); *Jackson v New York*, 240 AD2d 708, 659 NYS2d 321 (2d Dept 1997). To establish a violation of General Municipal Law §§ 205-a or 205-e, plaintiff must prove that the defendant violated a rule or requirement that is part of a well developed body of law and regulations with positive commands that mandate the performance or non-performance of specific acts, *Galapo v New York*, 95 NY2d 568, 721 NYS2d 857, 744 NE2d 685 (2000); *Desiderio v New York*, 236 AD2d 224, 653 NYS2d 337 (1st Dept 1997); see *Gammons v*

New York, 24 NY3d 562, 2 NYS3d 45, 25 NE3d 958 (2014); *Desmond v New York*, 88 NY2d 455, 646 NYS2d 492, 669 NE2d 472 (1996); *Malenczak v New York*, 265 AD2d 532, 697 NYS2d 138 (2d Dept 1999) (various provisions of New York City Police Department Patrol Guide Procedures were not part of well-developed body of law and did not impose clear legal duties mandating performance of certain acts). In *Gammons v New York*, supra, the Court observed that a statute can serve as a predicate for a cause of action under GML § 205-e when it contains either a particularized mandate or a clear legal duty. A statute or other requirement that provides for a general duty may serve as a predicate for a GML § 205-e cause of action, provided it imposes a clear legal duty, *id.* Moreover, where criminal liability may be imposed, the courts are “hard put to find a more well-developed body of case law,” *Williams v New York*, 2 NY3d 352, 779 NYS2d 449, 811 NE2d 1103 (2004); see *Lewis v Palazzolo*, 143 AD3d 783, 40 NYS3d 138 (2d Dept 2016); *Mulham v New York*, 110 AD3d 856, 973 NYS2d 314 (2d Dept 2013).

In *Desmond*, plaintiff based his General Municipal Law § 205-e claim on the violation of a police department directive governing high speed auto pursuit, *Desmond v New York*, 88 NY2d 455, 646 NYS2d 492, 669 NE2d 472 (1996). The Court held that the internal memorandum did not impose any clear legal duties and was not part of a well developed body of law and regulation with positive commands that mandate the performance or non-performance of specific acts, *id.* The directive simply authorized the officer to exercise a measure of guided discretion with certain specific criteria, *id.* Similarly, in *Galapo v New York*, 95 NY2d 568, 721 NYS2d 857, 744 NE2d 685 (2000), the Court held that the New York City Police Department Patrol Guide is not a duly enacted body of law or regulations that give rise to civil liability under General Municipal Law § 205-e; see *Brocato v New York*, 294 AD2d 281, 743 NYS2d 19 (1st Dept 2002) (neither Departmental Patrol Guide nor Interim Order can serve as basis for GML § 205-e claim).

An OSHA regulation that is part of a well developed body of law and imposes a clear legal duty can serve as a predicate to a claim under GML §§ 205-a or 205-e, see *Gammons v New York*, 24 NY3d 562, 2 NYS3d 45, 25 NE3d 958 (2014) (Labor Law § 27-a(3)(a)(1), which adopts workplace safety standards of OSHA, may serve as predicate for GML § 205-e claim); *McGovern v New York*, 294 AD2d 148, 742 NYS2d 218 (1st Dept 2002) (OSHA regulations that require protective clothing for firefighter’s head, body and extremities can serve as predicate to claim under GML § 205-a); see also *Blake v New York*, 109 AD3d 503, 971 NYS2d 4 (2d Dept 2013) (Labor Law § 27-a(3) may serve as proper predicate for GML § 205-e claim, but plaintiff must allege injuries resulting from “recognized hazard” within the meaning of the Labor Law); *Link v New York*, 34 AD3d 757, 825 NYS2d 518 (2d Dept 2006) (certain unspecified OSHA regulations applying to environmental and construction hazards did not constitute a well-developed body of law containing particularized mandates or imposing clear legal duties on police officer’s municipal employer).

In *Gonzalez v Iocovello*, 93 NY2d 539, 693 NYS2d 486, 715 NE2d

489 (1999), the Court held that a cause of action under General Municipal Law § 205-e may be based on a fellow officer's violation of Vehicle & Traffic Law § 1104(e). The court held that a state statute can serve as a predicate when it contains either a particularized mandate or a clear legal duty, so long as the statute is part of a well developed body of law and regulation, *id.* VTL § 1104 satisfactorily qualifies in this regard and, therefore, may serve as a basis for liability under General Municipal Law § 205-e, *id.* In the companion case to *Gonzalez*, *Cosgriff v New York*, the Court held that §§ 2903(b)(2) and 2904 of the New York City Charter and §§ 7-201(c)(2) and 19-152 of the Administrative Code of the City of New York, taken together, can form a predicate for a claim under General Municipal Law § 205-e, *id.* Since these provisions are part of a well developed body of law and impose a clear legal duty on the City to take appropriate steps to keep sidewalks in safe repair, they can serve as the basis for liability under General Municipal Law § 205-e, *id.*; see *Simons v New York*, 252 AD2d 451, 675 NYS2d 597 (1st Dept 1998) (GML § 205-e claim may be based on New York City Charter § 2903(b)). Similarly, violations of New York City Administrative Code §§ 27-1019 (construction waste control standards) and 27-1024 (competent watchmen at construction sites) can serve as a basis for liability under General Municipal Law § 205-e, *Johnson v George A. Fuller Co.*, 266 AD2d 158, 699 NYS2d 348 (1st Dept 1999).

In *Williams v New York*, 2 NY3d 352, 779 NYS2d 449, 811 NE2d 1103 (2004), the Court of Appeals held that violations of Penal Law sections that prohibit specific acts, such as assault, homicide, reckless endangerment and manslaughter, are proper predicates for liability under § 205-e. Further, the Court held, the defendant's conviction is not necessary to a finding that a violation of the Penal Law occurred for purposes of § 205-e liability. However, where no criminal charges have been brought against the defendant, a rebuttable presumption exists that there was no Penal Law violation and the § 205-e defendant is entitled to summary judgment dismissing that claim if there is a reasonable view of the evidence to support the conclusion either that no prohibited conduct took place or that a justification defense exists. Summary judgment may then be avoided only if the plaintiff comes forward with compelling evidence demonstrating a material question of fact as to whether the prohibited conduct occurred and was not justified, *id.*

The alleged violations of various sections of the New York City Administrative Code that impose upon a property owner the duty to maintain the interior of a premises in a safe condition are not sufficient predicates for a § 205-e claim against the New York City Housing Authority where the deceased, a police officer, was shot while still outside the premises, *Aversa v New York City Housing Authority*, 233 AD2d 217, 650 NYS2d 117 (1st Dept 1996). Further, § 205-e claims based on the New York City Administrative Code provisions requiring buildings to be maintained in safe condition, see § 27-127, and requiring building owners to keep the premises and facilities in safe condition, see § 27-128, could not be sustained where the only violations alleged were that a locker in a police station locker room was not properly secured

and that a detention cell in the police station was not properly configured, since the first claim implicated only a single piece of equipment and the second implicated the City's policies and procedures, *Williams v New York*, 2 NY3d 352, 779 NYS2d 449, 811 NE2d 1103 (2004). Where plaintiffs have not alleged that a landlord improperly failed to evict tenants from its premises for prior illegal conduct, Real Property Law § 231 is an insufficient predicate for a § 205-e claim against the landlord, *id.*

While some violations of the "general duty" clause of Labor Law § 27-a(1), which requires public employers to furnish a reasonably safe workplace, may furnish a ground for recovery under § 205-e, *Gammons v New York*, 24 NY3d 562, 2 NYS3d 45, 25 NE3d 958 (2014) (police officer fell from flatbed truck while loading wooden police barriers); *Balsamo v New York*, 287 AD2d 22, 733 NYS2d 431 (2d Dept 2001) (police officer stuck knee on unpadded computer console in police car); *Campbell v New York*, 31 AD3d 594, 819 NYS2d 294 (2d Dept 2006) (police officer in mounted unit thrown from horse that defendant municipality knew was dangerous), Labor Law § 27-a does not cover workplace hazards arising from the special risks faced by police officers because of the nature of police work, *Williams v New York*, 2 NY3d 352, 779 NYS2d 449, 811 NE2d 1103 (2004); see *Link v New York*, 34 AD3d 757, 825 NYS2d 518 (2d Dept 2006). Such hazards are related to the unique judgments that must be made by police supervisors responsible for minimizing danger to officers while protecting the public and were not intended to be encompassed by Labor Law § 27-a. This principle was applied in *Williams v New York*, *supra*, where police officers were shot by a prisoner while they transporting him from the police station. The prisoner had stolen the weapon from a locker that allegedly was not properly secured in the police station locker room, where the prisoner was being temporarily detained. Recovery was denied in *Williams* because the alleged hazard that caused the harm was among the special risks faced by police officers and was therefore not within the coverage of Labor Law § 27-a, *id.* Similarly, in *Ferriolo v New York*, 72 AD3d 490, 899 NYS2d 172 (1st Dept 2010), the court held that a locker room shooting resulting from fellow officer's accidental discharge of his gun was one of the risks faced by police officers in the performance of their duties and was not the type of occurrence contemplated by Labor Law § 27-a. The key inquiry in gauging whether a GML § 205-e claim may, under *Williams*, be predicated on Labor Law § 27-a appears to be whether the injury sustained by the police officer was a general occupational injury or one that arose from risks unique to police work, see *Gammons v New York*, *supra*. An injured Port Authority police officer could not rely on Labor Law § 27-a as a predicate for an action against the Port Authority based on unsafe workplace conditions, since the Port Authority is an Interstate Compact agency and is therefore not subject to the requirements of that statute, *Salvador-Pajaro v Port Authority of New York and New Jersey*, 52 AD3d 303, 860 NYS2d 47 (1st Dept 2008).

Causal relationship between the violation and the injury or death must be established, *Kenavan v New York*, 267 AD2d 353, 700 NYS2d

69 (2d Dept 1999); *Betterly v Estate of Silver*, 266 AD2d 30, 698 NYS2d 17 (1st Dept 1999); *Aversa v New York City Housing Authority*, 233 AD2d 217, 650 NYS2d 117 (1st Dept 1996), but it is not necessary to demonstrate the same degree of proximate cause as is required in a common law negligence action, *Giuffrida v Citibank Corp.*, 100 NY2d 72, 760 NYS2d 397, 790 NE2d 772 (2003); *Aldrich v Sampier*, 2 AD3d 1101, 769 NYS2d 338 (3d Dept 2003) (police officer whose vehicle was struck by passing motorist as officer began pursuit of reckless driver had raised a jury question on the issue of causative connection between accident and reckless driver's violation of law); *Dillon v New York*, 238 AD2d 302, 656 NYS2d 51 (2d Dept 1997); see *Kenavan v New York*, supra; *O'Connell v Kavanagh*, 231 AD2d 29, 662 NYS2d 1 (1st Dept 1997); *Plunkett v Emergency Medical Service of New York City*, 234 AD2d 162, 651 NYS2d 462 (1st Dept 1996). A plaintiff prosecuting a GML § 205-a claim need only establish a practical or reasonable connection between the statutory or regulatory violation and the claimed injury, *Giuffrida v Citibank Corp.* supra; *Alcalde v Riley*, 73 AD3d 1101, 902 NYS2d 149 (2d Dept 2010); *Terranova v New York City Transit Authority*, 49 AD3d 10, 850 NYS2d 123 (2d Dept 2007); see *Brennan v New York City Housing Authority*, 302 AD2d 483, 756 NYS2d 73 (2d Dept 2003). Stated otherwise, plaintiff must establish that the alleged code violations directly or indirectly caused the injuries, *Giuffrida v Citibank Corp.*, supra; *Foiles v V.L.J. Const. Corp.*, 17 AD3d 297, 794 NYS2d 27 (1st Dept 2005). In *Malzacher v 100 Audubon Corp.*, 276 AD2d 402, 715 NYS2d 47 (1st Dept 2000), the court reversed a judgment for defendant on the ground that the verdict was against the weight of the evidence because defendant's expert failed to clearly rebut the opinion of plaintiff's expert that the absence of a self-closing door required by the Administrative Code of the City of New York was reasonably connected to plaintiff's injury.

To establish entitlement to judgment as a matter of law on a GML § 205-a claim, defendant must show either that it did not violate any relevant government provision or that, if it did, the violation did not directly or indirectly cause plaintiff's injuries, *Giuffrida v Citibank Corp.*, 100 NY2d 72, 760 NYS2d 397, 790 NE2d 772 (2003). If defendant meets this initial burden, plaintiff is required to raise a question of fact that the alleged violations were a direct or indirect cause of the injury or death, *Giuffrida v Citibank Corp.*, supra; *Foiles v V.L.J. Const. Corp.*, 17 AD3d 297, 794 NYS2d 27 (1st Dept 2005). In a § 205-e case predicated on a violation of a Penal Law provision, however, the defendant is entitled to summary judgment if (a) no criminal charges were brought against the defendant, (b) a reasonable view of the evidence supports the conclusion that either no prohibited conduct occurred or that the conduct was justified and (c) the plaintiff does not come forward with compelling evidence demonstrating a material question of fact as to whether the conduct was criminal and not justified, *Williams v New York*, 2 NY3d 352, 779 NYS2d 449, 811 NE2d 1103 (2004).

Where a violation is claimed as a result of a defective condition the plaintiff must prove actual or constructive notice, although it is not nec-

essary for the plaintiff to prove such notice as would be required for recovery under a common law theory of negligence, *Mulham v New York*, 110 AD3d 856, 973 NYS2d 314 (2d Dept 2013); *Terranova v New York City Transit Authority*, 49 AD3d 10, 850 NYS2d 123 (2d Dept 2007); *Aldrich v Sampier*, 2 AD3d 1101, 769 NYS2d 338 (3d Dept 2003); *Lustenring v 98–100 Realty, LLC*, 1 AD3d 574, 768 NYS2d 20 (2d Dept 2003); *McCullagh v McJunkin*, 240 AD2d 713, 659 NYS2d 309 (2d Dept 1997); *Lusenskas v Axelrod*, 183 AD2d 244, 592 NYS2d 685 (1st Dept 1992); see *Alcalde v Riley*, 73 AD3d 1101, 902 NYS2d 149 (2d Dept 2010) (recognizing that notice of unsafe condition not required for recovery under General Municipal Law § 205-a, but holding that such notice is required for firefighter's common-law cause of action brought pursuant to General Obligations Law § 11-106). Rather, plaintiff must establish only that the circumstances surrounding the violation indicate that it was the result of neglect, omission or willful or culpable negligence on the defendant's part, *Mulham v New York*, supra. Notice of a defective condition on a staircase in an apartment building can be inferred from evidence in the record of the landlord's continuing battle with tenants who leave garbage in the common areas of the building, *O'Grady v New York City Housing Authority*, 259 AD2d 442, 687 NYS2d 352 (1st Dept 1999). Similarly, a question of fact existed as to a building's owner's actual or constructive notice of a blocked interior staircase where there was evidence that the owner resided in the building at around the time of the fire, *Alcalde v Riley*, supra. Where a GML § 205-e claim is based on an alleged roadway defect, however, local laws requiring prior written notice of the defect are applicable, *Montalvo v New York*, 46 AD3d 772, 848 NYS2d 330 (2d Dept 2007). For a discussion of such local laws, see Comment to PJI 2:225.

Neither comparative negligence nor assumption of risk may be interposed as an affirmative defense in an action under General Municipal Law sections 205-a or 205-e, see *Giuffrida v Citibank Corp.*, 100 NY2d 72, 760 NYS2d 397, 790 NE2d 772 (2003); *Mullen v Zoebe, Inc.*, 86 NY2d 135, 630 NYS2d 269, 654 NE2d 90 (1995); *Dubois v Vanderwalker*, 245 AD2d 758, 665 NYS2d 460 (3d Dept 1997); *Warner v Adelphi University*, 240 AD2d 730, 660 NYS2d 50 (2d Dept 1997), and intervening illegal acts are no defense to statutory liability, *Lusenskas v Axelrod*, 183 AD2d 244, 592 NYS2d 685 (1st Dept 1992).

General Obligations Law § 11-106 abrogated the former "Firefighter's Rule," which precluded recovery for injuries sustained by firefighters and police officers arising out of the particular hazards for which they were engaged, specifically trained and compensated to confront, *Santangelo v State*, 71 NY2d 393, 526 NYS2d 812, 521 NE2d 770 (1988); see *Padula v Tompkins*, 303 AD2d 804, 756 NYS2d 664 (3d Dept 2003); see also *Sierk v Frazon*, 32 AD3d 1153, 821 NYS2d 689 (4th Dept 2006) (applying GOL § 11-106 to peace officers). However, the statute exempts claims against the firefighters' and police officers' employers and co-workers. General Obligations Law § 11-106 precludes claims against employers regardless of the capacity in which the employer is sued, *Grogan v New York*, 259 AD2d 240, 699 NYS2d 12 (1st Dept 1999).

(statute did not authorize suit against City in its capacity as owner of sidewalk); *Flynn v New York*, 258 AD2d 129, 693 NYS2d 569 (1st Dept 1999). Notwithstanding the provisions of General Obligations Law § 11-106, police officers and firefighters may have the right to sue their employers when the requirements of General Municipal Law §§ 205-a or 205-e are satisfied and the action or law suit is not otherwise barred by the Workers' Compensation Law, see *Diegelman v Buffalo*, 28 NY3d 231, 43 NYS3d 803, 66 NE3d 673 (2016) (GML § 205-e).

The amendments to General Municipal Law and General Obligations Law revoking "Firefighter's Rule" neither expanded nor restricted the existing liability of employers or co-employees at common law, *Olson v New York*, 233 AD2d 488, 650 NYS2d 291 (2d Dept 1996). Thus, cases holding that police officers and firefighters are precluded from recovering for injuries arising from the performance of their duties continue to apply to suits against employers and co-workers, at least where an action under General Municipal Law § 205-a or § 205-e is not authorized. Those cases include: *Wadler v New York*, 14 NY3d 192, 899 NYS2d 73, 925 NE2d 875 (2010); *Cooper v New York*, 81 NY2d 584, 601 NYS2d 432, 619 NE2d 369 (1993); *Santangelo v State*, 71 NY2d 393, 526 NYS2d 812, 521 NE2d 770 (1988). No exception exists for situations in which the negligence that caused the injury was separate and distinct from the conduct that created the need for police action, *Cooper v New York*, *supra*. Nor is there an exception for injuries occurring when the officer was not "on duty," since officers often face significant risks when they are not technically at work, *Wadler v New York*, *supra*. In those narrow situations where the "Firefighter's Rule" is still applicable, the determinative factor is whether the injury sustained is related to the particular dangers that a police officer or firefighter is expected to assume, *Wadler v New York*, *supra*; *Zanghi v Niagara Frontier Transp. Com'n*, 85 NY2d 423, 626 NYS2d 23, 649 NE2d 1167 (1995); *Ferriolo v New York*, 72 AD3d 490, 899 NYS2d 172 (1st Dept 2010); *Simons v New York*, 252 AD2d 451, 675 NYS2d 597 (1st Dept 1998); see *Gammons v New York*, 24 NY3d 562, 2 NYS3d 45, 25 NE3d 958 (2014) (highlighting expansive nature). Those dangers include those inherent in the special risks associated with workplaces where guns and special security devices are present on the premises, *Wadler v New York*, *supra* (plaintiff injured when retractable concrete gate used to prevent terrorist assaults was accidentally raised as he attempted to drive into parking lot at police headquarters); *Ferriolo v New York*, *supra* (plaintiff injured when fellow officer accidentally discharged gun in locker room); see *Gammons v New York*, *supra* (plaintiff, assigned to barrier truck detail, injured when she fell from back of flatbed truck while loading barriers). The Rule does not apply where the police officer's or firefighter's performance of his or her duties merely furnished the occasion for an injury that was caused by a hazard unrelated to the enhanced risks associated with those duties, *Zanghi v Niagara Frontier Transp. Com'n*, *supra*; see *Carter v New York*, 272 AD2d 498, 708 NYS2d 426 (2d Dept 2000); *Melendez v New York*, 271 AD2d 416, 706 NYS2d 132 (2d Dept 2000).

A person properly held liable under General Municipal Law § 205-a

may seek indemnification or contribution from parties who are not in possession or control of the premises but who were allegedly responsible, in whole or in part, for the accident, even though the injured firefighter would not have a direct cause of action against the third party defendant, *Raquet v Braun*, 90 NY2d 177, 659 NYS2d 237, 681 NE2d 404 (1997). The limitations of the statutory cause of action available to injured firefighters do not affect the right of parties held liable pursuant to that cause of action to seek contribution and/or indemnification from those whose carelessness was, in whole or in part, the cause of the harm, *id.*

An injured police officer's wife may assert a derivative cause of action pursuant to GML § 205-e, *Cammilleri v S & W Realty Associates*, 243 AD2d 530, 663 NYS2d 222 (2d Dept 1997); see *Dubois v Vanderwalker*, 245 AD2d 758, 665 NYS2d 460 (3d Dept 1997). However, in a prior case, it was held that the wife of an injured fire fighter may not assert a loss of consortium claim under GML § 205-a, *Korfman v Parkway Village Associates*, 110 AD2d 886, 488 NYS2d 438 (2d Dept 1985).

Sanitation Workers

The common law "Firefighter's Rule" does not extend to New York City sanitation workers, who are not expected or trained to assume the hazards routinely encountered by police officers and firefighters, *Ciervo v New York*, 93 NY2d 465, 693 NYS2d 63, 715 NE2d 91 (1999).

E. Effect on Suits Against Third Party Tortfeasors

1. Employee's Claim

An employee covered by compensation insurance may, without affecting the right to compensation, sue a tortfeasor other than the employer or a co-employee for injuries sustained in the course of employment, WCL § 29. The right to sue these others may be lost by automatic assignment to the compensation carrier if the employee does not bring suit against the others within the time provided for in WCL § 29(1), see PJI 2:218. Further, the compensation carrier is entitled to a lien against a recovery by the employee from a third-party for the amount of benefits disbursed, WCL § 29(1), and has the right to offset the employee's future compensation benefits by the amount of the employee's net recovery, WCL § 29(4). However, the compensation carrier's lien does not extend to compensation payments made in lieu of first-party no-fault insurance benefits, WCL § 29(1-a); see *Shutter v Philips Display Components Co.*, 90 NY2d 703, 665 NYS2d 379, 688 NE2d 235 (1997); *Johnson v Buffalo & Erie County Private Industry Council*, 84 NY2d 13, 613 NYS2d 861, 636 NE2d 1394 (1994); *Johnston v Colvin*, 145 AD2d 846, 535 NYS2d 833 (3d Dept 1988). In addition, the compensation carrier's lien does not extend to uninsured motorist's benefits paid under an insurance policy purchased by the claimant who was disabled in a work related auto accident, *Shutter v Philips Display Components Co.*, *supra*. While the car-

rier may choose to waive or limit its rights in order to facilitate a settlement, the court may not compel it to do so, see *Miller v Arrow Carriers Corp.*, 130 AD2d 279, 520 NYS2d 76 (3d Dept 1987). However, the court may deduct from the lien a portion of claimant's litigation costs, including legal fees, WCL § 29(1); see *Kelly v State Ins. Fund*, 60 NY2d 131, 468 NYS2d 850, 456 NE2d 791 (1983); *Becker v Huss Co., Inc.*, 43 NY2d 527, 402 NYS2d 980, 373 NE2d 1205 (1978); see also *Wood v Firestone Tire & Rubber Co.*, 123 Misc2d 812, 475 NYS2d 735 (Sup 1984). As to the extent of the carrier's lien where plaintiff's claim arises out of a work related automobile accident, see Introductory Statement preceding PJI 2:75.

2. *Contribution Claim Against Employer*

As illustrated by the leading case of *Dole v Dow Chemical Co.*, 30 NY2d 143, 331 NYS2d 382, 282 NE2d 288 (1972), the employer is not protected by the exclusivity of the Workers' Compensation Law if impleaded by a third person tortfeasor sued by the employee, see CPLR Art. 14; *Cusick v Lutheran Medical Center*, 105 AD2d 681, 481 NYS2d 122 (2d Dept 1984); PJI 2:275; Annot: 100 ALR3d 350.

On September 10, 1996, the Workers' Compensation Reform Bill became effective to restore the force of the exclusive remedy provisions of the Workers' Compensation Law by protecting employers from suits other than those that are contract based. The law substantially curtails the rights of a third person tortfeasor who is sued by an employee to commence a third-party action against the plaintiff's employer as illustrated in *Dole v Dow Chemical Co.*, 30 NY2d 143, 331 NYS2d 382, 282 NE2d 288 (1972) and codified in CPLR Art. 14. Employers may be held responsible, however, for contribution and indemnity arising from an employee's "grave injury," or where the right to contribution or indemnification is preserved in a written agreement entered into prior to the accident, *Rodrigues v N & S Building Contractors, Inc.*, 5 NY3d 427, 805 NYS2d 299, 839 NE2d 357 (2005); *Potter v M.A. Bongiovanni Inc.*, 271 AD2d 918, 707 NYS2d 689 (3d Dept 2000). The provision requiring "grave injury" as a condition to impleading an employer does not apply in cases covered by the Firefighters' Benefit Law, even though that statute has the same objectives as the Workers' Compensation Law, *Frey v Whistler*, 309 AD2d 1210, 765 NYS2d 132 (4th Dept 2003). Consistent with common-law principles, the agreement to indemnify need not be signed to be enforceable, as long as an intent to enter into a binding contract is established by the parties' writing and conduct, *Flores v Lower East Side Service Center, Inc.*, 4 NY3d 363, 795 NYS2d 491, 828 NE2d 593 (2005). Further, the agreement need not specify the sites, persons and types of losses covered, *Rodrigues v N & S Building Contractors, Inc.*, *supra*.

A "grave injury" is defined to "mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and

permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability,” Workers’ Compensation Law, § 11. The phrase “permanent total disability” refers to unemployability in any capacity, without regard to whether the injury prevented the employee from functioning in other aspects of his or her life, *Rubeis v Aqua Club Inc.*, 3 NY3d 408, 788 NYS2d 292, 821 NE2d 530 (2004). For a detailed discussion of the “grave injury” requirement, see Comment to PJI 2:275, *infra*.

The relevant provisions of the new amendments restricting the right to bring a third-party action do not apply to actions pending on the effective date of the amendments, September 10, 1996, *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 673 NYS2d 966, 696 NE2d 978 (1998). The amendments are to be applied prospectively to actions filed on or after September 10, 1996, irrespective of the date of the accident, *id.*

II. Principles of Liability

Although the Workers’ Compensation Law bars most actions by injured workers against their employers for job-related injuries, actions against other potentially responsible parties, including property owners and building contractors, are ordinarily permissible. The principles involved in actions against defendants other than owners or contractors are discussed under other specific headings in this volume. Owners, contractors and their agents, however, have both common-law and statutory duties not addressed elsewhere. Moreover, GOL § 5-323 prohibits contractors from exempting themselves from liability for injury to person or property arising from their negligence in connection with work performed or services rendered in the construction, maintenance and repair of real property or its appurtenances.

The principles governing liability for breaches of the common-law and statutory duties of owners, contractors and their agents toward workers are discussed in this section, which also includes a charge for use in actions against employers who have failed to secure workers’ compensation coverage, see PJI 2:215.

The duties of owners and contractors to provide a safe workplace under the common law and Labor Law § 200 are considered in PJI 2:216. Owners, contractors and their agents also have specific duties that are imposed by the Labor Law, see PJI 2:216A, 2:217. The rules of the Industrial Board of Appeals may be found principally in Title 12, Part 23, of the Codes, Rules and Regulations of the State of New York. Many of those rules are individually discussed in the Comment following PJI 2:216A. For cases governed by a regulation, an adaptation of PJI 2:29 should be used. It should be noted that Labor Law § 241(8) does not give rise to a civil cause of action, *La Clair v Shelly Elec. Inc.*, 264 AD2d 55, 705 NYS2d 106 (3d Dept 2000).

Under Labor Law § 242, the provisions of Article 10 of the Labor Law, and the rules issued thereunder, are “applicable exclusively throughout the state, [n]otwithstanding any other law or regulation, local or general,” see also Labor Law § 202 (statute, which governs to window cleaning and cleaning of exterior surfaces of buildings, and rules issued thereunder “applicable exclusively throughout the state”). It thus appears that the provisions of Article 10 preempt local provisions dealing with building construction, demolition and repair, at least insofar as they conflict.

Where the claim is based on a statute or regulation, the specified provision must be analyzed carefully to ascertain upon whom it imposes a duty, in whose favor that duty runs, and whether it was in force at the time of the particular incident, see *Brown v Christopher Street Owners Corp.*, 87 NY2d 938, 641 NYS2d 221, 663 NE2d 1251 (1996); *Connors v Boorstein*, 4 NY2d 172, 173 NYS2d 288, 149 NE2d 721 (1958); *Arnold v Buffalo Terminal Elevators, Inc.*, 25 AD2d 611, 267 NYS2d 563 (4th Dept 1966). Additionally, consideration must be given to whether it is a regulation or a statute that governs the particular case and, if a statute, whether it creates absolute liability or imposes liability on the theory of negligence. For a general explanation of the effects of statutes on liability, see Introductory Statement preceding PJI 2:25 and the Comment to PJI 2:28. For a discussion of the principles of absolute liability applied in cases arising under the Labor Law, see Comments preceding PJI 2:216A and 2:217.

Violation of a statute imposing a specific duty on an owner or contractor will result in absolute liability in favor of any worker within the coverage of the statute for injuries proximately caused, without regard to either negligence or comparative negligence. In contrast, statutory causes of action predicated upon violations of administrative regulations do not give rise to strict liability; rather, the violation simply constitutes some evidence of negligence, *Bauer v Female Academy of Sacred Heart*, 97 NY2d 445, 741 NYS2d 491, 767 NE2d 1136 (2002); *Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132, 433 NE2d 115 (1982); *Conte v Large Scale Development Corp.*, 10 NY2d 20, 217 NYS2d 25, 176 NE2d 53 (1961); *Wells v British American Development Corp.*, 2 AD3d 1141, 770 NYS2d 161 (3d Dept 2003); *Fisher v Brown Group, Inc.*, 256 AD2d 1069, 683 NYS2d 773 (4th Dept 1998); see PJI 2:29 and Comment. Comparative negligence is a defense in such actions and may present a jury question, *Bauer v Female Academy of the Sacred Heart*, supra; *Long v Forest-Fehlhaber*, supra; *Fisher v Brown Group, Inc.*, 256 AD2d 1069, 683 NYS2d 773 (4th Dept 1998). This principle applies to violations of industrial rules promulgated by the Commissioner of Labor pursuant to Labor Law §§ 28-a, 200, 202, 241(6), 241(7), 241(8) and 241-a.

**PJI 2:215. Injured Employee—Common Law Action—
Cases Arising Under Workers’ Compensation
Law § 11 and Employers Liability Law § 5**

It was the duty of the defendant-employer [use

applicable portions only:] (to use reasonable care to prevent injury to the plaintiff-employee; to provide a reasonably safe place for the employee to work; to furnish safe machinery and appliances; to establish and promulgate proper rules to insure that the work would be done in a reasonably safe manner; to instruct employees with regard to the use of dangerous machines and methods of work; to warn the employee of any unusual risk that might be encountered; to provide reasonable supervision of the work; to employ sufficient competent fellow workers to enable them to perform the work properly and without injury to each other; to provide reasonable inspection of the place where the work is being done and the machinery, tools and appliances being used to see that they are reasonably safe and to make such changes and repairs as are necessary to keep them in reasonably safe condition).

It is for you to determine from the evidence whether the defendant used reasonable care in performing such duties. If you find that the defendant used reasonable care or that the defendant's failure to use reasonable care was not a substantial factor in causing the plaintiff's injury, you will find for the defendant [*add where appropriate:*] (on this issue). If, however, you find that the defendant failed to use reasonable care in performing any of such duties and that such failure was a substantial factor in causing plaintiff's injury, you will find in favor of plaintiff [*add where appropriate:*] (on this issue), even though you also find that plaintiff failed to use reasonable care.

Comment

[See also Introductory Statement to this division.]

The pattern charge deals with an action against an employer who has failed to secure workers' compensation coverage as required. In such case, the statute states that the injured worker's negligence, if any, is not a defense, WCL § 11.

An employer who is not required to and does not voluntarily provide

workers' compensation coverage may plead defenses of comparative negligence, including assumption of risk and bears the burden of proof on those issues, *Employer's Liability Law* § 5; *Buckley v Cunard S.S. Co.*, 233 App Div 361, 253 NYS 254 (1st Dept 1931); and the jury should be so instructed, *Farruggia v Riverhead*, 34 AD2d 1008, 312 NYS2d 802 (2d Dept 1970). The pattern charge may be adapted for use in such an action by eliminating the language after "plaintiff's injury" in the last sentence of the charge and substituting "you will find defendant at fault." If there is any evidence of plaintiff's negligence, comparative fault should then be charged, see PJI 2:36; see also PJI 2:275 (apportionment among plaintiff and multiple tortfeasors). When there are several causes of action and comparative negligence is not a defense to all of them, care must be taken to differentiate for the jury the comparative negligence rule applicable to each.

The fellow servant rule has been abrogated in New York, *Buckley v New York*, 56 NY2d 300, 452 NYS2d 331, 437 NE2d 1088 (1982); see also *Hefelev v New York*, 25 AD2d 142, 267 NYS2d 946 (1st Dept 1966) (fellow servant rule no bar to claim of social worker injured through negligence of her supervisors).

Causal relationship is incorporated in the pattern charge through use of the term "substantial factor." That term should be defined, and in some cases expanded upon, as indicated in the Comment to PJI 2:70.

The charge covers the various bases of liability of an employer for injury to employees. The case law is too vast to be set forth in this comment, but can be found in 52 NYJur2d, *Employment Relations*, §§ 213–242, 274–319; 2C Pt 1 Warren, *Negligence* 19-319, *Master and Servant*; *Restatement, Second, Agency* §§ 492–520. The failure of an employer to perform duties imposed by statute for the protection of employees is covered in PJI 2:216, 2:216A and PJI 2:217.

An owner or contractor also has a common law duty with respect to areas under its control and ways and approaches thereto, see Comment to PJI 2:216.

When a governmental entity, through its correctional authorities, directs a prison inmate to participate in a work program during incarceration, it owes the inmate a duty to provide reasonably safe machinery and equipment with which to work and adequate warnings and instructions for the safe operation of such machinery and equipment, *Callahan v State*, 19 AD2d 437, 243 NYS2d 881 (3d Dept 1963), *aff'd*, 14 NY2d 665, 249 NYS2d 871, 198 NE2d 903 (1964); *Bernard v State*, 34 AD3d 1065, 824 NYS2d 481 (3d Dept 2006); *Muhammad v State*, 15 AD3d 807, 790 NYS2d 570 (3d Dept 2005); *Kandrach v State*, 188 AD2d 910, 591 NYS2d 868 (3d Dept 1992); see *Lamp v Cortland*, 98 NY2d 748, 751 NYS2d 840, 781 NE2d 905 (2002), *rev'g Lamp v Cortland*, 294 AD2d 795, 743 NYS2d 583 (3d Dept 2002). Given the penalties that may be imposed for not following orders in a prison

environment, it is not unreasonable for an inmate to proceed as directed by prison authorities even if he or she thereby ignores a danger which should have been foreseen, *Lowe v State*, 194 AD2d 898, 599 NYS2d 639 (3d Dept 1993). Moreover, the special circumstances that confront an incarcerated inmate should be taken into consideration in assessing whether the inmate was comparatively negligent, *Bernard v State*, *supra*. However, where an inmate fails to use ordinary care and pursues a dangerous course of conduct, the inmate is required to take some responsibility for his or her own negligence, *Muhammad v State*, *supra*; *Martinez v State*, 225 AD2d 877, 639 NYS2d 145 (3d Dept 1996).

Introductory Statement

Injured Employees' Rights Under the Labor Law

Various provisions of the Labor Law provide protection for an "employee," a term defined as "a mechanic, workingman or laborer working for another for hire," Labor Law § 2(5); see *Schwab v Campbell*, 266 AD2d 840, 697 NYS2d 424 (4th Dept 1999). While an injured worker is precluded from commencing a Labor Law or a negligence cause of action against the employer or a co-employee, Workers' Compensation Law §§ 11, 29(6); *Heritage v Van Patten*, 59 NY2d 1017, 466 NYS2d 958, 453 NE2d 1247 (1983); *Werner v State*, 53 NY2d 346, 441 NYS2d 654, 424 NE2d 541 (1981); *Vanerstrom v Strasser*, 240 AD2d 563, 659 NYS2d 77 (2d Dept 1997), an action under the Labor Law may be maintained against other entities and against an employer who was required, but failed, to provide workers' compensation, Workers' Compensation Law § 11. For an extended discussion of the Workers' Compensation Law defense, see PJI 2:215, Introductory Statement. For a discussion of an action against a third-party tortfeasor other than the employer and of the third party's right to commence an action for indemnification or contribution against the employer where there is a "grave injury," see Comment to PJI 2:275.1.

I. Distinction Between Statutory and Common-Law Liability

Labor Law §§ 200(1), 240(1) and 241 are often cited as bases for recovery by employees injured during the course of their employment. Labor Law §§ 200 and 241(6), standing alone, codify an owner's, employer's and general contractor's common law duty to provide workers with a reasonably safe place to work, *Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 609 NYS2d 168, 631 NE2d 110 (1993); *Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132, 433 NE2d 115 (1982); *Allen v Cloutier Const. Corp.*, 44 NY2d 290, 405 NYS2d 630, 376 NE2d 1276 (1978); *Gasper v Ford Motor Co.*, 13 NY2d 104, 242 NYS2d 205, 192 NE2d 163 (1963). Liability under Labor Law § 200 depends on the negligence of the owner, contractor or agent, such as an owner's creation of an unsafe premises condition or negligent failure to correct a dangerous condition on the premises despite having had actual or constructive knowledge of the condition, *Ortega v Puccia*, 57 AD3d 54, 866 NYS2d 323 (2d Dept 2008); see *Espinosa v Azure Holdings II, LP*, 58 AD3d 287, 869 NYS2d 395 (1st Dept 2008). For a charge to be given where a claim under Labor Law § 200(1) is interposed, see PJI 2:216. For a discussion of the principles governing such claims, see Commentary following PJI 2:216.

Labor Law § 241(6) goes further than Labor Law § 200(1) by imposing a nondelegable (but not absolute) duty upon an owner or contractor, regardless of who controls or supervises the site, *St. Louis v North Elba*, 16 NY3d 411, 923 NYS2d 391, 947 NE2d 1169 (2011); *Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132, 433 NE2d 115 (1982); see *Monroe v New York*, 67 AD2d 89, 414 NYS2d 718 (2d Dept 1979);

see also *Kemp v Lakelands Precast Inc.*, 55 NY2d 1032, 449 NYS2d 710, 434 NE2d 1077 (1982). While Labor Law § 241(6) is not limited to accidents on building construction sites, *Joblon v Solow*, 91 NY2d 457, 672 NYS2d 286, 695 NE2d 237 (1998); *Mosher v State*, 80 NY2d 286, 590 NYS2d 53, 604 NE2d 115 (1992); *Ciancio v Woodlawn Cemetery Ass'n*, 249 AD2d 86, 671 NYS2d 466 (1st Dept 1998) (grave is "excavation" within purview of statute), the Court of Appeals has held that the statute only applies to accidents occurring in the context of construction, demolition and excavation and does not apply to claims arising out of the routine maintenance of a building or structure outside of that context, *Nagel v D & R Realty Corp.*, 99 NY2d 98, 752 NYS2d 581, 782 NE2d 558 (2002); see *Pakenham v Westmere Realty, LLC*, 58 AD3d 986, 871 NYS2d 456 (3d Dept 2009); *Goad v Southern Elec. Intern., Inc.*, 304 AD2d 887, 758 NYS2d 184 (3d Dept 2003) (abrogating *Robertson v Little Rapids Corp.*, 277 AD2d 560, 715 NYS2d 482 (3d Dept 2000), in light of *Nagel*).

Labor Law § 241(6), (7) and (8) authorize the Commissioner of Labor (formerly the Industrial Board of Appeals) to make rules to protect the safety of a worker. A violation of an administrative rule promulgated pursuant to Labor Law § 241(6) does not result in absolute liability but is merely evidence of negligence, *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993); *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 493 NYS2d 102, 482 NE2d 898 (1985); *Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132, 433 NE2d 115 (1982); *Puckett v Erie*, 262 AD2d 964, 693 NYS2d 780 (4th Dept 1999); see *Nagel v D & R Realty Corp.*, 99 NY2d 98, 752 NYS2d 581, 782 NE2d 558 (2002); *Bauer v Female Academy of Sacred Heart*, 97 NY2d 445, 741 NYS2d 491, 767 NE2d 1136 (2002). An action may be predicated upon Labor Law § 241(6) only where there has been a violation of a specific, detailed rule governing the conduct at issue, *Ross v Curtis-Palmer Hydro-Electric Co.*, *supra*; see *St. Louis v North Elba*, 16 NY3d 411, 923 NYS2d 391, 947 NE2d 1169 (2011); *Rosen v McGuire & Bennett Inc.*, 189 AD2d 966, 592 NYS2d 477 (3d Dept 1993); *Simon v Schenectady North Congregation of Jehovah's Witnesses*, 132 AD2d 313, 522 NYS2d 343 (3d Dept 1987). The regulations contained in Part 23 of the Industrial Code were promulgated pursuant to the rule making authority granted to the Commissioner of Labor under Labor Law § 241(6) and may serve as a predicate for a § 241(6) cause of action, but care must be taken when relying on regulations contained in other parts of the Code, *Nostrom v A.W. Chesterton Co.*, 15 NY3d 502, 914 NYS2d 725, 940 NE2d 551 (2010) (regulations contained in Part 12 of the Code can only serve as a predicate for a Labor Law § 241(6) action where the relied-upon regulation is specifically incorporated into Part 23). For a charge to be used in cases involving Labor Law § 241(6), see PJI 2:216A. The Comment to PJI 2:216A discusses principles of liability under Labor Law § 241(6) and contains a list of the Industrial Code rules that have been deemed sufficiently specific to support causes of action under that statute.

In contrast to Labor Law §§ 200(1) and 241(6), Labor Law §§ 240(1) and 241(1–5) contain specific safeguards and can lead to absolute li-

ability if violated, see *Felker v Corning Inc.*, 90 NY2d 219, 660 NYS2d 349, 682 NE2d 950 (1997); *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 606 NYS2d 127, 626 NE2d 912 (1993); *Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880, 488 NE2d 810 (1985); *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 493 NYS2d 102, 482 NE2d 898 (1985); *Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132, 433 NE2d 115 (1982); *Haimes v New York Telephone Co.*, 46 NY2d 132, 412 NYS2d 863, 385 NE2d 601 (1978); *Allen v Cloutier Const. Corp.*, 44 NY2d 290, 405 NYS2d 630, 376 NE2d 1276 (1978); *Koenig v Patrick Const. Corporation*, 298 NY 313, 83 NE2d 133 (1948); *Joyce v Rumsey Realty Corp.*, 17 NY2d 118, 269 NYS2d 105, 216 NE2d 317 (1966). In *Tilkins v Niagara Falls*, 52 AD2d 306, 383 NYS2d 758 (4th Dept 1976), and *Page v State*, 73 AD2d 479, 426 NYS2d 594 (3d Dept 1980), *aff'd*, 56 NY2d 604, 450 NYS2d 480, 435 NE2d 1095 (1982), the courts relied on the difference in the language of the opening paragraphs of Labor Law § 241 and § 241(6) as a basis for applying a more expansive coverage to Labor Law § 241(6) in connection with accidents at construction sites. It is therefore questionable whether the cases broadly interpreting Labor Law § 241(6) will apply in interpreting the specific requirements of Labor Law § 241(1–5) with respect to the construction or demolition of buildings, see *Murray v Hofstra University*, 40 AD2d 1018, 338 NYS2d 1013 (2d Dept 1972); *Kajowski v Irvico Realty Corp.*, 37 AD2d 991, 327 NYS2d 715 (2d Dept 1971); *Ramos v State*, 34 AD2d 1056, 312 NYS2d 185 (3d Dept 1970); see also *Copertino v Ward*, 100 AD2d 565, 473 NYS2d 494 (2d Dept 1984); *Rosenbaum v Lefrak Corp.*, 80 AD2d 337, 438 NYS2d 794 (1st Dept 1981); *Ackley v Vitale Bros. Contractors, Inc.*, 80 AD2d 989, 437 NYS2d 805 (4th Dept 1981). For the same reason, care should be exercised in applying the definitions of statutory terms in regulations promulgated pursuant to Labor Law § 241(6) to the interpretation of similar terms in Labor Law § 241(1–5), see *DaBolt v Bethlehem Steel Corp.*, 92 AD2d 70, 459 NYS2d 503 (4th Dept 1983).

Labor Law § 240(1), which is the source of an extensive body of case law, requires owners and contractors to provide scaffolds, hoists, ladders and similar devices that are constructed, positioned and operated in such a way as to give proper protection to workers. For a charge to be used in cases involving Labor Law § 240(1), see PJI 2:217. For a discussion of the case law principles governing Labor Law § 240(1) actions, see the Commentary following PJI 2:217.

Labor Law § 241-a, which requires planking to protect workers in or at elevator shaftways, also imposes absolute liability, *Duncan v Twin Leasing Corp.*, 283 App Div 1080, 131 NYS2d 423 (2d Dept 1954); *Santos v Sure Iron Works*, 166 AD2d 571, 560 NYS2d 857 (2d Dept 1990); *Silvers v E.W. Howell, Inc.*, 129 AD2d 694, 514 NYS2d 455 (2d Dept 1987); see *Brownrigg v New York City Housing Authority*, 70 AD3d 619, 898 NYS2d 545 (2d Dept 2010); *Fuller v Catalfamo*, 223 AD2d 850, 636 NYS2d 467 (3d Dept 1996); see also *Horan v Dormitory Authority*, 43 AD2d 65, 349 NYS2d 448 (3d Dept 1973) (Labor Law § 241-a creates a nondelegable duty). Labor Law § 241-a is designed to protect workers from either falling through the shaft for more than one story or being

struck by falling debris or other materials during construction, but it does not apply to a plaintiff injured by a descending elevator, *Sharp v Scandic Wall Ltd. Partnership*, 306 AD2d 39, 760 NYS2d 478 (1st Dept 2003); *Nevins v Essex Owners, Corp.*, 259 AD2d 384, 687 NYS2d 114 (1st Dept 1999).

There is no duty on the part of a contractor to protect against deliberate acts of third parties where the contractor has no notice of any potential for criminal activity, *Zdrojeski v Gramercy Court Associates*, 195 AD2d 552, 600 NYS2d 499 (2d Dept 1993).

II. Other Labor Law Provisions Authorizing Recovery by Injured Employees

Labor Law § 202, entitled “Protection of the public and of persons engaged at window cleaning and cleaning of exterior surfaces of buildings,” imposes a duty on owners, lessees, agents, managers or superintendents of certain public buildings and contractors involved with the cleaning of windows and exterior surfaces of such buildings to provide certain physical devices for the protection of window cleaners. The statute applies to the cleaning of interior windows, *Ferluckaj v Goldman Sachs & Co.*, 53 AD3d 422, 862 NYS2d 473 (1st Dept 2008), *rev'd on other grounds*, 12 NY3d 316, 880 NYS2d 879, 908 NE2d 869 (2009). Labor Law § 202 exempts from its requirements, *inter alia*, multiple dwellings of six stories or less and non-public buildings, see *Bauer v Female Academy of Sacred Heart*, 97 NY2d 445, 741 NYS2d 491, 767 NE2d 1136 (2002); *Retamal v Miriam Osborne Memorial Home Ass'n*, 256 AD2d 506, 682 NYS2d 409 (2d Dept 1998); *Williamson v 16 West 57th St. Co.*, 256 AD2d 507, 683 NYS2d 548 (2d Dept 1998). Comparative negligence principles apply to Labor Law § 202 claims, *Bauer v Female Academy of the Sacred Heart*, *supra*.

In *Bauer v Female Academy of Sacred Heart*, 97 NY2d 445, 741 NYS2d 491, 767 NE2d 1136 (2002), the Court of Appeals resolved a conflict among the various Departments by concluding that an injured window cleaner can commence claims simultaneously under Labor Law §§ 202 and 240(1), see *Stanley v Carrier Corp.*, 303 AD2d 1022, 756 NYS2d 689 (4th Dept 2003). It should be noted, however, that the requirements of Labor Law § 202 apply to owners, lessees, agents and managers, while absolute liability under Labor Law § 240(1) applies to owners and contractors and their agents only, *Bauer v Female Academy of the Sacred Heart*, *supra*. Therefore, while Labor Law §§ 240(1) and 202 will sometimes apply to the same fact patterns, they do not in every case, *Bauer v Female Academy of the Sacred Heart*, *supra*; *Stanley v Carrier Corp.*, *supra*.

Arts and Cultural Affairs Law § 37.09, formerly Labor Law § 202-a, requires owners, agents, lessees, managers or other persons in charge of public places of assembly, resorts or amusements to provide certain safety devices for exhibitions on aerial apparatus that require skill, timing or balance and which create a substantial risk of serious injury, see

Murach v Island of Bob Lo Co., Inc., 290 AD2d 180, 737 NYS2d 465 (4th Dept 2002). The statute is not analogous to Labor Law § 240(1) and does not impose strict liability, *id.*

Labor Law § 240(2) provides: “[s]caffolding or staging more than twenty feet from the ground or floor, swung or suspended from an overhead support or erected with stationary supports, except scaffolding wholly within the interior of a building and covering the entire floor space of any room therein, shall have a safety rail of suitable material properly attached, bolted, braced or otherwise secured, rising at least thirty-four inches above the floor or main portions of such scaffolding or staging and extending along the entire length of the outside and the ends thereof, with only such openings as may be necessary for the delivery of materials. Such scaffolding or staging shall be so fastened as to prevent it from swaying from the building or structure.” The statute provides for a private right of action, see *Saint v Syracuse Supply Co.*, 25 NY3d 117, 8 NYS3d 229, 30 NE3d 872 (2015). A plaintiff may recover under Labor Law § 240(2) if he or she establishes that the statute was violated, and that the violation was a proximate cause of the plaintiff’s injuries, *Pulsifer v Eastman Kodak Co.*, 219 AD2d 880, 631 NYS2d 948 (4th Dept 1995); see *Ryan v Cenci*, 95 AD2d 963, 464 NYS2d 289 (3d Dept 1983); see also *Pietrowski v Are-East River Science Park, LLC*, 86 AD3d 467, 928 NYS2d 266 (1st Dept 2011) (stating that plaintiff must establish that statutory violation was the proximate cause of plaintiff’s injuries); *Emmi v Emmi*, 186 AD2d 1025, 588 NYS2d 481 (4th Dept 1992) (indicating that statutory violation alone gives rise to liability). Moreover, the plaintiff’s injuries must have been caused by an elevation-related risk for liability to be imposed under the statute, *Bryant v General Elec. Co.*, 221 AD2d 687, 633 NYS2d 410 (3d Dept 1995). Because Labor Law §§ 240(1) and 240(2) relate to the same subject matter, they should be construed together as though forming part of the same statute, *id.* Thus, the judicial gloss on Labor Law § 240(1) extends to § 240(2), see *id.*; see also *Bruto v George Herman & Associates, Inc.*, 64 AD2d 844, 407 NYS2d 331 (4th Dept 1978).

Labor Law § 213, which defines as a misdemeanor the violation of any Labor Law provision or any rule, regulation or lawful order of the Industrial Commissioner, does not give rise to a private right of action in favor of an injured worker, *Pavlou v New York*, 300 AD2d 120, 752 NYS2d 619 (1st Dept 2002).

III. Statutory Terms

As a general rule, the courts look to the purposes and policies underlying the protective provisions of the Labor Law, as well as the statutory language, in determining the meaning of the statute’s terms. Accordingly, in assessing the applicability of the judicial decisions discussed below, care should be taken to consider their holdings in the context of the particular Labor Law provision at issue.

Labor Law § 240(1) states: “All contractors and owners and their

agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.” The duties imposed by Labor Law § 241 apply to “[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith.” The following discussion focuses on the case law construing the terms that are common to both provisions, namely “contractors,” “owners,” “agents,” “buildings” and “structures.” For a discussion regarding the case law construing “erection,” “demolition,” “repairing,” “altering,” “painting,” “cleaning,” “pointing” and “constructing” as used in Labor Law § 241, see Comment to PJI 2:217.

A. Persons Liable

The duties of protection imposed under Labor Law §§ 240 and 241 expressly apply to “[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work.” A myriad of cases address the meaning of these terms.

1. Owner

The term “owner” is not limited to title holders, *Scaparo v Ilion*, 13 NY3d 864, 893 NYS2d 823, 921 NE2d 590 (2009); *Cruz v 1142 Bedford Avenue, LLC*, 192 AD3d 859, 145 NYS3d 77 (2d Dept 2021); *Paul v Quogue*, 178 AD3d 942, 115 NYS3d 450 (2d Dept 2019); *Walp v ACTS Testing Labs, Inc./Division of Bureau Veritas*, 28 AD3d 1104, 817 NYS2d 458 (4th Dept 2006); *Demartino v CBS Auto Body and Towing, Inc.*, 208 AD2d 886, 618 NYS2d 92 (2d Dept 1994); *Copertino v Ward*, 100 AD2d 565, 473 NYS2d 494 (2d Dept 1984); see *DiVincenzo v Plaza Farms Development, Inc.*, 269 AD2d 842, 703 NYS2d 647 (4th Dept 2000). The term, which is one of the key terms used in the Labor Law, may encompass one who has an interest in property such as a lessee who contracted for or otherwise has the right to control the work, *Scaparo v Ilion*, *supra*; *Paul v Quogue*, *supra*; *Thompson v M and M Forwarding of Buffalo, New York, Inc.*, 174 AD3d 1433, 107 NYS3d 207 (4th Dept 2019); *Garcia v Market Associates*, 123 AD3d 661, 998 NYS2d 193 (2d Dept 2014) (lessee); *Ferluckaj v Goldman Sachs & Co.*, 53 AD3d 422, 862 NYS2d 473 (1st Dept 2008), *rev’d* on other grounds, 12 NY3d 316, 880 NYS2d 879, 908 NE2d 869 (2009); *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 852 NYS2d 138 (2d Dept 2008); *Walp v ACTS Testing Labs, Inc./Division of Bureau Veritas*, 28 AD3d 1104, 817 NYS2d 458 (4th Dept 2006); see *Cruz v 1142 Bedford Avenue, LLC*, *supra*; *Allan v DHL Exp. (USA), Inc.*, 99 AD3d 828, 952 NYS2d 275 (2d Dept 2012) (lessee); *Alexander v Hart*, 64 AD3d 940, 884 NYS2d 181 (3d Dept 2009) (individual with right to use and occupy Indian reserva-

tion land); *Zaher v Shopwell, Inc.*, 18 AD3d 339, 795 NYS2d 223 (1st Dept 2005) (lessee); *Copertino v Ward*, *supra* (holder of easement); *Ampolini v Long Island Lighting Co.*, 186 AD2d 772, 589 NYS2d 76 (2d Dept 1992). The Court of Appeals has left open the question of lessees' potential liability under Labor Law § 240(1), but has noted that any such liability would require a showing that the lessee had the right to control the work, *Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 880 NYS2d 879, 908 NE2d 869 (2009); *Hatch v St. Joseph's Hospital Health Center*, 174 AD3d 1404, 105 NYS3d 742 (4th Dept 2019); see *Garcia v Market Associates*, *supra* (lessee may be owner). An entity that contracted for and benefitted from the work is not an "owner" for purposes of Labor Law liability if it did not have an interest in the property on which the work was being performed, *Scaparo v Ilion*, 13 NY3d 864, 893 NYS2d 823, 921 NE2d 590 (2009) (defendant contracted for installation of sewer line across utility easement on adjacent property but did not direct the work or have authority to insist that proper safety practices be followed); see *Winkler v Halmar International, LLC*, 199 AD3d 598, 159 NYS3d 20 (1st Dept 2021) (municipal defendants fulfilled role of owner in contracting for construction of concrete mockup of aqueduct in preparation for planned aqueduct construction work).

With respect to title holders, liability under Labor Law § 240(1) and 241(6) rests upon the fact of ownership and it is generally irrelevant whether the owner has contracted for the work or benefitted from it, *Morton v State*, 15 NY3d 50, 904 NYS2d 350, 930 NE2d 271 (2010); *Sanatass v Consolidated Investing Co., Inc.*, 10 NY3d 333, 858 NYS2d 67, 887 NE2d 1125 (2008); *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 606 NYS2d 127, 626 NE2d 912 (1993); *Callari v Pellitieri*, 130 AD2d 935, 516 NYS2d 371 (4th Dept 1987) (owner who leased premises but who retained a right of control over the performance of the work may be held liable under Labor Law § 200). The fee owner's liability attaches even if the accident occurred in a portion of the premises subject to an easement, *Celestine v New York*, 59 NY2d 938, 466 NYS2d 319, 453 NE2d 548 (1983); *Murray v Lancaster Motorsports, Inc.*, 27 AD3d 1193, 812 NYS2d 726 (4th Dept 2006); *Silk v Turk*, 294 AD2d 896, 741 NYS2d 373 (4th Dept 2002); *Copertino v Ward*, 100 AD2d 565, 473 NYS2d 494 (2d Dept 1984).

A property owner who did not contract for the work may be liable only where there is some nexus between the owner and the worker or the work, such as a lease, grant of an easement or other property interest or the issuance of a work permit, *Guryev v Tomchinsky*, 20 NY3d 194, 957 NYS2d 677, 981 NE2d 273 (2012); *Morton v State*, 15 NY3d 50, 904 NYS2d 350, 930 NE2d 271 (2010); *Scaparo v Ilion*, 13 NY3d 864, 893 NYS2d 823, 921 NE2d 590 (2009); *Abbatiello v Lancaster Studio Associates*, 3 NY3d 46, 781 NYS2d 477, 814 NE2d 784 (2004); see *Sanatass v Consolidated Investing Co., Inc.*, 10 NY3d 333, 858 NYS2d 67, 887 NE2d 1125 (2008); *Yong Qiao Zhao v A.T.C. Construction Group Corp.*, 190 AD3d 788, 135 NYS3d 858 (2d Dept 2021) (where general contractor was performing unrelated work at two adjacent properties, plaintiff, who had only subcontracted to work at one of the sites,

could not maintain Labor Law action against the owner of the property where he had not been hired to work); *Paul v Quogue*, 178 AD3d 942, 115 NYS3d 450 (2d Dept 2019) (Labor Law not applicable to municipal owner of property that did not own telephone pole and wires plaintiff was working on when injured); *Mutadir v 80-90 Maiden Lane Del LLC*, 110 AD3d 641, 974 NYS2d 364 (1st Dept 2013) (owner had sufficient nexus to work where it had leased premises and required tenant to perform substantial demolition and construction on premises). Thus, a fee owner was held not liable under Labor Law § 241(6) where it did not contract for the work and the work was being performed on a Village utility right of way rather than on an easement that the fee owner had granted. *Scaparo v Ilion*, supra; see *Fox v Jenny Engineering Corp.*, 122 AD2d 532, 505 NYS2d 270 (4th Dept 1986) (no liability imposed on fee owner where easement was obtained through condemnation since owner has no power to impose conditions concerning construction on premises), *aff'd*, 70 NY2d 761, 520 NYS2d 750, 514 NE2d 1374 (1987). Similarly, the State was not liable under Labor Law § 241(6) for injuries sustained by a worker engaged in excavating a trench to repair a break in a water main that had been installed by a private company underneath a state highway, *Morton v State*, supra. Since the private water company had not obtained the State's permission or a required permit to perform the work, the requisite nexus was not established, *id.* Moreover, the State would not have been liable in these circumstances even if the water company had been entitled to enter the land without a work permit to make emergency repairs, since such an entry would have been made "upon compulsion" and, thus, does not establish the necessary nexus, *id.*; see *Guryev v Tomchinsky*, supra (agreement between condominium's board of managers and individual unit owner permitting renovation work to unit did not make board "owner" for purposes of Labor Law § 241(6) claim; agreement, which was required under condominium's by-laws, did not vest board with authority to determine which contractors to hire, control the work or insist that proper safety practices be followed); *Fox v Jenny Engineering Corp.*, supra. The property owner was held not subject to liability under Labor Law § 240(1) in the unusual circumstances surrounding the decontamination work in lower Manhattan in the wake of the September 11, 2001 terrorist attack on the World Trade Center, since the New York City Department of Environmental Protection evacuated the premises, solicited bids for the decontamination work, hired plaintiff's employer and refused to permit anyone other than agency staff or workers on the premises, *Campoverde v Liberty, LLC*, 37 AD3d 275, 832 NYS2d 7 (1st Dept 2007); *Moracho v Open Door Family Medical Center, Inc.*, 74 AD3d 657, 906 NYS2d 7 (1st Dept 2010) (noting that *Campoverde v Liberty, LLC*, supra, involved "unusual circumstances" and declining to apply its holding to general contractor prevented from accessing roof during asbestos abatement project).

Thus, an industrial development agency that was the title owner of the property was an "owner" under Labor Law § 240(1) even though it entered into a lease-back transaction and did not retain control of construction on the premises, *Adimey v Erie County Indus. Development Agency*, 89 NY2d 836, 652 NYS2d 724, 675 NE2d 459 (1996).

Similarly, because the Legislature has not carved out an exception for the City of New York under Labor Law § 240, it is deemed an “owner” for purposes of work performed by the New York City Transit Authority at a station owned by the City, even where the City allegedly lacked any ability to protect the Authority’s employees working on the transit system, *Coleman v New York*, 91 NY2d 821, 666 NYS2d 553, 689 NE2d 523 (1997); see also *Kowalska v Board of Educ. of City of New York*, 260 AD2d 546, 688 NYS2d 598 (2d Dept 1999), (school board demonstrated that subject school building was owned by City and that construction contract giving rise to accident was with New York City School Construction Authority; therefore, board could not be held liable under Labor Law § 240(1)). In *Costa v State*, 141 AD3d 43, 32 NYS3d 147 (1st Dept 2016), however, the court held that although the State held title to the pier on which the accident occurred, the State was not an “owner” of the pier because legislation (Unconsolidated Laws § 1641, et seq.) compelled the State to transfer possessory interest in the pier to a public trust and exempted the State from Labor Law liability.

Liability may be imposed upon the owner of the land beneath the building in which the accident occurred although that person did not own the building itself, *Mejia v Moriello*, 286 AD2d 667, 730 NYS2d 131 (2d Dept 2001); *Cannino v Locust Valley Fire District*, 241 AD2d 534, 661 NYS2d 240 (2d Dept 1997). Where the accident occurred near the top of a retaining wall that was being repaired for the benefit of the owners on both sides of the wall, plaintiff was entitled to recover from defendant owner under Labor Law § 240(1) even though plaintiff may have been standing on the adjacent owner’s side of the wall at the time of the accident, *Larosae v American Pumping, Inc.*, 73 AD3d 1270, 902 NYS2d 202 (3d Dept 2010).

Although a condominium owns the land beneath a building, an individual condominium unit constitutes real property separate and apart from the land, *Guryev v Tomchinsky*, 20 NY3d 194, 957 NYS2d 677, 981 NE2d 273 (2012). However, a condominium, its board, and its managing agent were not liable under Labor Law § 241(6) for an injury that occurred in an individual unit, *Guryev v Tomchinsky*, *supra*. In contrast, where a worker was struck by a falling pipe that was part of a condominium’s common elements, the condominium’s board of managers, rather than the owners of the individual units, was the proper defendant, *Lewis v Lester’s of N.Y., Inc.*, 205 AD3d 796, 165 NYS3d 870 (2d Dept 2022).

The fee owner is liable where the premises have been leased to a tenant who is undertaking construction over which the fee owner has no control, *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 606 NYS2d 127, 626 NE2d 912 (1993) (where property was leased for cleaning and repairing of railroad cars, presence of railroad car from which plaintiff fell was direct result of owner’s actions and established sufficient nexus for liability to attach to owner under Labor Law § 240(1)); see *Wong v New York*, 65 AD3d 1000, 885 NYS2d 120 (2d Dept 2009) (City leased property to Port Authority, which, in turn, leased premises to airline);

Otero v Cablevision of New York, 297 AD2d 632, 747 NYS2d 46 (2d Dept 2002); Seemueller v Erie, 202 AD2d 1052, 609 NYS2d 462 (4th Dept 1994). The same principle applies even where the tenant's lease required the owner's prior written consent for alterations and the tenant failed to comply with the lease before contracting for the work, Sanatass v Consolidated Investing Co., Inc., 10 NY3d 333, 858 NYS2d 67, 887 NE2d 1125 (2008); see Morales v D & A Food Service, 10 NY3d 911, 862 NYS2d 449, 892 NE2d 842 (2008), rev'g 41 AD3d 352, 839 NYS2d 464 (1st Dept 2007).

A property owner may be held liable under the Labor Law unless the injured employee was on the property by virtue of authority not derived, directly or indirectly, from the owner, Sanatass v Consolidated Investing Co., Inc., 10 NY3d 333, 858 NYS2d 67, 887 NE2d 1125 (2008); Gordon v Eastern Ry. Supply, Inc., 82 NY2d 555, 606 NYS2d 127, 626 NE2d 912 (1993). Such authority exists where the owner has leased the premises to the tenant who contracted for the work, even where the tenant disregarded a lease provision requiring the owner's consent, Sanatass v Consolidated Investing Co., supra; see Morales v D & A Food Service, 10 NY3d 911, 862 NYS2d 449, 892 NE2d 842 (2008), rev'g 41 AD3d 352, 839 NYS2d 464 (1st Dept 2007). Such authority also exists where the owner has granted an easement to the entity which contracted for the work, Celestine v New York, 59 NY2d 938, 466 NYS2d 319, 453 NE2d 548 (1983). For example, in Coleman v New York, 91 NY2d 821, 666 NYS2d 553, 689 NE2d 523 (1997), the municipal owner of an elevated train station that was leased to the New York City Transit Authority was held liable under Labor Law § 240(1) even though the leasing arrangement was established by statute and the municipal owner had no ability to protect Transit Authority workers. However, the requisite nexus did not exist where the injured cable technician's authority to be on the premises was derived solely from the mandatory access provisions of Public Service Law § 219, Abbatiello v Lancaster Studio Associates, 3 NY3d 46, 781 NYS2d 477, 814 NE2d 784 (2004); see Personius v Mann, 20 AD3d 616, 798 NYS2d 195 (3d Dept 2005), aff'd as mod on other grounds, 5 NY3d 857, 807 NYS2d 11, 840 NE2d 1024 (2005) (owner not liable to electric utility worker who entered premises to cut off power to burning barn where no evidence that owner had called worker to scene or was aware worker was on premises); see also Morton v State, 15 NY3d 50, 904 NYS2d 350, 930 NE2d 271 (2010) (State, which owned highway above private water main being repaired, not liable for emergency repair to main conducted without permit, since entry onto land made "upon compulsion").

In cases involving workers injured while performing alterations on cable lines affixed to utility poles, the utility pole owner cannot be held liable under Labor Law § 240(1) where the utility pole owner does not own the cable line and did not otherwise act in the capacity of owner, Villalta v Consolidated Edison Company of New York, Inc., 197 AD3d 1078, 154 NYS3d 61 (1st Dept 2021); Greenough v Niagara Mohawk Power Corp., 13 AD3d 1160, 787 NYS2d 762 (4th Dept 2004); Ackley v New York State Elec. & Gas Corp., 8 AD3d 941, 779 NYS2d 279 (3d

Dept 2004); *Sarigul v New York Telephone Co.*, 4 AD3d 168, 772 NYS2d 653 (1st Dept 2004); *Scott v Crystal Const. Corp.*, 1 AD3d 992, 768 NYS2d 745 (4th Dept 2003); *Lacey v Long Island Lighting Co.*, 293 AD2d 718, 741 NYS2d 558 (2d Dept 2002); *Bonghi v New York Telephone Co.*, 277 AD2d 893, 715 NYS2d 137 (4th Dept 2000); *Girty v Niagara Mohawk Power Corp.*, 262 AD2d 1012, 691 NYS2d 822 (4th Dept 1999); *Ray v Niagara Mohawk Power Corp.*, 256 AD2d 1070, 682 NYS2d 758 (4th Dept 1998); *Fuller v Niagara Mohawk Power Corp.*, 213 AD2d 986, 625 NYS2d 108 (4th Dept 1995). In *Sarigul v New York Telephone Co.*, *supra*, the First Department observed that this principle may appear inconsistent with the Court of Appeals' decisions in *Coleman v New York*, 91 NY2d 821, 666 NYS2d 553, 689 NE2d 523 (1997), and *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 606 NYS2d 127, 626 NE2d 912 (1993). Nonetheless, the court decided to adhere to the principle because, among other reasons, it is consistent with the First Department's rule that an apartment building owner cannot be held liable to a cable repair worker who is called by a tenant without the owner's knowledge, see *Abbatiello v Lancaster Studio Associates*, 307 AD2d 788, 763 NYS2d 44 (1st Dept 2003), *aff'd*, 3 NY3d 46, 781 NYS2d 477, 814 NE2d 784 (2004); *Wildman v Jensen*, 59 AD3d 165, 872 NYS2d 450 (1st Dept 2009); *Brown v Christopher Street Owners Corp.*, 211 AD2d 441, 620 NYS2d 374 (1st Dept 1995), *aff'd*, 87 NY2d 938, 641 NYS2d 221, 663 NE2d 1251 (1996); *Ceballos v Kaufman*, 249 AD2d 40, 671 NYS2d 229 (1st Dept 1998). In contrast, a garage owner was subject to Labor Law § 240(1) liability for a cable splicer's accident where the cable box on which the splicer was working was affixed to the garage wall and the owner had not only given permission for the work but had arranged for its own engineers to accompany the cable company's workers onto the work site, *Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430, 843 NYS2d 237 (1st Dept 2007).

Labor Law § 240(1) makes no distinction between in-possession and out-of-possession owners, *Nephew v Barcomb*, 260 AD2d 821, 688 NYS2d 751 (3d Dept 1999). "Owner" includes a seller who has relinquished possession of the property in favor of the buyer but who remains as fee owner, *Nephew v Barcomb*, *supra*. A contract vendor who retained title to the premises but gave the contract vendee permission to clean and paint the interior prior to the closing is still an "owner" under Labor Law §§ 240 and 241, *Marks v Morehouse*, 222 AD2d 785, 634 NYS2d 835 (3d Dept 1995); see *Custer v Jordan*, 107 AD3d 1555, 968 NYS2d 754 (4th Dept 2013) (out-of-possession contract vendor treated as owner even though contract vendee had made final payment on property where vendor still had title at time of accident and contract requirements with respect to survey and delivery of deed had not been satisfied); *Vigliotti v Executive Land Corp.*, 186 AD2d 646, 588 NYS2d 430 (2d Dept 1992); *DeFreece v Penny Bag, Inc.*, 137 AD2d 744, 524 NYS2d 825 (2d Dept 1988). "Owner" also includes a successor in interest to the holder of a license granted by a city permitting the installation of a cable line and attachments to the city's utility pole, *Wilcox v Paragon Cable T.V.*, 241 AD2d 914, 661 NYS2d 397 (4th Dept 1997), and a former fee owner who, as part of a financing mechanism, gave up fee title but received back a lease and retained control over construction

on the premises, *Collins v Monroe Indus. Development Agency (COMIDA)*, 167 AD2d 914, 561 NYS2d 995 (4th Dept 1990); see *Vigliotti v Executive Land Corp.*, *supra*.

The term “owner” includes an agent in charge of the property, Labor Law § 315(1), and such an agent may be held liable along with the fee owner, *Cardile v D'Ambrosia*, 72 AD2d 544, 420 NYS2d 732 (2d Dept 1979). An agent, however, may be liable only where the agent has obtained authority to supervise and control the work, *Kerr v Rochester Gas and Elec. Corp.*, 113 AD2d 412, 496 NYS2d 880 (4th Dept 1985); see *Guryev v Tomchinsky*, 20 NY3d 194, 957 NYS2d 677, 981 NE2d 273 (2012); *Fox v Jenny Engineering Corp.*, 122 AD2d 532, 505 NYS2d 270 (4th Dept 1986), *aff'd*, 70 NY2d 761, 520 NYS2d 750, 514 NE2d 1374 (1987); *Sog v G.S.E. Dynamics, Inc.*, 239 AD2d 489, 658 NYS2d 351 (2d Dept 1997); *Davis v Lenox School*, 151 AD2d 230, 541 NYS2d 814 (1st Dept 1989).

The extent to which lessees may be held liable as “owners” under Labor Law § 240(1) remains an open question, *Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 880 NYS2d 879, 908 NE2d 869 (2009). Some courts have held that a lessee can be held liable as an “owner” if it hired the contractor or, if it did not hire the contractor, otherwise had the right to control the work, *Allan v DHL Exp. (USA), Inc.*, 99 AD3d 828, 952 NYS2d 275 (2d Dept 2012); *Walp v ACTS Testing Labs, Inc./Division of Bureau Veritas*, 28 AD3d 1104, 817 NYS2d 458 (4th Dept 2006); *Zaher v Shopwell, Inc.*, 18 AD3d 339, 795 NYS2d 223 (1st Dept 2005); see *Garcia v Market Associates*, 123 AD3d 661, 998 NYS2d 193 (2d Dept 2014) (lessee may be “owner” if contracted for or supervised and controlled the work); *Bart v Universal Pictures*, 277 AD2d 4, 715 NYS2d 240 (1st Dept 2000) (Labor Law § 240(1) applicable where lessee had right to control work); see also *Sinzieri v Expositions, Inc.*, 270 AD2d 332, 704 NYS2d 293 (2d Dept 2000) (defendant lessee of arena was “owner” liable for worker’s injuries under Labor Law § 240(1)). Some of the decisions holding lessees liable are based on the premise that the term “owner” in Labor Law § 240(1) encompasses “a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit,” *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 852 NYS2d 138 (2d Dept 2008); *Zaher v Shopwell, Inc.*, *supra*. The Court of Appeals has stopped short of recognizing lessees as entities that are potentially liable as “owners,” but has noted that such liability, if it exists, would be limited to situations in which the lessee hired the contractor and “thus ha[d] the right to control the work being done,” *Ferluckaj v Goldman Sachs & Co.*, *supra*. It is unclear whether the *Ferluckaj* dictum was intended to preclude lessee liability under Labor Law § 240(1) where the lessee did not hire the contractor but otherwise had the right to control the work, see *Zaher v Shopwell, Inc.*, *supra* (Labor Law § 240(1) may apply to lessee where lessee has right to control work site even if lessee did not hire general contractor); *Bart v Universal Pictures*, *supra* (evidence that lessee hired contractor is one way to prove control of the work site, but control may also be proven by other means, such as contractual or statutory provisions granting right to control).

In one case decided before *Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 880 NYS2d 879, 908 NE2d 869 (2009), the court held that a lessee is responsible for maintaining all areas in which construction work is being performed in a safe condition, not just areas encompassed by the lease, *Kane v Countorous*, 293 AD2d 309, 739 NYS2d 711 (1st Dept 2002). In another pre-*Ferluckaj* case, the court held that a lessee who paid no rent but who contracted with a company to demolish a house may be held liable to plaintiff under Labor Law § 241(6), *Demartino v CBS Auto Body and Towing, Inc.*, 208 AD2d 886, 618 NYS2d 92 (2d Dept 1994).

The term “owner” does not include a prospective lessee who lacked the right to hire and fire the general contractor or subcontractors, did not contract for or supervise the work and had no right to insist that proper safety precautions be followed, *Crespo v Triad, Inc.*, 294 AD2d 145, 742 NYS2d 25 (1st Dept 2002); *Saaverda v East Fordham Road Real Estate Corp.*, 233 AD2d 125, 649 NYS2d 416 (1st Dept 1996); *Frierson v Concourse Plaza Associates*, 189 AD2d 609, 592 NYS2d 309 (1st Dept 1993); *Santos v American Museum of Natural History*, 187 AD2d 420, 589 NYS2d 520 (2d Dept 1992); *Pacheco v South Bronx Mental Health Council, Inc.*, 179 AD2d 550, 579 NYS2d 49 (1st Dept 1992); see *Villalta v Consolidated Edison Company of New York, Inc.*, 197 AD3d 1078, 154 NYS3d 61 (1st Dept 2021) (no evidence owner of telephone pole had right to insist plaintiff follow safety practices in performance of work for nonparty cable company); *Grindley v Eastchester*, 213 AD2d 448, 625 NYS2d 229 (2d Dept 1995) (party who is not owner in fee and does not contract for or benefit from work performed by injured plaintiff is not owner under Labor Law § 240(1)); *Wendel v Pillsbury Corp.*, 205 AD2d 527, 612 NYS2d 678 (2d Dept 1994). The term “owner” does not include a lessee not yet entitled to occupy the premises under construction, *Bach v Emery Air Freight Corp.*, 128 AD2d 490, 512 NYS2d 417 (2d Dept 1987).

The term “owner” may include a contract-vendee in particular circumstances, *DiVincenzo v Plaza Farms Development, Inc.*, 269 AD2d 842, 703 NYS2d 647 (4th Dept 2000); *Williams v G.H. Development and Const. Co. Inc.*, 250 AD2d 959, 672 NYS2d 937 (3d Dept 1998); *Marks v Morehouse*, 222 AD2d 785, 634 NYS2d 835 (3d Dept 1995); *Vigliotti v Executive Land Corp.*, 186 AD2d 646, 588 NYS2d 430 (2d Dept 1992); *DeFreece v Penny Bag, Inc.*, 137 AD2d 744, 524 NYS2d 825 (2d Dept 1988); see also *Greenough v Niagara Mohawk Power Corp.*, 13 AD3d 1160, 787 NYS2d 762 (4th Dept 2004) (question of fact whether defendant was contract-vendee subject to liability under § 240(1) where there was evidence that defendant was to become owner of cable being installed once it paid installer for materials and labor). However, a contract vendor who has retained title to the premises and who gives the contract vendee permission to clean and paint the interior prior to the closing is still an “owner” under Labor Law §§ 240 and 241, *Marks v Morehouse*, *supra*.

A critical distinction exists between condominium and cooperative

corporations for the purposes of Labor Law §§ 240 and 241(6) liability. Condominium units are owned by individual unit owners, *Jerdonek v 41 West 72 LLC*, 143 AD3d 43, 36 NYS3d 17 (1st Dept 2016). Therefore, a condominium corporation is not an owner of an individual unit and generally cannot be held liable under Labor Law §§ 240(1) or 241(6) for injuries to a worker occurring in an individual unit, *Guryev v Tomchinsky*, 20 NY3d 194, 957 NYS2d 677, 981 NE2d 273 (2012); *Lewis v Lester's of N.Y., Inc.*, 205 AD3d 796, 165 NYS3d 870 (2d Dept 2022). A cooperative corporation, however, may be an “owner” because it owns the entire building, including the individual units; the residents own shares in the corporation and are granted proprietary leases to occupy the units, see *id.* A residential cooperative is not liable as an “owner” under Labor Law § 240(1) for injuries sustained by a worker hired by the cooperative’s sponsor where the sponsor is the only person who stands to benefit by a sale of the apartment and the sponsor was not acting as the cooperative’s agent, *Webb v 444 Cent. Park Owners, Inc.*, 248 AD2d 175, 669 NYS2d 574 (1st Dept 1998). Similarly, the term “owner” does not include a homeowners’ association that had no ownership interest in the property on which plaintiff was to perform the work, *Mangiameli v Galante*, 171 AD2d 162, 574 NYS2d 842 (3d Dept 1991); see *Guryev v Tomchinsky*, *supra*. Because exclusive control of a condominium’s common elements rests with the condominium’s board of managers, the board is the “owner” of the common elements, *Jerdonek v 41 West 72 LLC*, *supra* (owners of individual units are not “owners” of common elements).

For purposes of Labor Law § 240(1), a defendant was considered an “owner” of a food service trailer that it did not own, as it derived a benefit from its presence on its land, *Ampolini v Long Island Lighting Co.*, 186 AD2d 772, 589 NYS2d 76 (2d Dept 1992); see *Lynch v New York*, 209 AD2d 590, 619 NYS2d 657 (2d Dept 1994) (entity owning billboard on which plaintiff was working and entity owning property on which billboard was erected could be considered “owners” under Labor Law).

The corporate partners in a partnership that owns the premises are all “owners” liable for any violations of Labor Law §§ 240(1) and 241(6), *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 802 NYS2d 41 (1st Dept 2005). However, the term “owner” does not include a parent corporation that owns the stock of a subsidiary corporation that owns the premises, see *Catherwood v American Sterilizer Co.*, 132 AD2d 938, 518 NYS2d 485 (4th Dept 1987), or the non-titled spouse of the owner, *Fisher v Coghlan*, 8 AD3d 974, 778 NYS2d 812 (4th Dept 2004). Further, notwithstanding its ownership under Highway Law § 349-f of the arterial highway where the accident occurred, a municipality was not deemed an “owner” within Labor Law §§ 240(1) and 241, where responsibility for the work site was shared by the municipality and the State pursuant to Highway Law art. XII-B, the rehabilitation project was initiated by the State, the State was in charge of the construction project, the project was ongoing at the time of the accident, the municipality had no input into the contractors or consultants hired, and the municipality did not perform any of the work or actively cause the

condition that led to the accident, *Albanese v New York*, 5 NY3d 217, 800 NYS2d 538, 833 NE2d 1213 (2005). Under those circumstances, the municipality's limited regulatory role in issuing work permits, reviewing plans and specification, attending meeting, inspecting the site and retaining authority to suspend or terminate the work was not sufficient to give rise to liability under Labor Law §§ 240(1) and 241.

2. *Contractor*

An entity is a “contractor” if it has the power to enforce safety standards and choose responsible subcontractors, *Yaguachi v Park City 3 and 4 Apartments, Inc.*, 185 AD3d 635, 126 NYS3d 505 (2d Dept 2020); *Milanese v Kellerman*, 41 AD3d 1058, 838 NYS2d 256 (3d Dept 2007); *Outwater v Ballister*, 253 AD2d 902, 678 NYS2d 396 (3d Dept 1998), or if it had the right to exercise control of the work, regardless of whether it actually exercised that right, *Nucci v Suffolk*, 204 AD3d 817, 166 NYS3d 672 (2d Dept 2022); *Rauls v DirecTV, Inc.*, 113 AD3d 1097, 977 NYS2d 864 (4th Dept 2014); *Mergenhausen v Dish Network Service L.L.C.*, 64 AD3d 1170, 883 NYS2d 405 (4th Dept 2009); *Futo v Brescia Bldg. Co., Inc.*, 302 AD2d 813, 755 NYS2d 125 (3d Dept 2003). Whether a party is a “contractor” within the meaning of the Labor Law may depend upon the terms of the relevant contract and may present factual issues for the jury, see *Bart v Universal Pictures*, 277 AD2d 4, 715 NYS2d 240 (1st Dept 2000); *Perkins v Randall Elec., Inc.*, 129 AD2d 1000, 514 NYS2d 840 (4th Dept 1987). A contractor that had the power to enforce safety standards and choose responsible subcontractors could be held liable even though it did not supervise the subcontractor's work or give detailed instructions to the subcontractor, where the subcontractor had performed similar work for the contractor in the past on numerous occasions and understood its responsibilities, *Milanese v Kellerman*, 41 AD3d 1058, 838 NYS2d 256 (3d Dept 2007). A contractor who retained the subcontractors who performed work allegedly causing injury could be held liable as a statutory agent, *Ohadi v Magnetic Construction Group Corp.*, 182 AD3d 474, 122 NYS3d 612 (1st Dept 2020). There was a factual question as to whether a corporate defendant was a contractor under the Labor Law where the evidence submitted in support of its motion for summary judgment failed to establish that its corporate officer was acting in his individual capacity when he retained the plaintiff to paint his residence, *Alexandridis v Van Gogh Contracting Company*, 180 AD3d 969, 120 NYS3d 347 (2d Dept 2020).

A defendant may be held liable as a general contractor under the Labor Law even if it did not hire or contract with the plaintiff's employer if the defendant was responsible for coordinating and supervising the entire construction project and was invested with concomitant power to enforce safety standards and to hire responsible contractors, *Lemiszeko v Mosovich 2014 Family Trust*, 191 AD3d 1363, 141 NYS3d 605 (4th Dept 2021). Where a parent company did not have a contract to supervise or coordinate the construction project of its subsidiary, and the parent company only approved the capital expenditures for the project and provided safety information to the subsidiary that did the work, the

parent company was not considered a contractor, *Clapp v Eastern Rock Products, Inc.*, 167 AD2d 902, 561 NYS2d 992 (4th Dept 1990). However, liability was imposed upon a person who categorized himself as a contractor on the building permit, had been given broad authority to hire subcontractors, had the power to insist that subcontractors comply with safety standards, performed a significant portion of the work himself, supplied materials and equipment, monitored the performance of the other workers, and suggested changes in both design and execution, *Relyea v Bushneck*, 208 AD2d 1077, 617 NYS2d 558 (3d Dept 1994); see *Douglas v Tishman Construction Corporation*, 205 AD3d 570, 169 NYS3d 277 (1st Dept 2022) (construction manager was statutory agent where it set forth its safety guidelines in subcontract with plaintiff's employer); *Hojohn v Beltrone Const. Co. Inc.*, 255 AD2d 658, 679 NYS2d 462 (3d Dept 1998). Likewise, in *Bagshaw v Network Service Management, Inc.*, 4 AD3d 831, 772 NYS2d 161 (4th Dept 2004), a company that was responsible for the coordination and execution of the work, had the authority to select a vendor to perform the work and actually hired and paid vendors was deemed a "contractor" even though the owner retained authority to approved the repair costs if they exceeded a specified amount. In *Nephew v Klewin Bldg. Co., Inc.*, 21 AD3d 1419, 804 NYS2d 157 (4th Dept 2005), the court held that a company designated as "designer/builder" was liable as a general contractor under Labor Law § 240(1) because it was contractually responsible for coordinating and supervising the project and had the power to enforce safety standards and hire responsible contractors. In contrast, the facts that defendant was listed as the contractor on work permits and that defendant allegedly hired a plumber after the accident to "sign off" on the plumbing work at the work site were not sufficient in themselves to raise a triable issue as to whether defendant was the work site contractor, *Huerta v Three Star Const. Co., Inc.*, 56 AD3d 613, 868 NYS2d 679 (2d Dept 2008).

A general contractor is not liable under the Labor Law if plaintiff's work at the time of the accident was outside the scope of the general contractor's contract, *Balthazar v Full Circle Const. Corp.*, 268 AD2d 96, 707 NYS2d 70 (1st Dept 2000) (Labor Law § 240(1)); *Root v Onondaga*, 174 AD2d 1014, 572 NYS2d 174 (4th Dept 1991) (Labor Law § 241(6)). It is the lack of actual authority to control or supervise plaintiff's work that may shield a party, and not the contractual provisions between the owner and contractor, *Butt v Bovis Lend Lease LMB, Inc.*, 47 AD3d 338, 847 NYS2d 84 (1st Dept 2007).

3. *Agent*

While the owner or general contractor may not avoid liability under Labor Law §§ 240(1) and 241(6) by delegating the work, see *Kingston v Hunter Highlands*, 222 AD2d 952, 636 NYS2d 428 (3d Dept 1995), the work may, in fact, be delegated, *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 802 NYS2d 41 (1st Dept 2005). Where the work is delegated to a third party, the third party has concomitant authority to supervise and control the work delegated and becomes an "agent" of the owner or

general contractor for purposes of the Labor Law, *Walls v Turner Const. Co.*, 4 NY3d 861, 798 NYS2d 351, 831 NE2d 408 (2005); *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 771 NYS2d 484, 803 NE2d 757 (2003); *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 445 NYS2d 127, 429 NE2d 805 (1981); *Bennett v Huckle*, 131 AD3d 993, 16 NYS3d 261 (2d Dept 2015), *aff'd*, 28 NY3d 964, 38 NYS3d 834, 60 NE3d 1200 (2016); see *Barreto v Metropolitan Transp. Authority*, 25 NY3d 426, 13 NYS3d 305, 34 NE3d 815 (2015); *Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 521 NYS2d 216, 515 NE2d 902 (1987). Once an entity becomes an agent under the Labor Law, it cannot escape liability to an injured plaintiff by delegating the work to another entity, *Nascimento v Bridgehampton Const. Corp.*, 86 AD3d 189, 924 NYS2d 353 (1st Dept 2011); *Inga v EBS North Hills, LLC*, 69 AD3d 568, 893 NYS2d 562 (2d Dept 2010); *Tomyuk v Junefield Ass'n*, 57 AD3d 518, 868 NYS2d 731 (2d Dept 2008); *McGlynn v Brooklyn Hospital-Caledonian Hosp.*, 209 AD2d 486, 619 NYS2d 54 (2d Dept 1994).

In analyzing whether defendant was an agent, defendant's title is not determinative, *Barrios v New York*, 75 AD3d 517, 905 NYS2d 255 (2d Dept 2010); *Damiani v Federated Dept. Stores, Inc.*, 23 AD3d 329, 804 NYS2d 103 (2d Dept 2005). The existence of an agency relationship turns upon whether the third party who is neither an owner nor a general contractor possesses the authority to supervise and control the work that gives rise to the plaintiff's injuries, *Barreto v Metropolitan Transp. Authority*, 25 NY3d 426, 13 NYS3d 305, 34 NE3d 815 (2015); *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 771 NYS2d 484, 803 NE2d 757 (2003); *Bennett v Huckle*, 131 AD3d 993, 16 NYS3d 261 (2d Dept 2015), *aff'd*, 28 NY3d 964, 38 NYS3d 834, 60 NE3d 1200 (2016); see *Larkin v Sano-Rubin Const. Co., Inc.*, 124 AD3d 1162, 3 NYS3d 167 (3d Dept 2015); *Wrobel v Pendleton*, 120 AD3d 963, 991 NYS2d 218 (4th Dept 2014); *Nascimento v Bridgehampton Const. Corp.*, 86 AD3d 189, 924 NYS2d 353 (1st Dept 2011); *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 802 NYS2d 41 (1st Dept 2005); *Nowak v Kiefer*, 256 AD2d 1129, 685 NYS2d 151 (4th Dept 1998). The determinative factor on the issue of control is whether the third party has control of the work and the authority to insist that proper safety practices be followed, *Lopes v Interstate Concrete, Inc.*, 293 AD2d 579, 741 NYS2d 73 (2d Dept 2002); *Everitt v Nozkowski*, 285 AD2d 442, 728 NYS2d 58 (2d Dept 2001); see *Herrera v Kent Avenue Property III LLC*, 203 AD3d 512, 161 NYS3d 766 (1st Dept 2022) (where plaintiff was injured when struck by excavator, contractor was statutory agent where it had been delegated authority to control activity that brought about injury, including responsibility to provide barriers, flagmen, and post danger signs); *Armental v 401 Park Avenue South Associates, LLC*, 182 AD3d 405, 121 NYS3d 259 (1st Dept 2020); *Marquez v L & M Development Partners, Inc.*, 141 AD3d 694, 35 NYS3d 700 (2d Dept 2016); *Tomyuk v Junefield Ass'n*, 57 AD3d 518, 868 NYS2d 731 (2d Dept 2008) (construction manager deemed owner's agent where its contract with owner made it responsible for assuring satisfactory performance of trade contractors, there was no general contractor and

construction manager assigned employee to act as project manager at the job site every day); see also *Guryev v Tomchinsky*, 20 NY3d 194, 957 NYS2d 677, 981 NE2d 273 (2012) (agreement between condominium's board of managers and individual unit owner permitting renovation work to unit did not make board "agent" for purposes of Labor Law § 241(6) claim; agreement, which was required under condominium's by-laws, did not vest board with authority to determine which contractors to hire, control the work or insist that proper safety practices be followed). A subcontractor's authority to supervise and control plaintiff's work may be demonstrated by the terms of its subcontract and the fact that the contractor itself subcontracted a portion of the work to plaintiff's employer, *Weber v Baccarat, Inc.*, 70 AD3d 487, 896 NYS2d 12 (1st Dept 2010); see *Nascimento v Bridgehampton Const. Corp.*, supra. Moreover, the significance of a subcontractor's authority to supervise and control plaintiff's work is not negated by the fact that the general contractor had concomitant or overlapping authority to supervise the entire project, *Weber v Baccarat, Inc.*, supra.

The requisite indicia of agency were lacking where a non-profit organization providing low-interest loans coordinated the repair work but did not involve itself with the details of how the individual contractors performed their jobs, *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 771 NYS2d 484, 803 NE2d 757 (2003). Similarly, a company hired to erect a sidewalk bridge that left the job site after completion of the bridge and was not scheduled to return to dismantle the bridge until the construction project was completed was not a statutory agent, but might be liable under the common law for negligent construction of the bridge, *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 802 NYS2d 41 (1st Dept 2005).

If it is determined that a party was vested with the requisite authority to supervise and control the injury-producing work, the mere fact that it may not have exercised such authority is irrelevant for purposes of determining the existence of an agency relationship under Labor Law § 240, *Weber v Baccarat, Inc.*, 70 AD3d 487, 896 NYS2d 12 (1st Dept 2010); *Williams v Dover Home Improvement, Inc.*, 276 AD2d 626, 714 NYS2d 318 (2d Dept 2000); *Fox v Brozman-Archer Realty Services, Inc.*, 266 AD2d 97, 698 NYS2d 654 (1st Dept 1999); *Doyne v Barry, Bette & Led Duke Inc.*, 246 AD2d 756, 668 NYS2d 58 (3d Dept 1998); see *Nascimento v Bridgehampton Const. Corp.*, 86 AD3d 189, 924 NYS2d 353 (1st Dept 2011). However, the third party is an "agent" responsible for injuries and activities only within the scope of the work delegated and is not liable for injuries sustained by reason of conduct outside the scope of its own work, *Rice v Cortland*, 262 AD2d 770, 691 NYS2d 616 (3d Dept 1999); *Doyne v Barry, Bette & Led Duke Inc.*, supra; *McGurk v Turner Const. Co.*, 127 AD2d 526, 512 NYS2d 71 (1st Dept 1987); see *Yaguachi v Park City 3 and 4 Apartments, Inc.*, 185 AD3d 635, 126 NYS3d 505 (2d Dept 2020).

The terms "general contractor" and "construction manager" are not synonymous, *Balthazar v Full Circle Const. Corp.*, 268 AD2d 96, 707

NYS2d 70 (1st Dept 2000). A construction manager may be deemed a contractor or agent of the owner if the construction manager is in charge of the project and has overall responsibility for the work, including matters of safety, *Maniscalco v Liro Engineering Const. Management, P.C.*, 305 AD2d 378, 759 NYS2d 163 (2d Dept 2003); *Ortega v Catamount Const. Corp.*, 264 AD2d 323, 694 NYS2d 367 (1st Dept 1999) (abrogated on other grounds by, *McCarthy v Turner Const., Inc.*, 17 NY3d 369, 929 NYS2d 556, 953 NE2d 794 (2011)); see *Tanksley v LCO Building LLC*, 201 AD3d 1323, 162 NYS3d 609 (4th Dept 2022) (construction manager may be vicariously liable as agent of owner where it had ability to control activity which brought about injury); *Pipia v Turner Const. Co.*, 114 AD3d 424, 980 NYS2d 392 (1st Dept 2014) (although defendant's contract designated it "consultant," defendant was "contractor" for purposes of Labor Law § 240(1), since it performed larger facilities management project, hired all subcontractors and other personnel and coordinated their work); *Ewing v ADF Const. Corp.*, 16 AD3d 1085, 793 NYS2d 306 (4th Dept 2005); *Falsitta v Metropolitan Life Ins. Co. Inc.*, 279 AD2d 879, 719 NYS2d 373 (3d Dept 2001). Thus, a construction manager that had assumed responsibility for contractual, statutory and regulatory compliance by all of the trade contractors on the job and had the power to stop work in the event of an unsafe practice or hazardous condition was deemed the owner's agent for purposes of liability under Labor Law § 240(1), *Walls v Turner Const. Co.*, 4 NY3d 861, 798 NYS2d 351, 831 NE2d 408 (2005). Among the determinative factors in *Walls* were the facts that (a) the contract terms imposing responsibility on the construction manager were specific, (b) there was no general contractor on the job, (c) the construction manager had the duty to oversee the site and the trade contractors, (d) the construction manager's representative acknowledged its authority to control activities at the work site and to stop unsafe work practices. In contrast, a construction manager was not liable as a statutory agent where it only coordinated the different subcontractors, created work schedules and prepared progress reports, *Armentano v Broadway Mall Properties, Inc.*, 30 AD3d 450, 817 NYS2d 132 (2d Dept 2006).

A subcontractor is an "agent" of the owner or general contractor under Labor Law § 241(6) only to the extent that it has been given authority to supervise and control the injury-producing activity, *Brown v Two Exchange Plaza Partners*, 146 AD2d 129, 539 NYS2d 889 (1st Dept 1989), *aff'd*, 76 NY2d 172, 556 NYS2d 991; 556 NE2d 430 (1990); *Serpe v Eyris Productions, Inc.*, 243 AD2d 375, 663 NYS2d 542 (1st Dept 1997); *Kozerski v Deer Run Homeowners Ass'n Inc.*, 217 AD2d 841, 629 NYS2d 518 (3d Dept 1995); *Iveson v Sweet Associates Inc.*, 203 AD2d 741, 610 NYS2d 382 (3d Dept 1994); see *Nascimento v Bridgehampton Const. Corp.*, 86 AD3d 189, 924 NYS2d 353 (1st Dept 2011). The fabrication and installation of catwalks by a subcontractor, even though they may affect the manner in which a worker performs his or her tasks, does not constitute supervision and control of the work, *Iveson v Sweet Associates Inc.*, *supra*; see *Kanney v Goodyear Tire & Rubber Co.*, 245 AD2d 1034, 667 NYS2d 163 (4th Dept 1997) (owning and assembling scaffold is not sufficient to establish control over work). A

subcontractor who has been charged with the duty to provide covers over all floor openings is an agent of the contractor who has been delegated the duties imposed by the statute and may be held accountable under Labor Law § 240(1), *O'Connor v Lincoln Metrocenter Partners, L.P.*, 266 AD2d 60, 698 NYS2d 632 (1st Dept 1999). A subcontractor is not liable for a dangerous condition that arises from another contractor's methods unless it exercised control and supervision over those methods, *Santangelo v Fluor Constructors Intern., Inc.*, 266 AD2d 893, 697 NYS2d 881 (4th Dept 1999).

Prime contractors have no liability under Labor Law §§ 240 and 241 unless they are acting as the agents of the owner and have been given the authority to supervise and control the work being performed at the time of the injury, *Decotes v Merritt Meridian Corp.*, 245 AD2d 864, 666 NYS2d 763 (3d Dept 1997); see *Hornicek v William H. Lane Inc.*, 265 AD2d 631, 696 NYS2d 557 (3d Dept 1999); *Hojohn v Beltrone Const. Co. Inc.*, 255 AD2d 658, 679 NYS2d 462 (3d Dept 1998); *Nowak v Smith & Mahoney, P.C.*, 110 AD2d 288, 494 NYS2d 449 (3d Dept 1985) (in case involving governmental construction contract, construction prime contractor, which was not party to electrical prime contract, not liable for injuries sustained by employee of electrical prime contractor, since, pursuant to contract and statute, construction prime contractor was not in a position to control electrical prime contractor's safety measures).

Engineers, architects, and landscape architects who do not direct or control the work for activities other than planning or design are immune from liability under Labor §§ 240(1) and 241(6), *Wrobel v Pendleton*, 120 AD3d 963, 991 NYS2d 218 (4th Dept 2014); see *Ohadi v Magnetic Construction Group Corp.*, 182 AD3d 474, 122 NYS3d 612 (1st Dept 2020) (design professional was not a statutory agent). Thus, an inspection engineer has no liability under Labor Law §§ 240 and 241 unless the engineer directs, controls or supervises the work being performed, *Suriano v New York*, 240 AD2d 486, 658 NYS2d 654 (2d Dept 1997); *Carter v Vollmer Associates*, 196 AD2d 754, 602 NYS2d 48 (1st Dept 1993); *Hamby v High Steel Structures, Inc.*, 134 AD2d 884, 521 NYS2d 926 (4th Dept 1987); see *Becker v Tallamy, Van Kuren, Gertis & Associates*, 221 AD2d 1014, 634 NYS2d 282 (4th Dept 1995); see also *Newman v York*, 140 AD2d 935, 529 NYS2d 924 (4th Dept 1988). An architect who has agreed to perform solely architectural services is not liable under Labor Law §§ 200, 240 and 241(6), *Houde v Barton*, 202 AD2d 890, 609 NYS2d 411 (3d Dept 1994). Where a company's involvement is limited to the provision of a crane and operator who was directed in his movements by plaintiffs, and the company exercised no supervision or control over any of the work being performed, it is not liable under Labor Law § 240(1), *Diamond v Reilly Homes Const. Corp.*, 245 AD2d 763, 665 NYS2d 464 (3d Dept 1997); *Velez v Tishman Foley Partners*, 245 AD2d 155, 666 NYS2d 591 (1st Dept 1997). Similarly, company that provided allegedly defective mini-container for transporting demolition debris was not liable under Labor Law § 241(6), since it had no authority to direct, supervise, or control

the injury-producing work, *Ahern v NYU Langone Medical Center*, 147 AD3d 537, 48 NYS3d 39 (1st Dept 2017).

A permittee of the fee owner whose permit placed safety obligations on it in connection with the production of a movie may be considered an agent of the owner for purposes of liability under Labor Law § 241(6), *Bart v Universal Pictures*, 277 AD2d 4, 715 NYS2d 240 (1st Dept 2000).

B. Persons Protected—Employees

The protections of the Labor Law apply to an employee, defined as “a mechanic, workingman or laborer working for another for hire,” Labor Law § 2(5), see *Doskotch v Pisocki*, 168 AD3d 1174, 90 NYS3d 667 (3d Dept 2019); *Schwab v Campbell*, 266 AD2d 840, 697 NYS2d 424 (4th Dept 1999). The Labor Law’s protections apply to all workers in qualifying situations, regardless of their immigration status, *Balbuena v IDR Realty LLC*, 6 NY3d 338, 812 NYS2d 416, 845 NE2d 1246 (2006). Further, an injured worker’s right to recover lost wages as an element of damages is not impaired because of his or her undocumented status, at least where the worker did not obtain his or her job by producing false work documents, *id*; see *Hoffman Plastic Compounds, Inc. v N.L.R.B.*, 535 US 137, 122 SCt 1275 (2002). In *Coque v Wildflower Estates Developers, Inc.*, 58 AD3d 44, 867 NYS2d 158 (2d Dept 2008), the court interpreted *Balbuena v IDR Realty LLC*, *supra*, to hold that the employee’s submission of false work documents does not preclude recovery under the Labor Law if the documents did not induce the employer to hire the employee. Thus, an undocumented worker who submitted false documents can seek damages under the Labor Law if the employer was, or should have been, aware of the worker’s immigration status and nonetheless hired the worker, *Coque v Wildflower Estates Developers, Inc.*, *supra*; see *Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 891 NYS2d 46 (1st Dept 2009) (undocumented worker not barred from recovering under Labor Law where employer failed to comply with employment verification obligations in good faith and, thus, it could not be inferred that social security card presented by worker induced employer to hire him). However, the fact that an injured worker was an undocumented alien is a factor that may be considered in determining the amount of the award for lost future wages, *Coque v Wildflower Estates Developers, Inc.*, *supra*; but see *Angamarca v New York City Partnership Housing Development Fund, Inc.*, 87 AD3d 206, 927 NYS2d 2 (1st Dept 2011).

A person is employed if he or she is “permitted or suffered to work,” Labor Law § 2(7). Section 241(6) and the rules under it refer to the protection of “persons employed therein or lawfully frequenting such places,” *Crowther v New York*, 262 AD2d 519, 692 NYS2d 439 (2d Dept 1999) (§ 241(6) applied to plaintiff inspector on construction site performing work for his employer, a contractor hired by construction manager); see *Cricks v Niagara Mohawk Power Corp.*, 278 AD2d 813, 718 NYS2d 537 (4th Dept 2000) (service technician engaged in on-the-job training at the direction of third-party defendant covered by Labor

Law § 240). In view of the difference between the definitional provisions of Labor Law § 2(5)–(7) and the definitions of “employer,” “employee” and “employment” in Workers’ Compensation Law § 201(4)–(6), a determination by the Workers’ Compensation Board that an injured plaintiff was not an employee is not ordinarily entitled to collateral estoppel effect in determining whether plaintiff was a protected worker under the Labor Law, *Baker v Muraski*, 61 AD3d 1373, 877 NYS2d 582 (4th Dept 2009); see *Torres v Perry Street Development Corp.*, 104 AD3d 672, 960 NYS2d 450 (2d Dept 2013) (no indication that plaintiff’s employment status adjudicated).

The duties imposed by the Labor Law run only to those who are permitted or suffered to work on a building or structure and hired by someone, whether owner, contractor, or agent, *Mordkofsky v V.C.V. Development Corp.*, 76 NY2d 573, 561 NYS2d 892, 563 NE2d 263 (1990); see *Pelonero v Sturm Roofing, LLC*, 175 AD3d 1062, 107 NYS3d 590 (4th Dept 2019) (summary judgment for plaintiff reversed when defendant’s owner testified that plaintiff was not working for defendant in any capacity, and thus plaintiff failed to eliminate factual questions as to whether he was worker within meaning of statute); *Torres v Perry Street Development Corp.*, 104 AD3d 672, 960 NYS2d 450 (2d Dept 2013) (defendant alleged that plaintiff was at site only to get paid for a prior job and was not working at site); *Johnson v Ebidenergy, Inc.*, 60 AD3d 1419, 875 NYS2d 677 (4th Dept 2009) (plaintiff was at site only to pick up paperwork for another job); *Paradise v Lehrer, McGovern & Bovis, Inc.*, 267 AD2d 132, 700 NYS2d 25 (1st Dept 1999); see also *Morton v State*, 13 AD3d 498, 788 NYS2d 124 (2d Dept 2004) (worker injured while performing work beneath a State-controlled highway not “employed” within the meaning of Labor Law § 241(6)), *aff’d*, 15 NY3d 50, 904 NYS2d 350, 930 NE2d 271 (2010); *Pastier v C.A.C. Industries, Inc.*, 204 AD3d 1029, 165 NYS3d 351 (2d Dept 2022) (electrician employed by non-party not protected by Labor Law when he fell into hole allegedly created during defendants’ reconstruction of parkway), where worker’s employer failed to obtain statutorily required work permits and failed to notify the State prior to commencing repairs); *Yearke v Zarcone*, 57 AD2d 457, 395 NYS2d 322 (4th Dept 1977) (“[u]nless plaintiff is both ‘employed’ and an ‘employee’ within the terms of the statute . . . he is not within the class that the legislature sought to protect”). Labor Law § 241(6) is limited to affording protection for those actually employed to work on a construction site, i.e., a plaintiff must demonstrate that he or she was both permitted or suffered to work on a building or structure and that he or she was hired by someone, be it an owner, contractor or their agent, for that purpose, *Mordkofsky v V.C.V. Development Corp.*, *supra*; *Paradise v Lehrer, McGovern & Bovis, Inc.*, *supra*; *Blandon v Advance Contracting Co., Inc.*, 264 AD2d 550, 695 NYS2d 36 (1st Dept 1999). In *Mordkofsky*, the Court of Appeals held that a contract-vendee of a custom-built home under construction was not protected by Labor Law §§ 200 and 241 because he was neither employed at the site, nor a laborer or one permitted to work at the place of the occurrence. However, an independent contractor hired by a general contractor is “employed” within the meaning of Labor Law § 241(6),

Nowak v Kiefer, 256 AD2d 1129, 685 NYS2d 151 (4th Dept 1998), even where the independent contractor employs other workers, Arey v M. Dunn, Inc., 29 AD3d 1137, 816 NYS2d 197 (3d Dept 2006). A worker hired directly by a contractor despite the owner's instructions that all hiring should be done through a temporary employment agency is nevertheless entitled to sue the owner under Labor Law § 240(1), LoVerde v 8 Prince Street Associates, LLC, 35 AD3d 1224, 829 NYS2d 300 (4th Dept 2006).

Since the primary purpose of the Labor Law is to extend special protections to “employees” and “workers,” Labor Law §§ 240 and 241 do not apply to a person serving as a volunteer and without pay, Stringer v Musacchia, 11 NY3d 212, 869 NYS2d 362, 898 NE2d 545 (2008); Whelen v Warwick Valley Civic and Social Club, 47 NY2d 970, 419 NYS2d 959, 393 NE2d 1032 (1979); Doskotch v Pisocki, 168 AD3d 1174, 90 NYS3d 667 (3d Dept 2019); Curatolo v Postiglione, 2 AD3d 480, 767 NYS2d 894 (2d Dept 2003); McNulty v Executive Kitchens, Ltd., 294 AD2d 411, 742 NYS2d 354 (2d Dept 2002); Marks v Morehouse, 222 AD2d 785, 634 NYS2d 835 (3d Dept 1995). Analysis of whether an injured person was an “employee” rather than a volunteer requires consideration of the “traditional parameters of employer-employee relationships” in conjunction with legislative intent, including the definition in Labor Law § 2(5) of an “employee” as a “mechanic, workingman or laborer working for another for hire,” Stringer v Musacchia, *supra*. The factors that are usually present when a person has been “hired” are (1) the voluntary undertaking of a mutual obligation, with the employee agreeing to perform a service in return for compensation (usually monetary); (2) the employer’s right to exercise authority in directing and supervising the manner and method of the work; and (3) the employer’s right to decide whether the work has been satisfactorily completed, Stringer v Musacchia, *supra*; Doskotch v Pisocki, *supra*. Under the analysis set forth in Stringer v Musacchia, 11 NY3d 212, 869 NYS2d 362, 898 NE2d 545 (2008), an individual does not become an employee covered by Labor Law § 240(1) by providing casual, uncompensated assistance in an informal arrangement that does not give rise to mutual duties or obligations and bears none of the traditional hallmarks of an employment relationship. Further, a person who provides assistance to a homeowner and receives some ancillary, non-monetary benefit in return is not an “employee” merely because the homeowner is relieved of having to pay someone else to perform the task, Stringer v Musacchia, *supra*; see Fuller v Spiesz, 53 AD3d 1093, 861 NYS2d 896 (4th Dept 2008) (plaintiff not employed where he agreed to work on friend’s roof in exchange for friend’s construction work on his residence). Thus, the provisions of the Labor Law are inapplicable to persons such as friends and neighbors who voluntarily rendered casual assistance to a homeowner in performing a home repair or construction job, Baggott v Corcoran, 48 AD3d 1182, 850 NYS2d 780 (4th Dept 2008); Schwab v Campbell, 266 AD2d 840, 697 NYS2d 424 (4th Dept 1999); Alver v Duarte, 80 AD2d 182, 439 NYS2d 501 (3d Dept 1981). Labor Law § 200 was held inapplicable to a neighbor who offered to come to defendant’s home and cut down several trees if he could then keep the wood, Howerter v Dugan, 232 AD2d 524,

649 NYS2d 32 (2d Dept 1996); see *Stringer v Musacchia*, supra (Labor Law § 240(1) inapplicable to worker who voluntarily participated in building shed in exchange for opportunity to join in hunting trip, where arrangement was informal and neither party assumed a contractual obligation to the other); see also *Alexandridis v Van Gogh Contracting Company*, 180 AD3d 969, 120 NYS3d 347 (2d Dept 2020) (question of fact as to whether plaintiff was to be paid for work or had volunteered his services); *Doskotch v Pisocki*, supra (question of fact as to whether plaintiff was employee of his mother where she directed him to climb ladder to inspect damaged chimney of her rental property, she had previously paid him for performing repairs, and would have paid him if he ultimately carried out repairs to chimney); *Lysiak v Murray Realty Co.*, 227 AD2d 746, 642 NYS2d 350 (3d Dept 1996) (question of fact as to whether injured person was paid employee or volunteer).

However, receipt of a traditional wage or other monetary compensation is not required for coverage under the Labor Law. Thus, the fact that plaintiff may have had an agreement with an employer that some or all of plaintiff's earnings would be applied to reduce a debt owed to the employer does not affect plaintiff's employment status, *Vernum v Zilka*, 241 AD2d 885, 660 NYS2d 599 (3d Dept 1997); see *Thompson v Marotta*, 256 AD2d 1124, 685 NYS2d 168 (4th Dept 1998) (Labor Law § 240(1) applies to plaintiff who painted defendant's house on condition that plaintiff and his family could inhabit house). Similarly, plaintiff was entitled to recover under the Labor Law where he was to be compensated by architectural services that defendant had agreed to supply, *Aloise v Saulo*, 51 AD3d 829, 858 NYS2d 355 (2d Dept 2008).

Employees hired to inspect construction work have generally been held to be within the class of persons protected by Labor Law § 240(1), *Campisi v Epos Contracting Corp.*, 299 AD2d 4, 747 NYS2d 218 (1st Dept 2002); see *DeSimone v New York*, 121 AD3d 420, 993 NYS2d 551 (1st Dept 2014) (onsite project manager inspecting condition at job site to ascertain whether condition supported back charge for additional work); *Fernandes v Equitable Life Assurance Society of U.S.*, 4 AD3d 214, 774 NYS2d 4 (1st Dept 2004) (HVAC testing); see *Doskotch v Pisocki*, 168 AD3d 1174, 90 NYS3d 667 (3d Dept 2019) (question of fact as to whether plaintiff entitled to Labor Law protection where he was inspecting damage to broken chimney and both he and defendant anticipated that he would carry out repair if inspection revealed repair was feasible); but see *Nelson v Sweet Associates, Inc.*, 15 AD3d 714, 788 NYS2d 705 (3d Dept 2005) (Labor Law § 241(6) inapplicable to plaintiff employed by owner solely to perform inspections); *Bosse v Hornell*, 197 AD2d 893, 602 NYS2d 294 (4th Dept 1993) (Labor Law §§ 240(1) and 241(6) inapplicable to plaintiff whose employer was hired solely to perform inspection work). Where plaintiff was performing the task while the alteration work was still ongoing, it is not significant that the specific work that was being performed was not a necessary and integral part of the work for which his employer was retained, *Velasco v Green-Wood Cemetery*, 8 AD3d 88, 779 NYS2d 459 (1st Dept 2004). Whether a person injured while conducting an inspection is protected

depends on several factors, including whether the person was employed by a company that was carrying out a construction or alteration project, whether the person's work was ongoing and contemporaneous with the construction or alteration work, whether the person was involved in performing the alteration or construction work and whether the person's work was part of a separate phase easily distinguishable from the construction and alteration work, *Prats v Port Authority of New York and New Jersey*, 100 NY2d 878, 768 NYS2d 178, 800 NE2d 351 (2003); *Doskotch v Pisocki*, supra; *Smith v Innovative Dynamics, Inc.*, 24 AD3d 1000, 809 NYS2d 216 (3d Dept 2005); *Bagshaw v Network Service Management, Inc.*, 4 AD3d 831, 772 NYS2d 161 (4th Dept 2004) (worker conducting inspection incidental to repair work protected; court distinguished inspections only for estimates or as precursors for work to be performed by others); see *DeSimone v New York*, supra (onsite project manager inspecting condition at job site to ascertain whether condition supported back charge for additional work; inspection contemporaneous with and related to ongoing construction project).

Cases in which Labor Law §§ 200(1), 240(1) and 241(6) have been held inapplicable include *Martinez v New York*, 93 NY2d 322, 690 NYS2d 524, 712 NE2d 689 (1999) (environmental inspector whose work was merely investigatory and terminated prior to commencement of asbestos removal by another entity); *Gibson v Worthington Division of McGraw-Edison Co.*, 78 NY2d 1108, 578 NYS2d 127, 585 NE2d 376 (1991) (design engineer whose employer had not been hired to perform any construction work); *Treacy v Inspired Event Productions, LLC*, 192 AD3d 444, 139 NYS3d 804 (1st Dept 2021) (delivering construction materials to loading dock is not construction work); *Ciesielski v Buffalo Indus. Park, Inc.*, 299 AD2d 817, 750 NYS2d 246 (4th Dept 2002) (same); *Spadola v 260/261 Madison Equities Corp.*, 19 AD3d 321, 798 NYS2d 38 (1st Dept 2005) (computer technician, whose duties were unrelated to construction work, employed by entity on whose behalf renovation work was being performed); *Agli v Turner Const. Co., Inc.*, 246 AD2d 16, 676 NYS2d 54 (1st Dept 1998) (operating engineers performing certain maintenance tasks at building under construction); *Groger v Morrison-Knudsen Co., Inc.*, 184 AD2d 620, 584 NYS2d 904 (2d Dept 1992) (taking measurements that were precipitated by but not connected with construction project); *Karaktin v Gordon Hillside Corp.*, 143 AD2d 637, 532 NYS2d 891 (2d Dept 1988) (inspecting or measuring premises for job estimate); *Chabot v Baer*, 82 AD2d 928, 440 NYS2d 734 (3d Dept 1981), aff'd, 55 NY2d 844, 447 NYS2d 705, 432 NE2d 598 (1982) (same); *Lukasinski v First New Amsterdam Realty, LLC*, 3 AD3d 302, 770 NYS2d 307 (1st Dept 2004) (measuring job site as part of preparatory work); see also *Harrison v New York*, 248 AD2d 592, 670 NYS2d 527 (2d Dept 1998) (Labor Law §§ 200, 240(1) and 241(6) do not apply where injured plaintiff's firm had not been hired by any contractor, owner, or agent to perform work on site, but instead, was merely acting as volunteer to look at subject area and evaluate whether use of hoist was possible).

A plaintiff may be precluded from recovery where he or she is injured while working in a location at the job site outside of his or her

authority, see *Yaguachi v Park City 3 and 4 Apartments, Inc.*, 185 AD3d 635, 126 NYS3d 505 (2d Dept 2020) (question of fact as to whether plaintiff was authorized to work on balcony from which he fell); see also *Orellana v Mo-Hak Associates, LLC*, 183 AD3d 451, 121 NYS3d 861 (1st Dept 2020) (question of fact as to whether plaintiff's duties were expressly limited to painting areas he could reach without use of ladder), or at a time when he or she was not authorized to work, see *McKnight v Metro-North Railroad*, 192 AD3d 679, 139 NYS3d 906 (2d Dept 2021) (plaintiff, who returned to worksite after he had completed work for day to retrieve car keys, not entitled to protection of Labor Law § 241(6)); *Jardin v A Very Special Place, Inc.*, 138 AD3d 927, 30 NYS3d 270 (2d Dept 2016) (question of fact as to whether plaintiff was permitted to be at renovation site at time of accident); *Lazri v Kingston City Consol. School Dist.*, 95 AD3d 1642, 945 NYS2d 487 (3d Dept 2012) (question of fact where contractors were not permitted to work at site on weekends without giving owner notice and plaintiff was injured on Sunday); *Haque v Crown Heights NRP Associates, LP*, 33 AD3d 864, 823 NYS2d 473 (2d Dept 2006) (triable issue of fact as to whether plaintiff had permission to perform work on the date in question). However, a plaintiff machine equipment operator who was injured while he was assisting coworkers secure a damaged garage door at the end of the workday was found to be an employee, despite the fact that the workers never alerted a supervisor to the issue, *Russo v Van Dale Properties, LLC*, 200 AD3d 1470, 159 NYS3d 226 (3d Dept 2021).

Labor Law § 240(1) is not applicable to a plaintiff whose employer was hired solely to provide operations and grounds maintenance to defendant's premises where maintenance and repairs to building were the responsibility of another party, *Chapman v IBM Corp.*, 233 AD2d 585, 649 NYS2d 228 (3d Dept 1996). The protection of Labor Law § 240(1) does not extend to an individual injured at a construction site whose role was limited to providing security and who did not participate in any protected activity, *Bolster v Eastern Bldg. and Restoration, Inc.*, 96 AD3d 1123, 946 NYS2d 298 (3d Dept 2012) (correction officer serving as escort for construction workers laboring at prison not covered by § 240(1)).

The statutory protection of Labor Law § 241(6) does not extend to the duties of a night watchman or security guard employed by the owner whose duties are unrelated to the renovation being performed, *Blandon v Advance Contracting Co., Inc.*, 264 AD2d 550, 695 NYS2d 36 (1st Dept 1999); see *Shields v St. Marks Housing Associates, L.P.*, 230 AD2d 903, 646 NYS2d 854 (2d Dept 1996); see also *Moses v Pinazo*, 265 AD2d 391, 697 NYS2d 66 (2d Dept 1999) (Labor Law § 241(6) did not apply to plaintiff who was employed by hospital as laboratory clerk and had no responsibilities with respect to any construction work going on at hospital). However, a person who is a covered employee is protected even if not actually working on assigned duties at the time of the injury, *Swedenhjelm v Safway Steel Products, Inc.*, 19 AD3d 1004, 796 NYS2d 800 (4th Dept 2005) (plaintiff who was integral part of work crew covered even though he was returning to work site from computer class when accident occurred); *Reeves v Red Wing Co., Inc.*, 139 AD2d 935,

527 NYS2d 916 (4th Dept 1988) (injured employee was a supervisor who was asked by defendant's employee to provide estimate of cost of another project); see *Birbilis v Rapp*, 205 AD2d 569, 613 NYS2d 414 (2d Dept 1994). Thus, an assistant mechanic for a company hired to perform alterations who had done construction work on the project and was a member of the construction team was not rendered ineligible for protection under Labor Law § 240(1) because he was preparing air handling units for inspection at the time of the accident, *Prats v Port Authority of New York and New Jersey*, 100 NY2d 878, 768 NYS2d 178, 800 NE2d 351 (2003); *Aguilar v Henry Marine Service, Inc.*, 12 AD3d 542, 785 NYS2d 95 (2d Dept 2004).

If the defendant-owner in an action brought under the Labor Law is also a fellow employee of the plaintiff, who was injured while pursuing their common employment, the plaintiff's claim is barred by the exclusivity provision of Workers' Comp. L. § 29(6), *Macchirole v Giamboi*, 97 NY2d 147, 736 NYS2d 660, 762 NE2d 346 (2001) (defendant-owner of personal residence where injury occurred); *Heritage v Van Patten*, 59 NY2d 1017, 466 NYS2d 958, 453 NE2d 1247 (1983) (defendant-owner of commercial property where injury occurred); *Vanerstrom v Strasser*, 240 AD2d 563, 659 NYS2d 77 (2d Dept 1997). In a Labor Law action, collateral-estoppel effect should be afforded to prior determinations of the Workers' Compensation Board regarding whether there was an employee/employer relationship between plaintiff and defendant, *Lee v Jones*, 230 AD2d 435, 659 NYS2d 549 (3d Dept 1997).

Where plaintiff was both the owner of the building where the accident occurred and the sole shareholder, officer and director of defendant corporation, plaintiff's Labor Law claims were dismissed because he was not "working for another for hire," *Scott v Scott's Landing, Inc.*, 277 AD2d 918, 715 NYS2d 135 (4th Dept 2000).

C. Buildings and Structures

The term "building" includes a water tank that was part of the building, *Caraciolo v 800 Second Ave. Condominium*, 294 AD2d 200, 743 NYS2d 8 (1st Dept 2002). An air conditioning unit built into the wall of a building is part of the "building" for purposes of Labor Law § 240(1), *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 (2d Dept 1997).

The term "structure" is liberally construed and means "any production or piece of work artificially built up or composed of parts joined together in some definite manner," *Joblon v Solow*, 91 NY2d 457, 672 NYS2d 286, 695 NE2d 237 (1998); *Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55, 604 NE2d 117 (1992); *Lewis-Moors v Contel of New York, Inc.*, 78 NY2d 942, 573 NYS2d 636, 578 NE2d 434 (1991); *McCoy v Abigail Kirsch at Tappan Hill, Inc.*, 99 AD3d 13, 951 NYS2d 32 (2d Dept 2012) (collecting cases); see *Dahar v Holland Ladder & Mfg. Co.*, 18 NY3d 521, 941 NYS2d 31, 964 NE2d 402 (2012). Whether an item is or is not a "structure" is fact-specific and must be determined on a case-

by-case basis, *Eherts v Shoprite Supermarkets, Inc.*, 199 AD3d 1270, 158 NYS3d 343 (3d Dept 2021); *McCoy v Abigail Kirsch at Tappan Hill, Inc.*, *supra*. In determining whether an item is a structure, a court may consider, among other factors, the item's size, purpose, design, composition, and degree of complexity; the ease or difficulty of its assembly and disassembly; the tools required to create it and dismantle it; the manner and degree of its interconnecting parts; and the amount of time the item is to exist, *McCoy v Abigail Kirsch at Tappan Hill, Inc.*, *supra*. However, no one factor should be deemed controlling, *id*. By definition, a structure necessarily includes constructs distinct from the building itself, *Eherts v Shoprite Supermarkets, Inc.*, *supra*.

Thus, a structure includes a power screen used to screen gravel or make sand, *Hodges v Boland's Excavating and Topsoil, Inc.*, 24 AD3d 1089, 807 NYS2d 421 (3d Dept 2005), a wood-chip stacker, *Foote v Lyonsdale Energy Ltd. Partnership*, 23 AD3d 924, 805 NYS2d 163 (3d Dept 2005), and a utility pole with attached hardware and support systems, *Lewis-Moors v Contel of New York, Inc.*, 78 NY2d 942, 573 NYS2d 636, 578 NE2d 434 (1991); see also *Rodriguez v New York City Housing Authority*, 194 AD2d 460, 599 NYS2d 263 (1st Dept 1993) (repairing and installing cable wire in and to subject building was alteration of structure within Labor Law § 240(1)); *Atwell v Mountain Ltd.*, 184 AD2d 1065, 584 NYS2d 255 (4th Dept 1992) (installing heavy telephone cable to a commercial building, involving stringing cable along roads to telephone pole and then to and into the building, was alteration of a structure within Labor Law § 240(1)). A tap, an electrical device owned by a cable company and attached to a cable line, is a structure within the meaning of Labor Law § 240(1), *Ray v Niagara Mohawk Power Corp.*, 256 AD2d 1070, 682 NYS2d 758 (4th Dept 1998). However, in *Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430, 843 NYS2d 237 (1st Dept 2007), the court held that, unlike free-standing utility poles and attached cables, a cable box mounted on a wall of an apartment building garage is not a "structure." A partially fabricated component that is to be shipped to an off-site construction project does not constitute a structure, *Dahar v Holland Ladder & Mfg. Co.*, 79 AD3d 1631, 914 NYS2d 817 (4th Dept 2010), *aff'd* on other grounds, 18 NY3d 521, 941 NYS2d 31, 964 NE2d 402 (2012).

A pipeline is also a structure under the statute, *Cox v LaBarge Bros. Co., Inc.*, 154 AD2d 947, 547 NYS2d 167 (4th Dept 1989); see *Kemp v Lakelands Precast Inc.*, 55 NY2d 1032, 449 NYS2d 710, 434 NE2d 1077 (1982), as is a railroad car, *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 606 NYS2d 127, 626 NE2d 912 (1993), an airplane, *Wong v New York*, 65 AD3d 1000, 885 NYS2d 120 (2d Dept 2009), a utility van, *Moore v Shulman*, 259 AD2d 975, 688 NYS2d 854 (4th Dept 1999), a crane, *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 796 NYS2d 684 (2d Dept 2005); *Cornacchione v Clark Concrete Co., Inc.*, 278 AD2d 800, 723 NYS2d 572 (4th Dept 2000), a free standing sign, *Smith v Shell Oil Co.*, 85 NY2d 1000, 630 NYS2d 962, 654 NE2d 1210 (1995), an exhibit composed of interlocking parts, *Sinzieri v Expositions, Inc.*, 270 AD2d 332, 704 NYS2d 293 (2d Dept 2000), a landfill,

Bockmier v Niagara Recycling, Inc., 265 AD2d 897, 696 NYS2d 605 (4th Dept 1999), a pumping station, Cabri v ICOS Corp. of America, 240 AD2d 456, 658 NYS2d 646 (2d Dept 1997), metal shelving, spanning from the floor to two feet below the ceiling, affixed and bracketed to a section of wall, Pino v Robert Martin Co., 22 AD3d 549, 802 NYS2d 501 (2d Dept 2005); see Eherts v Shoprite Supermarkets, Inc., 199 AD3d 1270, 158 NYS3d 343 (3d Dept 2021) (hot water heater on platform suspended from ceiling); Kharie v South Shore Record Management, Inc., 118 AD3d 955, 988 NYS2d 654 (2d Dept 2014) (free-standing shelves composed of component pieces attached in definite manner), a manhole, Dos Santos v Consolidated Edison of New York, Inc., 104 AD3d 606, 963 NYS2d 12 (1st Dept 2013), and a burial vault, Ciancio v Woodlawn Cemetery Ass'n, 249 AD2d 86, 671 NYS2d 466 (1st Dept 1998). An oil burner or furnace suspended from the ceiling of a building by rods may be considered either part of the building or a separate structure for purposes of Labor Law § 240(1), Kinsler v Lu-Four Associates, 215 AD2d 631, 628 NYS2d 303 (2d Dept 1995); see Vessio v Ador Converting & Biasing, Inc., 215 AD2d 648, 628 NYS2d 305 (2d Dept 1995) (replacing a burner in a boiler is repair of structure). A chupah (i.e., a canopy used during weddings conducted in accordance with Jewish tradition) consisting of various interconnected pipes ten feet long and three inches wide, secured to steel metal bases supporting an attached fabric canopy, is a structure, McCoy v Abigail Kirsch at Tappan Hill, Inc., 99 AD3d 13, 951 NYS2d 32 (2d Dept 2012). However, a decorated wooden disk suspended for use as a ceremonial wedding canopy is not a structure under Labor Law §§ 240(1) and 241(6), Stanislawczyk v 2 East 61st Street Corp., 1 AD3d 155, 767 NYS2d 30 (1st Dept 2003).

A highway at grade is not a building or structure within the meaning of Labor Law § 240(1), Spears v State, 266 AD2d 898, 698 NYS2d 135 (4th Dept 1999); see Vargas v State, 273 AD2d 460, 710 NYS2d 609 (2d Dept 2000) (elevated highway not a “building” or “structure” under Labor Law § 240(1)). Thus, Labor Law § 240(1) imposes no duty on the owner of a highway under construction or repair, Spears v State, *supra*; see Juett v Lucente, 112 AD3d 1136, 977 NYS2d 426 (3d Dept 2013) (§ 240(1) inapplicable where worker hurt while trimming trees in preparation for expansion of parking area).

IV. Exemption for One and Two Family Dwellings

A. In General

Labor Law §§ 240(1), 241 and 241-a exempt from liability owners of one- and two-family dwellings “who contract for but do not direct or control the work,” see Bartoo v Buell, 87 NY2d 362, 639 NYS2d 778, 662 NE2d 1068 (1996); Khela v Neiger, 85 NY2d 333, 624 NYS2d 566, 648 NE2d 1329 (1995); Lombardi v Stout, 80 NY2d 290, 590 NYS2d 55, 604 NE2d 117 (1992); Van Amerogen v Donnini, 78 NY2d 880, 573 NYS2d 443, 577 NE2d 1035 (1991); Cannon v Putnam, 76 NY2d 644, 563 NYS2d 16, 564 NE2d 626 (1990); Alexandridis v Van Gogh Contracting Company, 180 AD3d 969, 120 NYS3d 347 (2d Dept 2020); Pelham v

Moracco, LLC, 172 AD3d 1689, 100 NYS3d 744 (3d Dept 2019); Pesa v Ginsberg, 186 AD2d 521, 589 NYS2d 330 (1st Dept 1992); Clayson v Oldfield, 181 AD2d 993, 582 NYS2d 570 (4th Dept 1992). The homeowners' exemption was enacted to protect homeowners of one- and two-family dwellings, who are not in a position to realize, understand and insure against the responsibilities of the nondelegable duty imposed by Labor Law §§ 240(1) and 241(6), Cannon v Putnam, 76 NY2d 644, 563 NYS2d 16, 564 NE2d 626 (1990); Assevero v Hamilton & Church Properties, LLC, 131 AD3d 553, 15 NYS3d 399 (2d Dept 2015); Lenda v Breeze Concrete Corp., 73 AD3d 987, 903 NYS2d 417 (2d Dept 2010). The defendant has the burden of showing that the exemption applies, Lombardi v Stout, *supra*. Any doubt concerning the applicability of the exemption should be resolved in favor of the general rule that responsibility for job safety lies with the owner, Van Amerogen v Donnini, *supra*; Garcia v Martin, 285 AD2d 391, 728 NYS2d 455 (1st Dept 2001); but see Miller v Shah, 3 AD3d 521, 770 NYS2d 739 (2d Dept 2004) (exemption is to be construed very strictly in favor of homeowners).

Although Labor Law § 240(1) and § 241(6) do not specifically define "family" for the purposes of the homeowner's exemption, Multiple Dwelling Law § 4(5) describes, in pertinent part, a family as "two or more persons occupying a dwelling, living together and maintaining a common household," see Patino v Drexler, 116 AD3d 534, 984 NYS2d 38 (1st Dept 2014) (exemption applicable where defendant's family, household staff and groundskeeper lived together on premises and maintained common household). A building's classification as a "multiple dwelling" does not automatically cause the homeowner to lose the protection of the exemption, Hossain v Kurzynowski, 92 AD3d 722, 939 NYS2d 89 (2d Dept 2012); see Small v Gutleber, 299 AD2d 536, 751 NYS2d 49 (2d Dept 2002) (exemption applicable to building classified as multiple dwelling, where owners occupied all but a portion of one floor, which was occupied by tenant, and owners had contracted for work to have building reclassified as two-family dwelling). That a certificate of occupancy classifies a building within an occupancy group that includes one- and two-family residential dwellings is not dispositive on the issue of whether the subject building qualifies as such a dwelling for the purposes of applying the exemption, Assevero v Hamilton & Church Properties, LLC, 131 AD3d 553, 15 NYS3d 399 (2d Dept 2015).

B. Buildings to Which Exemption Applies—residential versus commercial uses

The existence of both residential and commercial uses on the property does not, by itself, render the exemption inapplicable. Whether the exemption applies turns on the site and purpose of the work, Bartoo v Buell, 87 NY2d 362, 639 NYS2d 778, 662 NE2d 1068 (1996); Khela v Neiger, 85 NY2d 333, 624 NYS2d 566, 648 NE2d 1329 (1995); Cannon v Putnam, 76 NY2d 644, 563 NYS2d 16, 564 NE2d 626 (1990); see Mandelos v Karavasidis, 86 NY2d 767, 631 NYS2d 133, 655 NE2d 174 (1995); Nicholas v Phillips, 151 AD3d 731, 54 NYS3d 675 (2d Dept 2017); Feilen v Christman, 135 AD3d 1130, 23 NYS3d 452 (3d Dept 2016); Assevero v

Hamilton & Church Properties, LLC, 131 AD3d 553, 15 NYS3d 399 (2d Dept 2015); Allen v Fiori, 277 AD2d 674, 716 NYS2d 414 (3d Dept 2000); Telfer v Gunnison Lakeshore Orchards Inc., 245 AD2d 620, 664 NYS2d 493 (3d Dept 1997); but see Dupre v Arant, 151 AD3d 1675, 56 NYS3d 725 (4th Dept 2017) (exemption not applicable where property purchased as residence but owner never resided there and work done was to improve it for sale); Krukowski v Steffensen, 194 AD2d 179, 605 NYS2d 773 (2d Dept 1993) (where homeowner contracted for substantial work upon single structure used as both dwelling and place of business, it did not qualify for exemption). In Allen v Fiori, supra, the use and purpose test outlined in Bartoo v Buell, supra, and Cannon v Putnam, supra, applied to the homeowners' intentions at the time of the injury underlying the action and not to their hopes for the future, see Feilen v Christman, supra; Farias v Simon, 122 AD3d 466, 997 NYS2d 28 (1st Dept 2014); Landon v Austin, 88 AD3d 1127, 931 NYS2d 424 (3d Dept 2011).

In Cannon v Putnam, 76 NY2d 644, 563 NYS2d 16, 564 NE2d 626 (1990), the exemption was properly invoked where the commercial activities were housed in structures that were completely separate from the owner's dwelling place and the work being performed was unrelated to the commercial structures. Bartoo v Buell, 87 NY2d 362, 639 NYS2d 778, 662 NE2d 1068 (1996), held that an owner who contracts for work that directly relates to the residential use of the home is shielded by the homeowner exemption even if the work also serves a commercial purpose, see Gonzalez v Romero, 178 AD3d 1401, 116 NYS3d 456 (4th Dept 2019); Crowningshield v Kim, 19 AD3d 975, 798 NYS2d 172 (3d Dept 2005); Hosler v Northern Eagle Beverages, Inc., 15 AD3d 925, 790 NYS2d 341 (4th Dept 2005); Farrell v Okeic, 266 AD2d 892, 698 NYS2d 132 (4th Dept 1999); see also Debenedetto v Chetrit, 190 AD3d 933, 140 NYS3d 569 (2d Dept 2021) (fact that defendants were constructing house on adjacent property for commercial purpose did not defeat exemption, since property where plaintiff was injured intended for noncommercial use); Feilen v Christman, 135 AD3d 1130, 23 NYS3d 452 (3d Dept 2016) (homeowner, who used premises as primary residence, entitled to exemption even though one room on premises was rented as sleeping unit for bed and breakfast); Telfer v Gunnison Lakeshore Orchards Inc., 245 AD2d 620, 664 NYS2d 493 (3d Dept 1997) (corporate homeowner entitled to exemption even though business-related papers were located in house and various rooms were used to complete business related paperwork and hold occasional corporate meeting among family members where home's principal use was a single-family residence and work contracted for related to residential nature and use of structure); Vliet v Alweis, 227 AD2d 853, 642 NYS2d 394 (3d Dept 1996) (homeowner, who performed certain transcription work on home computer and stored portion of work records in attic, entitled to exemption where effect of work performed on commercial use of premises negligible). The exemption was held applicable where a county acquired a single-family home for nonpayment of taxes, Nucci v Suffolk, 204 AD3d 817, 166 NYS3d 672 (2d Dept 2022).

Where defendants owned a commercial dairy farm on which they

also resided, the exemption was held inapplicable to an action by a laborer injured while constructing a barn which was to be used for commercial purposes, *Gernstl v Edwards*, 162 AD2d 966, 557 NYS2d 191 (4th Dept 1990); see *Crowningshield v Kim*, 19 AD3d 975, 798 NYS2d 172 (3d Dept 2005) (mixed use of barn entitles owner to exemption). Similarly, the exemption did not apply where the plaintiff was injured while power washing a barn being prepared for use as an event center, even though the defendants resided on the same property and partially used the barn for personal storage, *Gonzalez v Romero*, 178 AD3d 1401, 116 NYS3d 456 (4th Dept 2019). An out-of-possession vendor of a single-family home was not entitled to the homeowner exemption where he never lived in the home and derived a commercial benefit from the property by earning interest on the contract vendee's payments, *Custer v Jordan*, 107 AD3d 1555, 968 NYS2d 754 (4th Dept 2013).

The statutory exemption may be applicable to work performed on structures located on the property that contains a residential building, as long as the structure on which the work is performed is used for a residential purpose, *Dineen v Rechichi*, 70 AD3d 81, 888 NYS2d 834 (4th Dept 2009). Thus, the homeowner's exemption was held applicable to work performed on a barn used to store the homeowner's property and shelter her daughter's horse, *Lista v Newton*, 41 AD3d 1280, 838 NYS2d 299 (4th Dept 2007); see *Crowningshield v Kim*, 19 AD3d 975, 798 NYS2d 172 (3d Dept 2005) (barn used to store personal items unrelated to defendants' farm business); *Lyon v Kuhn*, 279 AD2d 760, 718 NYS2d 485 (3d Dept 2001) (outbuilding used as garage to store defendant's possessions); *Farrell v Okeic*, 266 AD2d 892, 698 NYS2d 132 (4th Dept 1999) (barn used to store defendant's personal belongings, tool, and equipment, as well as his mother's household furniture). However, the owners of a structure being renovated to house a music studio for a professional musician and a photography workspace for a professional photographer were not, as a matter of law, entitled to the exemption, as there was no affidavit from the homeowners as to whether they intended to use the space for noncommercial purposes, *Hawver v Steele*, 204 AD3d 1125, 166 NYS3d 369 (3d Dept 2022). The remedial purposes of the statutory exemption also are served by extending it to work performed on a barn intended to be used in connection with a single-family home that was planned but not yet built, *Dineen v Rechichi*, *supra*. In *Van Hoesen v Dolen*, 94 AD3d 1264, 942 NYS2d 650 (3d Dept 2012), the court concluded that the defendant single-family-homeowners, who had an indoor horseback riding arena constructed on their property, were entitled to the exemption, notwithstanding that the arena was neither appurtenant to the home nor intended for the storage of personal items. The court reasoned that the arena was built on the same property as the single-family home and that defendants testified without contradiction that the arena was solely for the use of their family members. Moreover, use by the owners of corporate checks to pay for materials and use of some corporate materials did not defeat the exemption, *id.*

The statutory exemption was also held applicable to a church-owned

single-family dwelling used exclusively as a residence for the pastor and his wife, where no church business was conducted from the building and the church did not direct or control work, *Uddin v Three Bros. Const. Corp.*, 33 AD3d 691, 823 NYS2d 178 (2d Dept 2006); see *Muniz v Church of Our Lady of Mt. Carmel*, 238 AD2d 101, 655 NYS2d 38 (1st Dept 1997) (replacing two windows in parish house kitchen was wholly related to residential nature of rectory; kitchen served no purpose in connection with incidental church business conducted on premises); *Jarvis v Dianto*, 210 AD2d 380, 621 NYS2d 87 (2d Dept 1994); *Pigott v Church of Holy Infancy*, 179 AD2d 161, 583 NYS2d 534 (3d Dept 1992) (parish house used exclusively as personal residence and not for church business or any activity generating financial gain).

The use of defendants' home for certified family home care in exchange for a stipend did not foreclose application of the homeowner exemption, *Sanchez v Marticorena*, 103 AD3d 1057, 962 NYS2d 425 (3d Dept 2013). Although bed and breakfast guest homes are not automatically entitled to the exemption, where the owner intends to reside in the guest home and there exists a substantial residential purpose for the renovations, the exemption applies, *Yerdon v Lyon*, 259 AD2d 864, 686 NYS2d 223 (3d Dept 1999); see *Feilen v Christman*, 135 AD3d 1130, 23 NYS3d 452 (3d Dept 2016); see also *Soto v Justin Hochberg 2014 Irrevocable Trust*, 202 AD3d 1122, 159 NYS3d 911 (2d Dept 2022) (exemption applicable to single-family townhouse owned jointly by three family trusts and occupied by father of trustees, where trustees did not dire or control work); *Sanders v Sanders-Morrow*, 177 AD3d 920, 114 NYS3d 114 (2d Dept 2019) (exemption applicable to single-family home with one entrance but divided into three separate living spaces, occupied by relatives who were not agents and did not exercise supervisory control); *Domiguez v Barsalin, LLC*, 158 AD3d 532, 68 NYS3d 705 (1st Dept 2018) (exemption applicable to one-family house where defendants intended its use as family vacation home and nothing in house plans indicated any portion would be for commercial use); *Farias v Simon*, 122 AD3d 466, 997 NYS2d 28 (1st Dept 2014) (exemption applicable to one-family house where, at time of plaintiff's accident, owners intended to use house, which was undergoing renovations, as second home; that owners never occupied house and ultimately decided to lease it out irrelevant because focus is on owners' intentions at time of accident); *Stone v Altarac*, 305 AD2d 849, 761 NYS2d 109 (3d Dept 2003) (repairs to roof over newly renovated residence's bathroom; exemption not negated by former commercial use and owner's intention to operate business in future). The exemption was not extended to owners who rented a house to college students, since the house was always used by the owners exclusively as income-producing property, *Van Amerogen v Donnini*, 78 NY2d 880, 573 NYS2d 443, 577 NE2d 1035 (1991); see *Assevero v Hamilton & Church Properties, LLC*, 131 AD3d 553, 15 NYS3d 399 (2d Dept 2015) (exemption inapplicable to building containing commercial space on ground floor and two apartments on upper floors; commercial unit intended for use as retail store, commercial unit had its own entrance, both apartments had own entrances, and commercial space and one apartment used to generate rent); *Landon v*

Austin, 88 AD3d 1127, 931 NYS2d 424 (3d Dept 2011) (exemption inapplicable where residence renovated for resale or rental since work being performed for commercial purpose); Lenda v Breeze Concrete Corp., 73 AD3d 987, 903 NYS2d 417 (2d Dept 2010) (exemption inapplicable to property used to house owner's paid caretaker as part of compensation for taking care of owner's six properties); Sweeney v Sanvidge, 271 AD2d 733, 705 NYS2d 723 (3d Dept 2000) (exemption does not apply to two-family residence rented in its entirety for two years prior to accident); Lawless v Kera, 259 AD2d 596, 687 NYS2d 169 (2d Dept 1999) (exemption does not apply to owner building house solely to sell it); Morelock v Danbrod Realty Corp., 203 AD2d 733, 610 NYS2d 657 (3d Dept 1994) (dwelling purchased solely for purposes of renovation and resale does not qualify). Where the owner used the premises during the summer but rented it during the non-summer months, the exemption was applicable, Stephens v Tucker, 184 AD2d 828, 584 NYS2d 667 (3d Dept 1992). The exemption does not apply to an apartment building being converted to a single-family residence where the owners never resided in the building and did not intend to move into the building once it was converted, Trala v Egloff, 258 AD2d 924, 685 NYS2d 552 (4th Dept 1999). In Zangiacomi v Hood, 193 AD2d 188, 603 NYS2d 31 (1st Dept 1993), the developer-owner of a single-family house who was making renovations as a commercial venture and who had never resided in the house prior to the time of the accident, was not entitled to the statutory exemption. Nor does the exemption apply to an empty one- or two-family dwelling that is being prepared for rental, Lombardi v Stout, 80 NY2d 290, 590 NYS2d 55, 604 NE2d 117 (1992) (issue of fact existed because applicability of exemption turned on whether owner's purpose in making renovations was to prepare property for commercial rental); see Dupre v Arant, 151 AD3d 1675, 56 NYS3d 725 (4th Dept 2017) (exemption not applicable where owner purchased property with intention of using as residence, but later demolished all residential structures to improve property for sale). However, the exemption is applicable to a multiple-family dwelling that is being converted into single-family use, Stejskal v Simons, 309 AD2d 853, 765 NYS2d 886 (2d Dept 2003), *aff'd*, 3 NY3d 628, 782 NYS2d 397, 816 NE2d 186 (2004); see also Hosler v Northern Eagle Beverages, Inc., 15 AD3d 925, 790 NYS2d 341 (4th Dept 2005) (single-family house with apartment over attached garage qualified as two-family dwelling, even though house was shared by defendant and defendant's brother and brother paid defendant rent); Small v Gutleber, 299 AD2d 536, 751 NYS2d 49 (2d Dept 2002) (exemption applicable to building classified as multiple dwelling, where owners occupied all but a portion of one floor, which was occupied by tenant, and owners had contracted for work to have building reclassified as two-family dwelling).

C. Exemption's Restriction to Owners Who Do Not Direct or Control The Work

The statutory exemption is defeated where the owner directs or controls the work out of which the injury arose, Emmi v Emmi, 186 AD2d 1025, 588 NYS2d 481 (4th Dept 1992); Sarvis v Maida, 173 AD2d

1019, 569 NYS2d 997 (3d Dept 1991). The phrase “direct or control” is to be strictly construed, *Capuzzi v Fuller*, 200 AD3d 1448, 159 NYS3d 223 (3d Dept 2021); *Venter v Cherkasky*, 200 AD3d 932, 159 NYS3d 487 (2d Dept 2021); *Alexandridis v Van Gogh Contracting Company*, 180 AD3d 969, 120 NYS3d 347 (2d Dept 2020); *Peck v Szwarcberg*, 122 AD3d 1216, 997 NYS2d 816 (3d Dept 2014); *Miller v Shah*, 3 AD3d 521, 770 NYS2d 739 (2d Dept 2004), and applies where the owner supervises the method and manner of the work, can order changes in the specifications, reviews the progress and details of the job with the general contractor, and/or provides the equipment necessary to perform the work, *Valentin v Thirty-Four Square Corp.*, 227 AD2d 467, 643 NYS2d 157 (2d Dept 1996); see *Alexandridis v Van Gogh Contracting Company*, *supra*; *Ramirez v I.G.C. Wall Systems, Inc.*, 140 AD3d 1047, 35 NYS3d 159 (2d Dept 2016); *Jumawan v Schnitt*, 35 AD3d 382, 825 NYS2d 728 (2d Dept 2006); *Garcia v Petrakis*, 306 AD2d 315, 760 NYS2d 551 (2d Dept 2003); *Jenkins v Jones*, 255 AD2d 805, 680 NYS2d 307 (3d Dept 1998). The owner must significantly participate in the project before he or she will be deemed to have crossed the line from being a legitimately concerned homeowner to a *de facto* supervisor who is not entitled to the exemption, *Peck v Szwarcberg*, *supra*. Instructions about aesthetic design matters and retention of the limited power of general supervision do not constitute the requisite direction or control, *Affri v Basch*, 13 NY3d 592, 894 NYS2d 370, 921 NE2d 1034 (2009); *Alexandridis v Van Gogh Contracting Company*, *supra*; *Decavallas v Pappantoniou*, 300 AD2d 617, 752 NYS2d 712 (2d Dept 2002); see *Capuzzi v Fuller*, *supra* (homeowner entitled to exemption where he discussed work orders, logistics, materials, architectural drawings, and checked in with contractors on daily basis). The applicability of the exemption depends on whether there was direction or control by the owner of the particular aspect of the work from which the injury arose, *Capuzzi v Fuller*, *supra*; *Wadowski v Cohen*, 150 AD3d 930, 55 NYS3d 279 (2d Dept 2017); *Van Alstine v Padula*, 228 AD2d 909, 644 NYS2d 386 (3d Dept 1996); *Sarvis v Maida*, 173 AD2d 1019, 569 NYS2d 997 (3d Dept 1991).

The statutory protection is available to homeowners who contract out all of the work and to homeowners who do some of the work themselves and even to homeowners acting as general contractors, provided that the injury did not result from the work directed or controlled by the owners, *Soskin v Scharff*, 309 AD2d 1102, 766 NYS2d 248 (3d Dept 2003). Even where the homeowner supplied material for the work and worked side by side with the injured plaintiff, his brother, the homeowner was entitled to invoke the exemption as a matter of law because he submitted nonparty deposition testimony indicating that no one at the work site supervised the project or the method and manner of the work, *Luthringer v Luthringer*, 59 AD3d 1028, 872 NYS2d 779 (4th Dept 2009). Where the owners provide general supervision of all aspects of the work, including scheduling the work, monitoring the progress on the site, pointing out mistakes, or giving the injured worker specific instructions regarding the manner or method of the work, the owners may not invoke the statutory exemption, *Ennis v Hayes*, 152 AD2d 914, 544 NYS2d 99 (4th Dept 1989); see *Garcia v Martin*, 285

AD2d 391, 728 NYS2d 455 (1st Dept 2001); *Chura v Baruzzi*, 192 AD2d 918, 596 NYS2d 592 (3d Dept 1993); see also *Ramirez v I.G.C. Wall Systems, Inc.*, 140 AD3d 1047, 35 NYS3d 159 (2d Dept 2016) (owner assembled and placed subject ladder and instructed workers to use it, performed some construction work himself, coordinated subcontractors, and was several feet away from plaintiff when he fell from ladder). The homeowner's exemption is not applicable to an agent to whom the owner has delegated his or her authority to direct, supervise or control the work, *Fisher v Coghlan*, 8 AD3d 974, 778 NYS2d 812 (4th Dept 2004). However, the exemption protected an owner who made lists of what was to be done and, as the work progressed, gave the contractor written notes as to changes, additions or deletions in the work, but who did not supervise, direct or control the contractor or his employees in the method or manner of the work, *Sotire v Buchanan*, 150 AD2d 971, 541 NYS2d 873 (3d Dept 1989), and an owner who, upset over the quality of the work, demanded that it be redone, see *Jonchuk v Weafer*, 199 AD2d 591, 604 NYS2d 353 (3d Dept 1993); see also *Affri v Basch*, 13 NY3d 592, 894 NYS2d 370, 921 NE2d 1034 (2009) (owner's direction to worker to place a vent through roof was mere aesthetic decision); *Peck v Szwarcberg*, 122 AD3d 1216, 997 NYS2d 816 (3d Dept 2014) (securing architectural plans, obtaining building permits, hiring contractors, observing work progress, discussing with workers local drainage requirements, and providing workers with information regarding buried lines on property insufficient to constitute direction or control of plaintiff's excavation work); *Lane v Karian*, 210 AD2d 549, 619 NYS2d 796 (3d Dept 1994) (providing plans, purchasing material, hiring contractors, and visiting worksite are insufficient to create question of fact on issue of direction and control); *Danish v Kennedy*, 168 AD2d 768, 564 NYS2d 217 (3d Dept 1990) (that homeowner made "suggestions" indicative of general concern for the successful completion of the work is insufficient to show "direction" or "control").

Involvement by the owner with minor details, such as matters pertaining to decorating, is not enough to establish control, *Devodier v Haas*, 173 AD2d 437, 570 NYS2d 63 (2d Dept 1991); see *McGuiness v Contemporary Interiors*, 205 AD2d 739, 613 NYS2d 697 (2d Dept 1994); *Kelly v Bruno and Son, Inc.*, 190 AD2d 777, 593 NYS2d 555 (2d Dept 1993); see also *Torres v Levy*, 32 AD3d 845, 821 NYS2d 127 (2d Dept 2006) (exemption applicable where owner's wife's involvement was no more extensive than would be expected of typical homeowner who hired contractor to renovate or construct addition). Offering suggestions, lending tools, demonstrating areas which need to be painted, and selecting the paint to be used, are also insufficient to defeat the statutory exemption, *Valencia v Calero*, 5 AD3d 254, 773 NYS2d 295 (1st Dept 2004); *Pesa v Ginsberg*, 186 AD2d 521, 589 NYS2d 330 (1st Dept 1992); see *Schultz v Noeller*, 11 AD3d 964, 783 NYS2d 185 (4th Dept 2004) (exemption available to owner whose involvement limited to designating location of electrical outlets and switches); *Ortiz v Pena*, 227 AD2d 297, 642 NYS2d 317 (1st Dept 1996) (that homeowner suggested borrowing ladder from neighbor or helped to clear debris from adjoining lot was insufficient to defeat statutory exemption). In addition, where the owner's

directions indicate nothing more than the desire to have the job performed according to the contract, the exemption is still applicable, *Pesa v Ginsberg*, supra. A homeowner who inspects the worksite and aspects of the contractor's work does not exercise direction or control over the job, *Jenkins v Jones*, 255 AD2d 805, 680 NYS2d 307 (3d Dept 1998); *Van Alstine v Padula*, 228 AD2d 909, 644 NYS2d 386 (3d Dept 1996). Similarly, visiting the work site at least five times per week, reviewing plans with the architect, hiring some subcontractors, and making general decisions do not, standing alone, constitute direction or control over the work, *Garcia v Petrakis*, 306 AD2d 315, 760 NYS2d 551 (2d Dept 2003). Likewise, a homeowner was entitled to invoke the exemption where construction was performed according to plaintiff's detailed plan, plaintiff specified the materials to be purchased and plaintiff identified the subcontractors and laborers to be employed, even though the homeowner named himself as the general contractor in the building permit application, arranged for the building inspector's visit, hired the subcontractors and laborers, ordered and paid for the materials and did some menial work on the project, *Snyder v Gnall*, 57 AD3d 1289, 870 NYS2d 562 (3d Dept 2008). A homeowner who performs a significant amount of work in constructing the home unrelated to the plaintiff's work and who does not control, direct, or supervise the method or manner of the injured plaintiff's tasks, is entitled to the statutory exemption, *Lang v Havlicek*, 272 AD2d 298, 707 NYS2d 642 (2d Dept 2000).

For a charge to be used where there are factual issues with respect to whether the owner directed or controlled the work, see PJI 2:216A.1 and 2:217.1.

V. Indemnification and Contribution in Actions Under Labor Law §§ 240 and 241

Caveat: The discussion below must be read in light of the 1996 amendments to the Workers' Compensation Law, which state that an employer will not be liable for common-law contribution or indemnity to a third person unless such third person proves that the employee has sustained a "grave injury," Workers' Compensation Law § 11; see *Way v George Grantling Chemung Contracting Corp.*, 289 AD2d 790, 736 NYS2d 424 (3d Dept 2001); see also Comment to PJI 2:218. For a further discussion of the grave injury requirement, see Comment to PJI 2:275.1.

Indemnification or contribution by one primarily liable for the injury is not precluded by the fact that the duty under Labor Law §§ 240 and 241 is nondelegable, *McCarthy v Turner Const., Inc.*, 17 NY3d 369, 929 NYS2d 556, 953 NE2d 794 (2011); *Cunha v New York*, 12 NY3d 504, 882 NYS2d 674, 910 NE2d 422 (2009); *Kelly v Diesel Const. Division of Carl A. Morse, Inc.*, 35 NY2d 1, 358 NYS2d 685, 315 NE2d 751 (1974); see also PJI 2:275. While an owner or contractor may not seek indemnification if it bears some percentage of fault, such a culpable party may nevertheless seek contribution from another whose culpabil-

ity was also a cause of the injury, *Burgos v 213 West 23rd Street Group LLC*, 48 AD3d 283, 851 NYS2d 185 (1st Dept 2008). Whether an owner or general contractor who is only vicariously liable is entitled to common-law indemnification or contribution from a subcontractor is dependent upon whether the subcontractor is found liable for the occurrence, *Krawczyk v Ehrenfeld*, 277 AD2d 205, 715 NYS2d 728 (2d Dept 2000); *Seecharan v 100 West 33rd Street Realty Corp.*, 198 AD2d 121, 603 NYS2d 308 (1st Dept 1993); see *McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 87 NYS3d 86 (2d Dept 2018).

An owner or general contractor may only obtain common law indemnification if it was free of negligence and did not exercise actual supervision over the injury-producing work, *McCarthy v Turner Const., Inc.*, 17 NY3d 369, 929 NYS2d 556, 953 NE2d 794 (2011). A party's authority to supervise the injury-producing work and implement safety procedures is not alone a sufficient basis for requiring common law indemnification; liability for common law indemnification may only be imposed against those parties who exercise actual supervision, *id.* Thus, a general contractor is entitled to common-law indemnity from a subcontractor where the subcontractor had complete control over the plaintiff's work, supplied the ladder that slipped and caused the plaintiff's injuries, and failed to provide adequate safety equipment, *Morin v Hamlet Golf Development Corp.*, 270 AD2d 321, 704 NYS2d 286 (2d Dept 2000); *Lopez v 36-2nd J Corp.*, 211 AD2d 667, 622 NYS2d 288 (2d Dept 1995); see *Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 87 NYS3d 189 (2d Dept 2018); *Danaher v Notarfrancesco*, 213 AD2d 444, 623 NYS2d 630 (2d Dept 1995).

A general contractor is not entitled to contribution from the owner of the premises on which the plaintiff's accident occurred, where the owner is involved solely by virtue of its possessory interest in the premises and the general contractor had supervision and control over the work site, *Einhorn v Fine Times, Inc.*, 277 AD2d 8, 715 NYS2d 243 (1st Dept 2000). Although a party that has itself actually participated to some degree in the wrongdoing cannot recover under the doctrine of implied indemnity, the mere occasional presence of an owner or general contractor at the work site is not the equivalent of participating in the wrongdoing, *Perez v Spring Creek Associates, L.P.*, 265 AD2d 314, 696 NYS2d 468 (2d Dept 1999) (owner's periodic inspection of work to insure it was proceeding on schedule); *Mangano v American Stock Exchange, Inc.*, 234 AD2d 198, 651 NYS2d 494 (1st Dept 1996); *Pazmino v Woodside Development Co.*, 212 AD2d 520, 622 NYS2d 299 (2d Dept 1995). The ability of a contractor to limit its contractual obligation to indemnify does not necessarily affect its duty to provide indemnification under the common law, *Felker v Corning Inc.*, 90 NY2d 219, 660 NYS2d 349, 682 NE2d 950 (1997). As to an express waiver of the protection of Labor Law § 240 by a self-employed contractor, see *Horning v Gore*, 87 AD2d 34, 451 NYS2d 848 (3d Dept 1982).

Case law under Labor Law § 240(1) has allowed for consideration of plaintiff's negligence in determining the liability of plaintiff's employer

in a third-party action based on respondeat superior, *LaFleur v Consolidated Edison Co. of New York, Inc.*, 245 AD2d 36, 665 NYS2d 861 (1st Dept 1997). In *LaFleur*, since there was no evidence of active negligence on the part of the defendant owner, the owner was allowed recovery in its third-party action against plaintiff's employer based on the evidence of the employer's negligent supervision and control as well as on theories of respondeat superior. In *Guiga v JLS Const. Co., Inc.*, 255 AD2d 244, 685 NYS2d 1 (1st Dept 1998), there was evidence that plaintiff was warned not to use the ladder and that plaintiff was negligent in failing to heed that warning. The Court held that, based on this evidence, the jury's apportionment of ten percent of the liability for negligence to plaintiff was proper. In addition, the Court held that it was proper to impute plaintiff's negligence to plaintiff's employer based on respondeat superior principles for purposes of the defendant's contribution/indemnification claims. Similarly, in *Bieber v Tower Builder and Contractor Corp.*, 216 AD2d 431, 628 NYS2d 368 (2d Dept 1995), where plaintiff recovered damages pursuant to Labor Law § 240(1), the court determined that plaintiff's employer, of which plaintiff was president as well as a shareholder and employee, could be liable for contribution and/or indemnification to the defendants to the extent that their damages were attributable to the injured plaintiff's negligence. In *Bieber*, the injured plaintiff and his employer were distinct legal entities and, therefore, contribution and/or indemnification by the employer, which was vicariously liable for its employee's negligence, was not precluded because the injured plaintiff was not being penalized for his own culpable conduct. In *Rose v Mount Ebo Associates, Inc.*, 170 AD2d 766, 565 NYS2d 578 (3d Dept 1991), the injured employee was essentially self-employed and, as a result, the third-party action against him was dismissed since any indemnification or contribution by the unincorporated third-party defendant employer would have effectively reduced the recovery of the injured employee in violation of the policies underlying the Labor Law, see *Di Vincenzo v Tripart Development, Inc.*, 278 AD2d 903, 718 NYS2d 544 (4th Dept 2000); *Schaefer v RCP Associates*, 232 AD2d 286, 649 NYS2d 13 (1st Dept 1996) (there is no bar to imputing plaintiff's negligence to third-party defendant employer; however, third-party defendant's attempt to recover that allocable share back from plaintiff is not permitted because to do so would defeat plaintiff's right to compensation for injuries under the Labor Law). CPLR article 16 does not affect the common-law rule of joint and several liability between or among tortfeasors liable for indemnification, *Salamone v Wincaf Properties, Inc.*, 9 AD3d 127, 777 NYS2d 37 (1st Dept 2004) (abrogated by, *Frank v Meadowlakes Development Corp.*, 6 NY3d 687, 816 NYS2d 715, 849 NE2d 938 (2006)).

VI. Conflict of Laws Issues Under the Labor Law

A. In General

New York's choice-of-law "interest analysis" principles require an examination of (1) the significant contacts and the jurisdiction in which they are located and (2) whether the purpose of the law is to regulate

conduct or to allocate loss, see *Schultz v Boy Scouts of America, Inc.*, 65 NY2d 189, 491 NYS2d 90, 480 NE2d 679 (1985). Applying this analysis, the Court of Appeals determined that Labor Law §§ 240 and 241 are primarily “conduct-regulating” rather than “loss-allocating” rules, *Padula v Lilarn Properties Corp.*, 84 NY2d 519, 620 NYS2d 310, 644 NE2d 1001 (1994). Therefore, these sections are inapplicable in an action between New York domiciliaries arising from injuries sustained by plaintiff employee while performing work on a construction project in Massachusetts, *id*; see *Florio v Fisher Development, Inc.*, 309 AD2d 694, 765 NYS2d 879 (1st Dept 2003) (Labor Law §§ 200, 240 and 241 inapplicable to accident occurring in Connecticut); *Grivas v Port Authority of New York and New Jersey*, 229 AD2d 301, 644 NYS2d 624 (1st Dept 1996) (Labor Law sections do not govern liability in action arising out of fall from New Jersey side of interstate bridge); *Hardzynski v ITT Hartford Ins. Co.*, 227 AD2d 449, 643 NYS2d 122 (2d Dept 1996); see also *Salvador-Pajaro v Port Authority of New York and New Jersey*, 52 AD3d 303, 860 NYS2d 47 (1st Dept 2008) (since Port Authority is Interstate Compact agency and not subject to New York Labor Law, injured Port Authority police officer could not bring Labor Law § 27-a action against Port Authority based on unsafe workplace conditions). On the other hand, where plaintiff’s injury occurred in New York, plaintiff’s action against defendants is governed by the conduct-regulating rules set forth in New York Labor Law § 240 and the obligations and liabilities of the defendants vis-a-vis each other are also governed by New York law, *Augello v 20166 Tenants Corp.*, 224 AD2d 73, 648 NYS2d 101 (1st Dept 1996); see *Wortham v Port Authority of New York and New Jersey*, 177 AD3d 481, 110 NYS3d 539 (1st Dept 2019) (accident occurred in New York); *O’Leary v S & A Elec. Contracting Corp.*, 149 AD3d 500, 53 NYS3d 617 (1st Dept 2017). In addition, New York’s general principles regarding contribution apply to a third-party contribution action between two non-domiciliaries arising out of such action, *Augello v 20166 Tenants Corp.*, *supra*.

B. Maritime Activities

A full review of the federal statutes designed to protect certain classes of workers from injury is beyond the scope of this Comment. However, a brief review of the relationship between New York worker-protection laws and the federal laws protecting maritime workers is appropriate in view of the navigable waters in and around the State. Federal maritime law does not govern if the accident does not occur on navigable waters, since there is no maritime nexus, *Posillico v Laquila Const., Inc.*, 265 AD2d 394, 696 NYS2d 507 (2d Dept 1999).

Even in cases that are within federal admiralty jurisdiction, the substantive law of New York, including the absolute liability provisions of the Labor Law, may be applicable, *Cammon v New York*, 95 NY2d 583, 721 NYS2d 579, 744 NE2d 114 (2000); see *Lee v Astoria Generating Co., L.P.*, 13 NY3d 382, 892 NYS2d 294, 920 NE2d 350 (2009); *Durando v New York*, 105 AD3d 692, 963 NYS2d 670 (2d Dept 2013). States may modify or supplement maritime law by creating liabilities

that a court of admiralty would recognize when the state action is not hostile to the characteristic features of maritime law or inconsistent with federal statute, *Just v Chambers*, 312 US 383, 312 US 668, 61 SCt 687 (1941); *Durando v New York*, supra. In assessing whether state law has been preempted where there is admiralty jurisdiction, a number of factors may be considered, including whether the state rule conflicts with federal law, hinders uniformity, makes substantive changes, or interferes with the characteristic features of maritime law or commerce, *Cammon v New York*, supra; see *Pipia v Turner Const. Co.*, 114 AD3d 424, 980 NYS2d 392 (1st Dept 2014). The Court of Appeals has determined that because the protection of workers engaged in maritime activities is an objective of federal maritime law, application of New York Labor Law §§ 200, 240(1) and 241(6) will not unduly interfere with the federal interest in maintaining the free flow of maritime commerce. In addition, the concept of strict liability is not necessarily antithetical to the federal maritime law. For example, strict liability is a part of federal maritime products liability law, *Cammon v New York*, supra. In *Cammon*, the Court concluded that because strict liability is not wholly at odds with federal maritime principles, New York's Labor Law provisions should not be displaced in an accident arising out of a local land-based repair, *id.*; see *Pastorino v New York*, 191 AD3d 440, 142 NYS3d 7 (1st Dept 2021) (where plaintiff was injured during bridge construction project while stepping from tugboat onto barge, Labor Law claims against project owner that did not own the barge or tugboat were not preempted because work was essentially local in character); *Aguilar v Henry Marine Service, Inc.*, 12 AD3d 542, 785 NYS2d 95 (2d Dept 2004).

In contrast, where the work was performed on a “vessel” as that term is used in the Longshore and Harbor Workers’ Compensation Act (LHWCA), 33 USC § 905(a), state law claims based on Labor Law §§ 240(1) and 241(6) are preempted, *Lee v Astoria Generating Co., L.P.*, 13 NY3d 382, 892 NYS2d 294, 920 NE2d 350 (2009) (citing 33 USC § 905(b)); see *Pipia v Turner Const. Co.*, 114 AD3d 424, 980 NYS2d 392 (1st Dept 2014) (“float stage” regularly used to carry workers and materials around water constituted “vessel”); *Emanuel v Sheridan Transp. Corp.*, 10 AD3d 46, 779 NYS2d 168 (1st Dept 2004) (worker injured while placing gangway between barge and drydock facility not entitled to recover under Labor Law, since injury not land-based); *Rigopoulos v State*, 236 AD2d 459, 653 NYS2d 667 (2d Dept 1997) (no recovery under Labor Law for accident arising from repairing bridge from floating barge); see also *Pereira v NAB Const. Corp.*, 256 AD2d 395, 681 NYS2d 583 (2d Dept 1998) (preparing bridge for sandblasting and painting while working on beams of bridge not traditional maritime activity). In *Lee*, the Court of Appeals held that a barge that was located on navigable water, was not permanently anchored or moored and was practically capable of being used as a means of transportation on water was a “vessel” even though it was stationed at a land-based electric generation facility.

Where applicable, the Longshore and Harbor Workers’ Compensa-

tion Act (LHWCA) provides for the employer's strict liability and constitutes an injured maritime worker's exclusive remedy against the employer. However, the exclusivity provisions of the LHWCA do not restrict the ability of a defendant to assert a third-party claim for contribution against an employer/vessel owner in the latter capacity, *Durando v New York*, 105 AD3d 692, 963 NYS2d 670 (2d Dept 2013); *Olsen v James Miller Marine Service, Inc.*, 16 AD3d 169, 791 NYS2d 92 (1st Dept 2005); see also *Pastorino v New York*, 191 AD3d 440, 142 NYS3d 7 (1st Dept 2021) (antisubrogation rule barred project owner's cross claims against plaintiff's employer, which was insulated from liability under LHWCA, because project owner was additional insured under employer's insurance policy).

C. Federal Immigration Laws

The federal Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1324a et seq., which requires employers to verify prospective workers' identity and work eligibility and to refuse to hire undocumented workers, does not pre-empt New York's Labor Law or preclude undocumented workers from recovering damages, including lost wages, under that statute, *Balbuena v IDR Realty LLC*, 6 NY3d 338, 812 NYS2d 416, 845 NE2d 1246 (2006). In *Coque v Wildflower Estates Developers, Inc.*, 58 AD3d 44, 867 NYS2d 158 (2d Dept 2008), the court extended *Balbuena v IDR Realty LLC*, supra, by holding that the employee's submission of false work documents does not preclude recovery under the Labor Law if the documents did not induce the employer to hire the employee. Thus, an undocumented worker who submitted false documents can seek damages under the Labor Law if the employer was, or should have been, aware of the worker's immigration status and nonetheless hired the worker, *Coque v Wildflower Estates Developers, Inc.*, supra; see *Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 891 NYS2d 46 (1st Dept 2009) (undocumented worker not barred from recovering under Labor Law where employer failed to comply with employment verification obligations in good faith and, thus, it could not be inferred that social security card presented by worker induced employer to hire him). However, the federal statute does preclude lost pay awards by the NLRB to employees who obtained their jobs by presenting false documents, *Hoffman Plastic Compounds, Inc. v N.L.R.B.*, 535 US 137, 122 SCt 1275 (2002).

D. Indian Reservations

An action brought under the New York Labor Law is not barred merely because the accident occurred on an Indian reservation, *Alexander v Hart*, 64 AD3d 940, 884 NYS2d 181 (3d Dept 2009) (citing 25 USC § 233). The state court's exercise of jurisdiction in an action aimed at protecting workers does not violate an Indian nation's sovereignty, since such actions involve private rights having no bearing on the internal affairs of the tribal nation's governance, *Alexander v Hart*, supra. Moreover, while federal law permits the State's courts to give effect to tribal law, including tribal law concerning liability to injured workers, the ex-

istence and meaning of such law must be proven to the court's satisfaction, *id.*

A person or entity with an interest in the specific reservation property on which the accident occurred may be held liable under the Labor Law as an "owner" even though all property within the reservation is owned by the United States government in trust for the Indian nations, *Alexander v Hart*, 64 AD3d 940, 884 NYS2d 181 (3d Dept 2009). Thus, defendant could be held liable as an "owner" where defendant was granted full rights to use and occupy the property under a document signed by the tribal council chiefs and defendant contracted for the work that led to plaintiff's injury, *id.*

PJI 2:216. Injured Employee—Statutory Negligence—Safe Place to Work

[The following charge should be used in cases involving claims against owners for allegedly defective or unsafe conditions on the work premises]

As you have heard, the plaintiff AB claims that the defendant CD, the owner of the workplace, violated section 200 of the New York State Labor Law and thereby caused injury to AB. Under section 200 of the Labor Law, the workplace where AB was working was required to be "so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places."

AB claims that CD violated the Labor Law by *[state plaintiff's contentions]*. CD claims *[state defendant's contentions]*.

As the owner of the workplace, CD owed a duty to workers to use reasonable care to make the area where work was being performed, as well as the areas on the property that led to and from that area, reasonably safe. CD's duty included the obligation to correct any unsafe condition that CD created, as well as any unsafe condition that was known to CD or to any of CD's employees. CD was also obligated to conduct reasonable inspections to detect any unsafe conditions and to correct any unsafe conditions that could have been discovered

through such inspections. Finally, CD was obligated to correct any unsafe condition that existed for so long that, in the use of reasonable care, CD or CD's employees should have known of its existence.

In deciding whether CD violated section 200 of the Labor Law, you will first consider whether the workplace was unsafe and, if so, whether the unsafe condition resulted from CD's failure to use reasonable care to provide a safe workplace.

If you decide that the workplace was not unsafe or that the unsafe condition did not result from any failure by CD to use reasonable care, then you will find for CD [add where appropriate: on this issue].

If you decide that the workplace was unsafe and that the unsafe condition resulted from CD's failure to use reasonable care and, further, that the unsafe condition was a substantial factor in causing AB's injury, you will find for AB [add where appropriate: on this issue].

[The following charge should be used in cases involving claims against general contractors for allegedly defective or unsafe conditions on the work premises]

As you have heard, the plaintiff AB claims that the defendant CD, the general contractor, violated section 200 of the New York State Labor Law and thereby caused injury to AB. Under section 200 of the Labor Law, the workplace where AB was working was required to be "so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places." AB claims that CD violated the Labor Law by *[state plaintiff's contentions]*. CD claims *[state defendant's contentions]*.

As general contractor, CD owed a duty to workers to use reasonable care to make the parts of the workplace that were under its control reasonably safe. This duty extended to the ways of getting to

and from the workplace that were within CD's control.

CD's duty included an obligation to correct any unsafe condition that CD created or that existed in areas within CD's control and that were known to CD or to any of CD's employees. CD also had a duty to conduct reasonable inspections of the work areas within its control, to detect any unsafe conditions and to correct any unsafe conditions that could have been discovered through such inspections. Finally, CD had an obligation to correct any unsafe condition in the areas within its control that existed for so long that, in the use of reasonable care, CD or its employees should have known of its existence.

In deciding whether CD violated section 200 of the Labor Law, you will first consider whether the workplace was unsafe and, if so, whether the unsafe condition [*state where appropriate: was created by CD, was in an area that was within CD's control*] and resulted from CD's failure to use reasonable care [*state where appropriate: to keep the workplace safe, to correct the unsafe condition after CD or its employee knew or, in the use of reasonable care, should have known of that condition*].

If you decide that the workplace was not unsafe or that the unsafe condition was not [*state where appropriate: created by CD, in an area that was within CD's control*], then you will find for CD [*add where appropriate: on this issue*].

If you decide that the workplace was unsafe and that the unsafe condition was [*state where appropriate: created by CD, in an area of the workplace that was within CD's control*], then you will go on to consider whether the unsafe condition resulted from CD's failure to use reasonable care in making or keeping the workplace safe, and whether such failure was a substantial factor in causing AB's injury.

If you decide that the unsafe condition did not

result from CD's failure to use reasonable care in making or keeping the workplace safe or that such failure was not a substantial factor in causing AB's injury, then you will find for CD [*add where appropriate: on this issue*].

If you decide that the unsafe condition did result from CD's failure to use reasonable care in making or keeping the workplace safe and that such failure was a substantial factor in causing AB's injury, then you will find for AB [*add where appropriate: on this issue*].

[The following charge should be used in the First, Third and Fourth Departments for cases involving claims against owners or general contractors where the claim arises from allegedly unsafe means or manner of work]

As you have heard, the plaintiff AB claims that the defendant CD, the [owner of the workplace, general contractor] violated section 200 of the New York State Labor Law and thereby caused injury to AB. Under section 200 of the Labor Law, the workplace where AB was working was required to be "so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places."

AB claims that CD exercised supervisory control over the work that resulted in (his, her) injury and that CD violated the Labor Law by [*state plaintiff's contentions*]. CD claims [*state defendant's contentions*].

A (property owner, general contractor) who exercises supervisory control over the work owes a duty to workers to use reasonable care to make the means and manner of work reasonably safe. This duty includes an obligation to correct any unsafe methods, practices, materials or equipment used in the work if the (property owner, general contractor) knew or, in the exercise of reasonable care, should have known of the unsafe practices or equipment.

A (property owner, general contractor) exercises supervisory control when it actually manages, directs or oversees the manner in which the work that led to the injury was performed. A (property owner, general contractor) does not exercise supervisory control by merely having the general responsibility or power to monitor safety conditions at the worksite.

In deciding whether CD violated section 200 of the Labor Law, you will first consider whether CD exercised supervisory control over AB's work. If you decide that CD did not exercise supervisory control over the work that led to AB's injury, then you will find for CD [*add where appropriate: on this issue*]. On the other hand, if you decide that CD did exercise supervisory control over the work that led to AB's injury, then you will go on to consider whether the methods, practices, materials or equipment used in AB's work were unsafe and, if so, whether CD knew about or, in the exercise of reasonable care, should have known about that unsafe [*state as appropriate: method, practice, material or equipment*] and failed to use reasonable care to prevent or correct it.

If you decide that the [*state as appropriate: method, practice, material or equipment*] used in AB's work was not unsafe or that CD did not know or, in the exercise of reasonable care, could not have discovered the [*state as appropriate: method, practice, material or equipment*] or that CD did not fail to use reasonable care to prevent or correct the [*state as appropriate: method, practice, material or equipment*], then you will find for CD [*add where appropriate: on this issue*]. However, if you decide that the [*state as appropriate: method, practice, material or equipment*] used in AB's work was unsafe, that CD knew or, in the exercise of reasonable care, should have known about the unsafe [*state as appropriate: method, practice, material or equipment*] and that CD failed to use reasonable care to prevent or correct the [*state as appropriate: method, practice, material or equipment*], then you will go on to consider whether the unsafe [*state as*

appropriate: method, practice, material or equipment] was a substantial factor in causing AB's injury.

If you decide that the unsafe [*state as appropriate: method, practice, material or equipment]* used in AB's work was not a substantial factor in causing AB's injury, then you will find for CD [*add where appropriate: on this issue*]. On the other hand, if you decide that the unsafe [*state as appropriate: method, practice, material or equipment]* used in AB's work was a substantial factor in causing AB's injury, then you will find for AB [*add where appropriate: on this issue*].

[The following charge should be used in the Second Department for cases involving claims against owners or general contractors where the means or manner of work was allegedly unsafe]

As you have heard, the plaintiff AB claims that the defendant CD, the [owner of the workplace, general contractor] violated section 200 of the New York State Labor Law and thereby caused injury to AB. Under section 200 of the Labor Law, the workplace where AB was working was required to be "so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places."

AB claims that CD had the authority to supervise or control the work that resulted in (his, her) injury [*state plaintiff's contentions*]. CD claims [*state defendant's contentions*].

A (property owner, general contractor) who has the authority to supervise or control the performance of the work owes a duty to workers to use reasonable care to make the means and manner of work reasonably safe. This duty includes an obligation to correct any unsafe methods, practices, materials or equipment used in the work if the (property owner, general contractor) knew or,

in the exercise of reasonable care, should have known of the [*state as appropriate: method, practice, material or equipment*].

A (property owner, general contractor) has the authority to supervise or control the work that resulted in an injury when it has the power to direct the way that the work is conducted or decide which tools and equipment should be used.

In deciding whether CD violated section 200 of the Labor Law, you will first consider whether CD had the authority to supervise or control the work that resulted in AB's injury. If you decide that CD did not have the authority to supervise or control the work that led to AB's injury, then you will find for CD [*add where appropriate: on this issue*]. On the other hand, if you decide that CD did have the authority to supervise or control the work that led to AB's injury, then you will go on to consider whether the methods, practices, materials or equipment used in AB's work were unsafe and, if so, whether CD failed to use reasonable care to prevent or correct the [*state as appropriate: method, practice, material or equipment*] that it knew about or, in the exercise of reasonable care, should have known about.

AB claims that CD violated Labor Law § 200 by [*state plaintiff's contentions*]. CD claims [*state defendant's contentions*]

If you decide that the methods, practices, materials or equipment used in AB's work were not unsafe or that CD did not know or, in the exercise of reasonable care, could not have discovered the unsafe methods, practices, materials or equipment or that CD did not fail to use reasonable care to prevent or correct the hazard, then you will find for CD [*add where appropriate: on this issue*]. However, if you decide that the methods, practices, materials or equipment used in AB's work were unsafe, that CD knew or, in the exercise of reasonable care, should have known about the [*state as appropriate: method, practice, material or equipment*], and that CD failed to use reasonable

care to prevent or correct the [*state as appropriate: method, practice, material or equipment*], **then you will go on to consider whether the methods, practices, materials or equipment were a substantial factor in causing AB's injury.**

If you decide that the [*state as appropriate: method, practice, material or equipment*] **used in AB's work was not a substantial factor in causing AB's injury, then you will find for CD** [*add where appropriate: on this issue*]. **On the other hand, if you decide that the unsafe methods, practices, materials or equipment used in AB's work were a substantial factor in causing AB's injury, then you will find for AB** [*add where appropriate: on this issue*].

Comment

[See also Introductory Statement to this division.]

Caveat 1: In charging causes of action based on Labor Law § 200, care should be taken to distinguish between injuries resulting from unsafe premises conditions and those resulting from the contractor's methods, *Ortega v Puccia*, 57 AD3d 54, 866 NYS2d 323 (2d Dept 2008); see *Cody v State*, 82 AD3d 925, 919 NYS2d 55 (2d Dept 2011); *Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 908 NYS2d 117 (2d Dept 2010); *Barillaro v Beechwood RB Shorehaven, LLC*, 69 AD3d 543, 894 NYS2d 434 (2d Dept 2010) (summary judgment motion); see *Landahl v Buffalo*, 103 AD3d 1129, 959 NYS2d 306 (4th Dept 2013). Moreover, in some cases, a triable issue of fact may exist as to whether plaintiff's injuries were caused by a dangerous condition on the premises or a danger created by the manner or methods of the work, *Cook v Orchard Park Estates, Inc.*, 73 AD3d 1263, 902 NYS2d 674 (3d Dept 2010), or whether a dangerous condition on the premises and a danger created by the manner of the work were concurrent causes of plaintiff's injuries, see *Reyes v Arco Wentworth Management Corp.*, 83 AD3d 47, 919 NYS2d 44 (2d Dept 2011) (discussing, in context of summary judgment motion, liability standard applicable to owner when plaintiff's injury may have been caused concurrently by both premises condition and manner of work). The distinction between accidents arising from premises conditions and those arising from the manner in which the work was performed dictates which standard of liability will be applicable to a given action and the distinction may be nuanced, *Slikas v Cyclone Realty, LLC*, *supra*; see *Bennett v Huckle*, 131 AD3d 993, 16 NYS3d 261 (2d Dept 2015), *aff'd*, 28 NY3d 964, 38 NYS3d 834, 60 NE3d 1200 (2016); *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 950 NYS2d 35 (1st Dept 2012); *Cody v State*, *supra*; *Reyes v Arco Wentworth Management Corp.*, *supra*.

Caveat 2: The pattern charge regarding owners' and general

contractors' liability for injuries arising from the means and manner of the work reflects the view that, in this class of cases, an owner or general contractor may be held liable under Labor Law § 200 only if it actually controlled or supervised the work, see *O'Sullivan v IDI Const. Co., Inc.*, 7 NY3d 805, 822 NYS2d 745, 855 NE2d 1159 (2006); *Narducci v Manhasset Bay Associates*, 96 NY2d 259, 727 NYS2d 37, 750 NE2d 1085 (2001); *Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 877, 609 NYS2d 168, 631 NE2d 110 (1993); *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993); *Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55, 604 NE2d 117 (1992); *Allen v Cloutier Const. Corp.*, 44 NY2d 290, 405 NYS2d 630, 376 NE2d 1276 (1978); see also *Barreto v Metropolitan Transp. Authority*, 25 NY3d 426, 13 NYS3d 305, 34 NE3d 815 (2015). However, relying on *Comes v New York State Elec. and Gas Corp.*, supra, and *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816, 693 NE2d 1068 (1998), the Second Department has held that the authority to control or supervise the work is sufficient, *Ortega v Puccia*, 57 AD3d 54, 866 NYS2d 323 (2d Dept 2008). Thus, in cases tried within the Second Department, the charge must be modified accordingly.

Caveat 3: The pattern charge assumes that there is no triable factual dispute as to whether the injury occurred in a place of work or on a way or approach thereto, *Chaney v New York City Transit Authority*, 12 AD2d 61, 208 NYS2d 205 (1st Dept 1960), aff'd, 10 NY2d 871, 223 NYS2d 502, 179 NE2d 507 (1961). If such a factual question exists, the pattern charge must be modified to address that issue.

Based on *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993); *Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55, 604 NE2d 117 (1992); *Allen v Cloutier Const. Corp.*, 44 NY2d 290, 405 NYS2d 630, 376 NE2d 1276 (1978); *Gasper v Ford Motor Co.*, 13 NY2d 104, 242 NYS2d 205, 192 NE2d 163 (1963); *Chaney v New York City Transit Authority*, 12 AD2d 61, 208 NYS2d 205 (1st Dept 1960), aff'd, 10 NY2d 871, 223 NYS2d 502, 179 NE2d 507 (1961); *Gasques v State*, 59 AD3d 666, 873 NYS2d 717 (2d Dept 2009), aff'd, 15 NY3d 869, 910 NYS2d 415, 937 NE2d 79 (2010); *Snyder v Gnall*, 57 AD3d 1289, 870 NYS2d 562 (3d Dept 2008); *Wynne v B. Anthony Const. Corp.*, 53 AD3d 654, 862 NYS2d 379 (2d Dept 2008); *Lane v Fratello Const. Co.*, 52 AD3d 575, 860 NYS2d 177 (2d Dept 2008); *Weinberg v Alpine Improvements, LLC*, 48 AD3d 915, 851 NYS2d 692 (3d Dept 2008); *Verel v Ferguson Elec. Const. Co., Inc.*, 41 AD3d 1154, 838 NYS2d 280 (4th Dept 2007); *Wolfe v KLR Mechanical, Inc.*, 35 AD3d 916, 826 NYS2d 458 (3d Dept 2006); *Carelli v Demoro-Grafferi*, 121 AD2d 673, 504 NYS2d 441 (2d Dept 1986) (citing PJI). The portion of the charge that is to be given in cases tried within the Second Department is based on *Ortega v Puccia*, 57 AD3d 54, 866 NYS2d 323 (2d Dept 2008); *Peay v New York City School Const. Authority*, 35 AD3d 566, 827 NYS2d 189 (2d Dept 2006). A proper charge under Labor Law § 200 must instruct the jury as to the owner's duties under that statute and any defenses available to the owner, *Rosas v Ishack*, 219 AD2d 633, 631 NYS2d 417 (2d Dept 1995); *Carelli v Demoro-Grafferi*, supra. As to proximate cause,

see PJI 2:70 and Comment. The charge must distinguish between the obligation of the subcontractor and the general duty of the owner and the general contractor to provide a safe place to work, *Grillo v St. Luke's Hospital Center*, 37 AD2d 566, 322 NYS2d 346 (2d Dept 1971).

Labor Law § 200 codifies an owner's, employer's and general contractor's common-law duty to provide workers with a reasonably safe place to work, *Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 609 NYS2d 168, 631 NE2d 110 (1993); *Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132, 433 NE2d 115 (1982); *Allen v Cloutier Const. Corp.*, 44 NY2d 290, 405 NYS2d 630, 376 NE2d 1276 (1978); *Gasper v Ford Motor Co.*, 13 NY2d 104, 242 NYS2d 205, 192 NE2d 163 (1963); see *Soskin v Scharff*, 309 AD2d 1102, 766 NYS2d 248 (3d Dept 2003); *Brasch v Yonkers Const. Co.*, 306 AD2d 508, 762 NYS2d 626 (2d Dept 2003); *Rosen v McGuire & Bennett Inc.*, 189 AD2d 966, 592 NYS2d 477 (3d Dept 1993). This charge and comment deal with Labor Law § 200(1). Where plaintiff relies upon both § 200 and § 241(6), each section must be separately charged and the jury given a special verdict sheet that requires a specific determination as to each theory, *Zalduondo v New York*, 141 AD2d 816, 529 NYS2d 881 (2d Dept 1988). For a charge and comment on Labor Law § 241(6), see PJI 2:216A. For the differences between Labor Law §§ 200(1) and 241(6), see *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993); *Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55, 604 NE2d 117 (1992); *Lagzdins v United Welfare Fund-Security Division Marriott Corp.*, 77 AD2d 585, 430 NYS2d 351 (2d Dept 1980); see also *Zalduondo v New York*, *supra*; *Simon v Schenectady North Congregation of Jehovah's Witnesses*, 132 AD2d 313, 522 NYS2d 343 (3d Dept 1987). One important difference is that the exemption from liability for owners of one- and two-family homes who do not control the work is unavailable as a defense to a Labor Law § 200 claim, *Ortega v Puccia*, 57 AD3d 54, 866 NYS2d 323 (2d Dept 2008). For a detailed discussion of the exemption, which is applicable in actions under Labor Law §§ 240(1) and 241(6), see Introductory Statement to PJI 2:216, IV. Exemption for One and Two Family Dwellings.

Labor Law § 200 claims fall into two broad categories: those involving injuries arising from allegedly defective or dangerous premises conditions and those involving injuries arising from the manner in which the work is performed, *Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 87 NYS3d 189 (2d Dept 2018); *Mayer v Conrad*, 122 AD3d 1366, 997 NYS2d 869 (4th Dept 2014); *Chowdhury v Rodriguez*, 57 AD3d 121, 867 NYS2d 123 (2d Dept 2008); *Ortega v Puccia*, 57 AD3d 54, 866 NYS2d 323 (2d Dept 2008). In the former class of cases, property owners may be held liable under Labor Law § 200 if the owner either created the dangerous condition or had actual or constructive notice of the condition, *Eherts v Shoprite Supermarkets, Inc.*, 199 AD3d 1270, 158 NYS3d 343 (3d Dept 2021); *Alexandridis v Van Gogh Contracting Company*, 180 AD3d 969, 120 NYS3d 347 (2d Dept 2020); *Mayer v Conrad*, *supra*; *Ortega v Puccia*, *supra*; see *Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 908 NYS2d 117 (2d Dept 2010); *Espinosa v Azure Holdings II, LP*, 58 AD3d 287, 869 NYS2d 395 (1st Dept 2008). General

contractors may also be held liable for unsafe premises conditions if they created or had actual or constructive notice of the condition and also had control of the place where the injury occurred, *Alexandridis v Van Gogh Contracting Company*, supra; *Wynne v B. Anthony Const. Corp.*, 53 AD3d 654, 862 NYS2d 379 (2d Dept 2008); *Lane v Fratello Const. Co.*, 52 AD3d 575, 860 NYS2d 177 (2d Dept 2008); *Weinberg v Alpine Improvements, LLC*, 48 AD3d 915, 851 NYS2d 692 (3d Dept 2008); *Verel v Ferguson Elec. Const. Co., Inc.*, 41 AD3d 1154, 838 NYS2d 280 (4th Dept 2007); *Wolfe v KLR Mechanical, Inc.*, 35 AD3d 916, 826 NYS2d 458 (3d Dept 2006); see *Murphy v Columbia University*, 4 AD3d 200, 773 NYS2d 10 (1st Dept 2004).

In contrast, in cases arising from the manner in which the work was performed, the Court of Appeals has held that the owner or general contractor may be liable only if it exercised supervision or control of the work that led to the injury, *O'Sullivan v IDI Const. Co., Inc.*, 7 NY3d 805, 822 NYS2d 745, 855 NE2d 1159 (2006); *Narducci v Manhasset Bay Associates*, 96 NY2d 259, 727 NYS2d 37, 750 NE2d 1085 (2001); *Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 877, 609 NYS2d 168, 631 NE2d 110 (1993); *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993); *Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55, 604 NE2d 117 (1992); *Allen v Cloutier Const. Corp.*, 44 NY2d 290, 405 NYS2d 630, 376 NE2d 1276 (1978); see *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816, 693 NE2d 1068 (1998) (general contractor that controlled coordination of work potentially liable where negligent performance of that activity could have been substantial factor in causing injury); see also *Persichilli v Triborough Bridge and Tunnel Authority*, 16 NY2d 136, 262 NYS2d 476, 209 NE2d 802 (1965) (owner has no duty to supervise the method of contractor's or subcontractor's work). However, the Second Department has held that the proper test for owners' and general contractors' liability for injury arising out of the manner and means of the work is whether the defendant had the authority to control the work, *Ortega v Puccia*, 57 AD3d 54, 866 NYS2d 323 (2d Dept 2008); see *Gasques v State*, 59 AD3d 666, 873 NYS2d 717 (2d Dept 2009), *aff'd*, 15 NY3d 869, 910 NYS2d 415, 937 NE2d 79 (2010); *Reyes v Arco Wentworth Management Corp.*, 83 AD3d 47, 919 NYS2d 44 (2d Dept 2011); see also *Mayer v Conrad*, 122 AD3d 1366, 997 NYS2d 869 (4th Dept 2014). A defendant has the authority to control the work when it bears the responsibility for the manner in which the work is performed, *Lombardi v New York*, 175 AD3d 1521, 109 NYS3d 373 (2d Dept 2019); *Erickson v Cross Ready Mix, Inc.*, 75 AD3d 519, 906 NYS2d 284 (2d Dept 2010); *Enos v Werlatone, Inc.*, 68 AD3d 712, 888 NYS2d 902 (2d Dept 2009); see *Bonventre v Soho Mews Condominium*, 173 AD3d 411, 99 NYS3d 629 (1st Dept 2019). For a more detailed discussion of the case law regarding the test for owners' and general contractors' liability under Labor Law § 200 for the means and manner of the work, see "Accidents Caused by Means or Manner of the Work," *infra*.

A Labor Law § 200 claim may also arise because of both a dangerous condition on the premises and a danger created by the manner of

the work, rendering the conditions concurrent causes of plaintiff's injuries, see *Reyes v Arco Wentworth Management Corp.*, 83 AD3d 47, 919 NYS2d 44 (2d Dept 2011) (discussing, in context of summary judgment motion, liability standard applicable to owner when plaintiff's injury may have been caused concurrently by both premises condition and manner of work); see also *Bennett v Hucke*, 131 AD3d 993, 16 NYS3d 261 (2d Dept 2015), *aff'd*, 28 NY3d 964, 38 NYS3d 834, 60 NE3d 1200 (2016); *Cantalupo v Arco Plumbing & Heating, Inc.*, 194 AD3d 686, 148 NYS3d 224 (2d Dept 2021); *Garcia v Market Associates*, 123 AD3d 661, 998 NYS2d 193 (2d Dept 2014). In general, when a plaintiff alleges that an accident involves both a dangerous condition on the premises and the means and methods of the work, a property owner moving for summary judgment is obligated to address the proof applicable to both liability standards, *Venter v Cherkasky*, 200 AD3d 932, 159 NYS3d 487 (2d Dept 2021); *Reyes v Arco Wentworth Management Corp.*, *supra*. However, in *Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 87 NYS3d 189 (2d Dept 2018), the Second Department held that a defendant need not blindly accept the plaintiff's categorization of an accident as either a method and manner case, or a dangerous condition case, or both. Rather, a defendant moving for summary judgment may establish, as part of its *prima facie* burden, that the accident falls into one of the two broad categories of Labor Law § 200 cases, *id.*

Comparative negligence applies for apportionment of liability, CPLR 1411; *Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132, 433 NE2d 115 (1982); *Karian v Anchor Motor Freight, Inc.*, 144 AD2d 777, 535 NYS2d 175 (3d Dept 1988); see *Rodriguez v New York*, 31 NY3d 312, 76 NYS3d 898, 101 NE3d 366 (2018). The doctrine of primary assumption of risk has no application to a Labor Law § 200 claim, *Walter v State*, 235 AD2d 623, 651 NYS2d 704 (3d Dept 1997), but it has been applied to an employee's common-law claim that the owner of a sports venue breached its non-delegable duty to provide workers with a safe place to work, *Correa v New York*, 66 AD3d 573, 890 NYS2d 461 (1st Dept 2009). The owner is not liable for the consequences of plaintiff's unforeseeable decision to proceed with the work without the helper plaintiff had requested and whom the owner had supplied, *Simon v Schenectady North Congregation of Jehovah's Witnesses*, 132 AD2d 313, 522 NYS2d 343 (3d Dept 1987). There is no liability under Labor Law § 200 where plaintiff's act of jumping out of a stalled elevator six feet above a lobby floor after the elevator's doors had been opened manually was an intervening and superseding cause, *Egan v A.J. Const. Corp.*, 94 NY2d 839, 702 NYS2d 574, 724 NE2d 366 (1999); see *Weingarten v Windsor Owners Corp.*, 5 AD3d 674, 774 NYS2d 537 (2d Dept 2004). Nor is the owner liable for the "extraordinary" decision by a worker to clear a blockage in a harvester while the machine was still running, *Gokey v Castine*, 163 AD2d 709, 558 NYS2d 308 (3d Dept 1990). A defendant is not liable under Labor Law § 200 where the worker's conduct is the sole proximate cause of the accident, *Singh v 180 Varick, LLC*, 203 AD3d 1194, 163 NYS3d 455 (2d Dept 2022) (plaintiff was sole proximate cause of accident where he fell from ladder after losing balance). Foreseeable intervening misconduct will not serve

to supersede liability under Labor Law § 200, when the danger presented by such misconduct is a matter of common experience, *Ciancio v Woodlawn Cemetery Ass'n*, 249 AD2d 86, 671 NYS2d 466 (1st Dept 1998).

I. Accidents Caused by Unsafe Premises Conditions

A. In General

At common law an employer had a duty to provide the employees with a safe place to work, *Hess v Bernheimer & Swartz, Pilsener Brewing Co.*, 219 NY 415, 114 NE 808 (1916); *Rolnick v 25th Ave. Bldg. Corp.*, 27 AD2d 844, 278 NYS2d 45 (2d Dept 1967); *Robinson v Avella*, 10 AD2d 130, 197 NYS2d 557 (3d Dept 1960). The first sentence of § 200(1) codifies the common-law duty and extends it to the owner of a work site, *Jock v Fien*, 80 NY2d 965, 590 NYS2d 878, 605 NE2d 365 (1992); *Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132, 433 NE2d 115 (1982); *Allen v Cloutier Const. Corp.*, 44 NY2d 290, 405 NYS2d 630, 376 NE2d 1276 (1978); *Gasper v Ford Motor Co.*, 13 NY2d 104, 242 NYS2d 205, 192 NE2d 163 (1963); *Nowak v Smith & Mahoney, P.C.*, 110 AD2d 288, 494 NYS2d 449 (3d Dept 1985); *Monroe v New York*, 67 AD2d 89, 414 NYS2d 718 (2d Dept 1979). The duty is twofold: to make and keep the place of work safe, *Zucchelli v City Const. Co.*, 4 NY2d 52, 172 NYS2d 139, 149 NE2d 72 (1958); *Employers Mut. Liability Ins. Co. of Wis. v Di Cesare & Monaco Concrete Const. Corp.*, 9 AD2d 379, 194 NYS2d 103 (1st Dept 1959).

The common-law duty codified in Labor Law § 200 is not limited to construction work or construction workers, *Beadleston v American Tissue Corp.*, 41 AD3d 1074, 839 NYS2d 283 (3d Dept 2007), and applies to workers engaged in manufacturing processes, *Jock v Fien*, 80 NY2d 965, 590 NYS2d 878, 605 NE2d 365 (1992), as well as to workers engaged in maintenance functions, *Agli v Turner Const. Co., Inc.*, 246 AD2d 16, 676 NYS2d 54 (1st Dept 1998); see *Paradise v Lehrer, McGovern & Bovis, Inc.*, 267 AD2d 132, 700 NYS2d 25 (1st Dept 1999). However, an owner has no duty under Labor Law § 200 to a cable technician who is on the premises without the owner's knowledge and whose presence would be a trespass but for Public Service Law § 228(1)(a) (prohibiting landlords from interfering with cable installers), *Wildman v Jensen*, 59 AD3d 165, 872 NYS2d 450 (1st Dept 2009) (citing *Abbatiello v Lancaster Studio Associates*, 3 NY3d 46, 781 NYS2d 477, 814 NE2d 784 (2004)).

The statute does not create a cause of action irrespective of negligence. The duties it imposes "are governed by the generally applicable standards of the prudent man, the foreseeability of harm, and the rule of reason," *Employers Mut. Liability Ins. Co. of Wis. v Di Cesare & Monaco Concrete Const. Corp.*, 9 AD2d 379, 194 NYS2d 103 (1st Dept 1959); see *Hammond v International Paper Co.*, 161 AD2d 914, 557 NYS2d 477 (3d Dept 1990); *Abram v Lyon Steel Rigging Corp.*, 111 AD2d 291, 489 NYS2d 281 (2d Dept 1985); *Monroe v New York*, 67 AD2d 89, 414 NYS2d 718 (2d Dept 1979).

The duty to provide a safe place to work includes the detection of dangers discoverable by reasonable diligence, *Lunde v Nichols Yacht Sales, Inc.*, 143 AD2d 816, 533 NYS2d 130 (2d Dept 1988); *Kennedy v McKay*, 86 AD2d 597, 446 NYS2d 124 (2d Dept 1982); *Lagzdins v United Welfare Fund-Security Division Marriott Corp.*, 77 AD2d 585, 430 NYS2d 351 (2d Dept 1980); *Monroe v New York*, 67 AD2d 89, 414 NYS2d 718 (2d Dept 1979); *Bass v Standard Brands, Inc.*, 65 AD2d 689, 409 NYS2d 724 (1st Dept 1978). Thus, a tripping hazard created by a tool mislaid by a subcontractor constitutes, at the end of the subcontractor's work day, a premises condition, not a condition arising out of the manner of the work, *Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 908 NYS2d 117 (2d Dept 2010); see *Prevost v One City Block LLC*, 155 AD3d 531, 65 NYS3d 172 (1st Dept 2017) (dangerous premises condition standard applicable where plaintiff slipped on loose piece of sprinkler pipe that was lying on floor when he arrived); *Mayer v Conrad*, 122 AD3d 1366, 997 NYS2d 869 (4th Dept 2014) (unsecured embankment created by contractor's work constituted unsafe premises condition because it remained in that condition for several weeks prior to plaintiff's accident and contractor was not working on embankment at time of accident); see also *McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 913 NYS2d 435 (4th Dept 2010) (tripping hazard posed by pin, which had been stored on wooden form and was to be inserted into form to hold it together while concrete was poured into it, was created by manner in which plaintiff's employer performed its work; pin was not dangerous premises condition because it was not a defect "inherent in the property"). A hazard arising from the manner and means of the work may therefore transform into an unsafe premises condition with the passage of time, *Mayer v Conrad*, *supra*; *Slikas v Cyclone Realty, LLC*, *supra*. An owner who supplies a defective or unsafe ladder, scaffold or other device can be liable under Labor Law § 200 if it caused the dangerous condition or had actual or constructive notice of the condition, *Sochan v Mueller*, 162 AD3d 1621, 78 NYS3d 608 (4th Dept 2018); *Vogler v Perrault*, 149 AD3d 1298, 52 NYS3d 544 (3d Dept 2017); *Chowdhury v Rodriguez*, 57 AD3d 121, 867 NYS2d 123 (2d Dept 2008); *Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460, 869 NYS2d 172 (2d Dept 2008); see *Higgins v 1790 Broadway Associates*, 261 AD2d 223, 691 NYS2d 31 (1st Dept 1999).

An owner or contractor who created a dangerous condition on the premises may be held liable for a worker's resulting injuries, *Langer v MTA Capital Construction Company*, 184 AD3d 401, 125 NYS3d 694 (1st Dept 2020) (plaintiff entitled to summary judgment where entities responsible for site cleanliness created sludgy, oily condition that poured down onto plaintiff and caused him to lose his balance); *Goad v Southern Elec. Intern., Inc.*, 304 AD2d 887, 758 NYS2d 184 (3d Dept 2003) (question of fact existed as to defendant's liability under Labor Law § 200 where plaintiff submitted evidence that defendant had previously cut and improperly welded railing that collapsed and caused plaintiff's injury); see *Higgins v 1790 Broadway Associates*, 261 AD2d 223, 691 NYS2d 31 (1st Dept 1999). Where the injury arises out of a defective condition on the premises, an owner may be held liable if it had actual

or constructive knowledge of the unsafe condition even if it did not supervise or control the work, *Espinosa v Azure Holdings II, LP*, 58 AD3d 287, 869 NYS2d 395 (1st Dept 2008); *Beadleston v American Tissue Corp.*, 41 AD3d 1074, 839 NYS2d 283 (3d Dept 2007); *Singh v Young Manor, Inc.*, 23 AD3d 249, 804 NYS2d 65 (1st Dept 2005); *Griffin v New York City Transit Authority*, 16 AD3d 202, 791 NYS2d 98 (1st Dept 2005); *Murphy v Columbia University*, 4 AD3d 200, 773 NYS2d 10 (1st Dept 2004); *Bonura v KWK Associates, Inc.*, 2 AD3d 207, 770 NYS2d 5 (1st Dept 2003). A general contractor that did not supervise or control the work may also be held liable for an unsafe premises condition if had actual or constructive notice of the condition and control of the place where the injury occurred, *Wynne v B. Anthony Const. Corp.*, 53 AD3d 654, 862 NYS2d 379 (2d Dept 2008); *Lane v Fratello Const. Co.*, 52 AD3d 575, 860 NYS2d 177 (2d Dept 2008); *Weinberg v Alpine Improvements, LLC*, 48 AD3d 915, 851 NYS2d 692 (3d Dept 2008); *Verel v Ferguson Elec. Const. Co., Inc.*, 41 AD3d 1154, 838 NYS2d 280 (4th Dept 2007); *Wolfe v KLR Mechanical, Inc.*, 35 AD3d 916, 826 NYS2d 458 (3d Dept 2006); see *Murphy v Columbia University*, *supra*. Where the defective or dangerous condition was not created by defendant owner, notice, actual or constructive, is necessary, *Chaney v New York City Transit Authority*, 12 AD2d 61, 208 NYS2d 205 (1st Dept 1960), *aff'd*, 10 NY2d 871, 223 NYS2d 502, 179 NE2d 507 (1961); *Karian v Anchor Motor Freight, Inc.*, 144 AD2d 777, 535 NYS2d 175 (3d Dept 1988); *DeTommaso v M.J. Fitzgerald Const. Co.*, 138 AD2d 341, 525 NYS2d 632 (2d Dept 1988); *Rosenbaum v Lefrak Corp.*, 80 AD2d 337, 438 NYS2d 794 (1st Dept 1981); *Miller v Perillo*, 71 AD2d 389, 422 NYS2d 424 (1st Dept 1979); *Monroe v New York*, 67 AD2d 89, 414 NYS2d 718 (2d Dept 1979); *Forbes v Alvord & Swift*, 44 AD2d 538, 353 NYS2d 749 (1st Dept 1974). Factors relevant to the issue of whether an owner had notice of a dangerous condition include the frequency with which the owner visited the work site, the length of time the condition existed before plaintiff's accident, and whether the condition was visible or latent, *Mayer v Conrad*, 122 AD3d 1366, 997 NYS2d 869 (4th Dept 2014).

The courts have held that there is no duty to protect the employee against defects or dangers inherent in the injury-producing work that are readily observable by reasonable use of the senses, considering the employee's age, intelligence and experience, *Musillo v Marist College*, 306 AD2d 782, 762 NYS2d 663 (3d Dept 2003); see *Bodtman v Living Manor Love, Inc.*, 105 AD3d 434, 963 NYS2d 35 (1st Dept 2013); *Panetta v Paramount Communications, Inc.*, 255 AD2d 568, 681 NYS2d 85 (2d Dept 1998); *McLean v Studebaker Bros. Co. of New York*, 221 NY 475, 117 NE 951 (1917); *Reynolds v Fisher*, 220 AD2d 968, 632 NYS2d 704 (3d Dept 1995); *DeLong v State Street Associates L.P.*, 211 AD2d 891, 621 NYS2d 172 (3d Dept 1995); see also *Vega v Restani Const. Corp.*, 18 NY3d 499, 942 NYS2d 13, 965 NE2d 240 (2012) (discussing "ordinary and obvious" doctrine, which may preclude recovery of damages by worker who, confronting ordinary and obvious hazards of employment, and possessing time and other resources to enable worker to perform work safely, performed task incautiously). However, in *England v Vacri*

Const. Corp., 24 AD3d 1122, 807 NYS2d 669 (3d Dept 2005), the court held that the open and obvious nature of a dangerous condition absolves the owner and general contractor only of the duty to warn and does not relieve them of the duty to provide a reasonably safe workplace, see *Coleman v Crumb Rubber Mfrs.*, 92 AD3d 1128, 940 NYS2d 170 (3d Dept 2012); *Barberio v Agramunt*, 45 AD3d 514, 845 NYS2d 128 (2d Dept 2007); *Roosa v Cornell Real Property Servicing, Inc.*, 38 AD3d 1352, 831 NYS2d 784 (4th Dept 2007); *Tulovic v Chase Manhattan Bank, N.A.*, 309 AD2d 923, 767 NYS2d 44 (2d Dept 2003); *Waszak v State*, 275 AD2d 916, 713 NYS2d 397 (4th Dept 2000); see also *Verel v Ferguson Elec. Const. Co., Inc.*, 41 AD3d 1154, 838 NYS2d 280 (4th Dept 2007) (duty to warn of open and obvious condition). The England and Tulovic courts noted that their rulings reflected the change in the common law occasioned by *MacDonald v Schenectady*, 308 AD2d 125, 761 NYS2d 752 (3d Dept 2003), and similar decisions. The England court went on to note that, although the McDonald line of cases did not involve Labor Law § 200 claims, the holdings of those cases should be applied to cases arising under Labor Law § 200 because the statute was intended to codify common law principles. Thus, the court held in *Tighe v Hennegan Const. Co., Inc.*, 48 AD3d 201, 850 NYS2d 417 (1st Dept 2008), that a subcontractor that controlled the work out of which an electrician's injury arose was not absolved of liability merely because the hazard, i.e. debris accumulated as a result of the demolition, was readily observable, at least where the hazard was not inherent in the electrician's work, see *Landahl v Buffalo*, 103 AD3d 1129, 959 NYS2d 306 (4th Dept 2013) ("open and obvious" nature of worn marble step on which plaintiff allegedly slipped affects issue of comparative fault rather than defendant's liability; court distinguished *Gaspar v Ford Motor Co.*, 13 NY2d 104, 242 NYS2d 205, 192 NE2d 163 (1963), which involved open and obvious hazard inherent in injury-producing work). Applying its holding in *Sun Ho Chung v Jeong Sook Joh*, 29 AD3d 677, 815 NYS2d 641 (2d Dept 2006), in the Labor Law § 200 context, the Second Department has held that a worker injured as a result of a work site condition that was open and obvious and not "inherently dangerous" cannot recover for a violation of that statute, *Dinallo v DAL Elec.*, 43 AD3d 981, 842 NYS2d 519 (2d Dept 2007) (worker tripped over jack assembly three feet high, 30 inches wide and 30 inches deep).

There is no duty to protect an employee from dangers arising from a defect that he or she was hired to repair, *Hudson v Brookfield Const Co.*, 24 NY2d 811, 300 NYS2d 589, 248 NE2d 445 (1969); *Kowalsky v Conreco Co.*, 264 NY 125, 190 NE 206 (1934); *Mullin v Genesee County Electric Light, Power & Gas Co.*, 202 NY 275, 95 NE 689 (1911); *Soto v Justin Hochberg 2014 Irrevocable Trust*, 202 AD3d 1122, 159 NYS3d 911 (2d Dept 2022); *Torres v Board of Education of City of New York*, 175 AD3d 1584, 109 NYS3d 346 (2d Dept 2019); *Hansen v Trustees of Methodist Episcopal Church of Glen Cove*, 51 AD3d 725, 858 NYS2d 303 (2d Dept 2008); *Contrera v Geshner Realty Corp.*, 1 AD3d 111, 766 NYS2d 200 (1st Dept 2003). Similarly, a worker responsible for sweeping and mopping the area could not recover for injuries sustained when he slipped on a food substance in that area, *Jackson v Board of Educ. of*

City of New York, 30 AD3d 57, 812 NYS2d 91 (1st Dept 2006); see *Mejia v 110 William, LLC*, 195 AD3d 422, 144 NYS3d 578 (1st Dept 2021) (plaintiff's testimony that her job responsibilities included cleaning soap spills on bathroom floor was fatal to her claim arising from slip and fall on soapy, wet, slippery bathroom floor); *Imtianos v Sachs*, 44 AD3d 383, 843 NYS2d 569 (1st Dept 2007) (no recovery where janitor employed by cleaning service tripped on debris in area employer was responsible for keeping clear; hazard of tripping on debris inherent in janitor's work). Moreover, the common law duty of an employer to provide an employee with a safe place to work does not extend to hazards that are part of or inherent in the very work being performed, *Gasper v Ford Motor Co.*, 13 NY2d 104, 242 NYS2d 205, 192 NE2d 163 (1963); *Fonck v New York*, 198 AD3d 874, 156 NYS3d 308 (2d Dept 2021); *Monahan v New York City Dept. of Educ.*, 47 AD3d 690, 851 NYS2d 586 (2d Dept 2008); see *Vega v Restani Const. Corp.*, 18 NY3d 499, 942 NYS2d 13, 965 NE2d 240 (2012); *Jones v Erie*, 121 AD3d 1562, 993 NYS2d 846 (4th Dept 2014); *Landahl v Buffalo*, 103 AD3d 1129, 959 NYS2d 306 (4th Dept 2013); see also *Wagner v Wody*, 98 AD3d 965, 951 NYS2d 59 (2d Dept 2012) (doctrine applied to bar suit against third party, not plaintiff's employer); but see *Grasso v New York State Thruway Authority*, 159 AD3d 674, 71 NYS3d 604 (2d Dept 2018) (claimants allegedly injured while remediating contaminated site raised triable issue of fact as to whether their injuries were caused by hazardous substance they were not specifically hired to remediate). Likewise, defendant was not liable for injuries resulting from risk inherent in walking up smooth side of a sloped roof rather than a visibly corrugated portion, *Bodtman v Living Manor Love, Inc.*, 105 AD3d 434, 963 NYS2d 35 (1st Dept 2013). Thus, in *Dumoulin v Oval Wood Dish Corp.*, 211 AD2d 883, 621 NYS2d 705 (3d Dept 1995), the court held that defendant owner did not expose plaintiff to an unreasonable risk of danger because the dead tree that fell on him was a hazard inherent in the logging activity that plaintiff performed. However, a worker injured by the defect he or she was responsible to remedy may recover where the duty to remedy the defect had not yet arisen, *Torres v Board of Education of City of New York*, *supra*.

In *Widera v Ettco Wire and Cable Corp.*, 204 AD2d 306, 611 NYS2d 569 (2d Dept 1994), the court held that an employer had no duty to protect the unborn infant child of an employee for injuries resulting from the employee-father's exposure to chemicals at the work site. Similarly, in *Matter of New York City Asbestos Litigation*, 5 NY3d 486, 806 NYS2d 146, 840 NE2d 115 (2005), the Court of Appeals held that an employer had no duty to protect an employee's spouse from exposure to asbestos dust from laundering the employee's work clothes.

B. Accident Site

The duty extends only to employees and conditions at the work place, *Greer v Ferrizz*, 118 AD2d 536, 499 NYS2d 758 (2d Dept 1986). The pattern charge assumes that there is no dispute that the place of injury was at the work site.

The place of work is a flexible concept defined not only by the loca-

tion but by the circumstances of the work to be done, *Holgerson v South 45th St. Garage, Inc.*, 16 AD2d 255, 227 NYS2d 195 (1st Dept 1962), *aff'd*, 12 NY2d 1011, 239 NYS2d 134, 189 NE2d 628 (1963); see *Chaney v New York City Transit Authority*, 12 AD2d 61, 208 NYS2d 205 (1st Dept 1960), *aff'd*, 10 NY2d 871, 223 NYS2d 502, 179 NE2d 507 (1961); *Hoffmeister v Oaktree Homes, Inc.*, 206 AD2d 921, 615 NYS2d 177 (4th Dept 1994); *Brogan v International Business Machines Corp.*, 157 AD2d 76, 555 NYS2d 895 (3d Dept 1990); *Lindgren v Tugboat Dalzellable, Inc.*, 25 AD2d 683, 269 NYS2d 92 (2d Dept 1966), *aff'd*, 31 AD2d 599, 296 NYS2d 533 (2d Dept 1968), *rev'd on other grounds*, 26 NY2d 455, 311 NYS2d 495, 259 NE2d 916 (1970). The lack of proximity between the place of the accident and the precise location of the work is not dispositive of Labor Law liability for injuries to workers handling construction materials and equipment, see *Bloomfield v General Elec. Co.*, 198 AD2d 655, 603 NYS2d 606 (3d Dept 1993).

Owners or general contractors are responsible for the places of work provided by them and the ways and approaches to such places of work, *Chaney v New York City Transit Authority*, 12 AD2d 61, 208 NYS2d 205 (1st Dept 1960), *aff'd*, 10 NY2d 871, 223 NYS2d 502, 179 NE2d 507 (1961); *Tilkins v Niagara Falls*, 52 AD2d 306, 383 NYS2d 758 (4th Dept 1976); *Enea v Kuhn, Smith & Harris, Inc.*, 39 AD2d 908, 332 NYS2d 913 (2d Dept 1972); *Brennan v Concrete Const. Corp.*, 38 AD2d 639, 326 NYS2d 892 (3d Dept 1971); see also *Mustacchia v Lafayette Nat. Bank*, 26 AD2d 558, 271 NYS2d 130 (2d Dept 1966), *aff'd*, 20 NY2d 810, 284 NYS2d 703, 231 NE2d 289 (1967) (plaintiff must show that area was necessary as passageway). This responsibility runs to employees of a subcontractor, *White v Long Island Lighting Co.*, 32 AD2d 792, 302 NYS2d 463 (2d Dept 1969); see *Torrie v Virtuoso Bldg. Co., Inc.*, 58 AD2d 982, 397 NYS2d 260 (4th Dept 1977). The duty to provide a reasonably safe work place includes the roadway on the owner's premises used to transport tanks from the location where delivered by the supplier to the installation site, *Brogan v International Business Machines Corp.*, 157 AD2d 76, 555 NYS2d 895 (3d Dept 1990), as well as an area between the building under construction and a construction trailer, *Foster v Spevack*, 198 AD2d 892, 605 NYS2d 706 (4th Dept 1993), a walkway designated by the owner for workers reporting for work, *Zito v Occidental Chemical Corp.*, 259 AD2d 1015, 688 NYS2d 307 (4th Dept 1999), the driveway leading up to the front steps of a house, *DeFelice v Seakco Const. Co., LLC*, 150 AD3d 677, 54 NYS3d 55 (2d Dept 2017), and the restrooms designated for use by workers, *Locke v URS Architecture & Engineering-New York, P.C.*, 202 AD3d 505, 163 NYS3d 38 (1st Dept 2022). It does not, however, include the public sidewalk, the control and maintenance of which are a municipal responsibility, at least when the employer has committed no affirmative act rendering the sidewalk unsafe, *Moore v Suburban Fuel Oil Service, Inc.*, 22 AD2d 827, 255 NYS2d 230 (2d Dept 1964), *aff'd*, 16 NY2d 647, 261 NYS2d 82, 209 NE2d 122 (1965).

Whether the injury occurred in a place of work or on a way or approach thereto may constitute a question of law, *Chaney v New York*

City Transit Authority, 12 AD2d 61, 208 NYS2d 205 (1st Dept 1960), *aff'd*, 10 NY2d 871, 223 NYS2d 502, 179 NE2d 507 (1961). If on the facts of a particular case it does not, the pattern charge must be modified to address that issue.

Violations of regulations promulgated by the Mine Safety and Health Administration may protect workers other than miners and may be invoked as some evidence of negligence in cases brought under the common law and Labor Law § 200 involving allegedly unsafe worksites, *Ferguson v Hanson Aggregates New York, Inc.*, 103 AD3d 1174, 959 NYS2d 326 (4th Dept 2013) (citing PJI 2:29). However, to be applicable to a common-law or Labor Law § 200 cause of action, the regulation must be one that relates to the duty to maintain safe premises, *id.* Thus, a rule entitled “[s]ite-specific hazard awareness training,” see 30 CFR 46.11, could not be invoked as some evidence of a breach of the common-law or statutory duty, *Ferguson v Hanson Aggregates New York, Inc.*, *supra*.

II. Accidents Caused by Means or Manner of the Work

A. In General

In *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993), the Court of Appeals stated that, where the accident arose out of the means or manner in which the work was performed, a worker cannot recover against an owner or general contractor under Labor Law § 200 unless the party to be charged “exercised” some supervisory control over the work. This analysis, which requires actual exercise of control, has been repeated in numerous Court of Appeals decisions, *Affri v Basch*, 13 NY3d 592, 894 NYS2d 370, 921 NE2d 1034 (2009); *O’Sullivan v IDI Const. Co., Inc.*, 7 NY3d 805, 822 NYS2d 745, 855 NE2d 1159 (2006); *Narducci v Manhasset Bay Associates*, 96 NY2d 259, 727 NYS2d 37, 750 NE2d 1085 (2001); *Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55, 604 NE2d 117 (1992); *Allen v Cloutier Const. Corp.*, 44 NY2d 290, 405 NYS2d 630, 376 NE2d 1276 (1978); 376 NE2d 1276, as well as many Appellate Division decisions, *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 852 NYS2d 138 (2d Dept 2008); *Fisher v WNY Bus Parts, Inc.*, 12 AD3d 1138, 785 NYS2d 229 (4th Dept 2004); *Mitchell v New York University*, 12 AD3d 200, 784 NYS2d 104 (1st Dept 2004); *Carney v Allied Craftsman General Contractors, Inc.*, 9 AD3d 823, 780 NYS2d 441 (3d Dept 2004).

Additionally, the Court of Appeals has stated that “an implicit precondition to the duty to provide a safe place to work is that the party to be charged have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition,” *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 445 NYS2d 127, 429 NE2d 805 (1981); see *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816, 693 NE2d 1068 (1998); *Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 609 NYS2d 168, 631 NE2d 110 (1993). Thus, an employee of a general contractor could not recover under Labor

Law § 200 from the prime contractors, who had been retained by the owner, were not in privity with the general contractor and had no authority to control the activity producing the injury, *Russin v Louis N. Picciano & Son*, supra.

There are many Appellate Division decisions holding that an owner or general contractor may be liable under Labor Law § 200 only if it exercised supervisory control of the work that led to the injury, *Abreu v Frocione Properties, LLC*, 199 AD3d 1452, 154 NYS3d 620 (4th Dept 2021); *Krencik v Oakgrove Construction, Inc.*, 186 AD3d 1006, 129 NYS3d 567 (4th Dept 2020); *Peck v Szwarcberg*, 122 AD3d 1216, 997 NYS2d 816 (3d Dept 2014); *Fassett v Wegmans Food Markets, Inc.*, 66 AD3d 1274, 888 NYS2d 635 (3d Dept 2009); *Snyder v Gnall*, 57 AD3d 1289, 870 NYS2d 562 (3d Dept 2008); *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 852 NYS2d 138 (2d Dept 2008); *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 841 NYS2d 249 (1st Dept 2007); *Capasso v Kleen All of America, Inc.*, 43 AD3d 1346, 842 NYS2d 798 (4th Dept 2007); *Fisher v WNY Bus Parts, Inc.*, 12 AD3d 1138, 785 NYS2d 229 (4th Dept 2004); *Mitchell v New York University*, 12 AD3d 200, 784 NYS2d 104 (1st Dept 2004); *Carney v Allied Craftsman General Contractors, Inc.*, 9 AD3d 823, 780 NYS2d 441 (3d Dept 2004); see *Vickers v Parcels*, 198 AD3d 1160, 155 NYS3d 622 (3d Dept 2021). Others have referred both to the exercise of supervisory control and the authority to control as touchstones of liability under Labor Law § 200, *Sotarriba v 346 West 17th Street LLC*, 179 AD3d 599, 118 NYS3d 90 (1st Dept 2020); *Perrino v Entergy Nuclear Indian Point 3, LLC*, 48 AD3d 229, 850 NYS2d 428 (1st Dept 2008); *Norman v Welliver McGuire, Inc.*, 48 AD3d 945, 851 NYS2d 310 (3d Dept 2008); *McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d 796, 839 NYS2d 164 (2d Dept 2007); *Peay v New York City School Const. Authority*, 35 AD3d 566, 827 NYS2d 189 (2d Dept 2006). Finally, some Appellate Division decisions refer only to the “authority” to control the work when discussing owners’ and general contractors’ Labor Law § 200 liability for unsafe work methods, *Matter of New York Asbestos Litigation*, 146 AD3d 461, 49 NYS3d 1 (1st Dept 2017); *Vukovich v 1345 Fee, LLC*, 61 AD3d 533, 878 NYS2d 15 (1st Dept 2009); *Kajo v E.W. Howell Co., Inc.*, 52 AD3d 659, 861 NYS2d 105 (2d Dept 2008); *Allen v Telergy Network Services, Inc.*, 52 AD3d 1094, 860 NYS2d 299 (3d Dept 2008); *Alfonseca v Van-Tag Const. Corp.*, 39 AD3d 266, 833 NYS2d 458 (1st Dept 2007).

The Second Department has explicitly held that the proper test for owners’ and general contractors’ liability for injury arising out of the means and manner of the work is whether the defendant had the authority to control the work, *Ortega v Puccia*, 57 AD3d 54, 866 NYS2d 323 (2d Dept 2008); see *Wong v New York*, 65 AD3d 1000, 885 NYS2d 120 (2d Dept 2009); *Gasques v State*, 59 AD3d 666, 873 NYS2d 717 (2d Dept 2009), *aff’d*, 15 NY3d 869, 910 NYS2d 415, 937 NE2d 79 (2010). The *Ortega* court explicitly rejected the principle that the actual exercise of control over the work is required to impose liability on an owner or general contractor. Mere general supervisory authority over the project

is not a sufficient basis for imposing liability, *Lombardi v New York*, 175 AD3d 1521, 109 NYS3d 373 (2d Dept 2019); *Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 87 NYS3d 189 (2d Dept 2018); see *Debenne-detto v Chetrit*, 190 AD3d 933, 140 NYS3d 569 (2d Dept 2021) (fact that defendants often visited work site to inspect work, make requests, and ask questions insufficient to impose liability on owner and general contract under Labor Law § 200); *Harrison v State*, 88 AD3d 951, 931 NYS2d 662 (2d Dept 2011) (right to generally supervise work, stop the contractor's work if safety violation is noted, or ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200). Instead, there must be a showing that the defendants bore the responsibility for the manner in which the work was performed, *Erickson v Cross Ready Mix, Inc.*, 75 AD3d 519, 906 NYS2d 284 (2d Dept 2010); *Enos v Werlatone, Inc.*, 68 AD3d 712, 888 NYS2d 902 (2d Dept 2009). It should be noted that the Second Department's analysis in *Ortega* pertains to an owner or general contractor's potential liability under Labor Law § 200 and not to the separate question of the applicability of the "homeowners' exemption" to liability under Labor Law §§ 240(1) and 241(6). For a detailed discussion of the homeowners' exemption, see Introductory Statement to PJI 2:216, IV. Exemption for One and Two Family Dwellings.

B. Owners

An owner may be held liable for injuries sustained by the employees of a subcontractor stemming from the subcontractor's negligence where the owner supervised or controlled the equipment or safety procedures, *Gregory v General Elec. Co.*, 131 AD2d 967, 516 NYS2d 549 (3d Dept 1987). The retention of general supervisory control, presence at the work site, or authority to enforce safety standards is insufficient to establish the control necessary to impose liability on an owner, *Abreu v Frocione Properties, LLC*, 199 AD3d 1452, 154 NYS3d 620 (4th Dept 2021); *Peck v Szwachberg*, 122 AD3d 1216, 997 NYS2d 816 (3d Dept 2014); see *Vickers v Parcels*, 198 AD3d 1160, 155 NYS3d 622 (3d Dept 2021) (homeowner's presence at property at time of tree trimming accident does not create inference of supervisory control). Thus, the mere retention of inspection privileges or the right to review job safety does not constitute such direct control over the work area of an independent contractor as to impose liability upon the owner, *Perri v Gilbert Johnson Enterprises, Ltd.*, 14 AD3d 681, 790 NYS2d 25 (2d Dept 2005); *Ramos v State*, 34 AD2d 1056, 312 NYS2d 185 (3d Dept 1970); see *Dumoulin v Oval Wood Dish Corp.*, 211 AD2d 883, 621 NYS2d 705 (3d Dept 1995). The retention of general supervisory power by the owner also does not render the owner liable for the contractor's negligence in maintaining the contractor's equipment on the owner's premises, even though the owner's supervisory employees had knowledge of the unsafe practice, *Ortiz v Uhl*, 39 AD2d 143, 332 NYS2d 583 (4th Dept 1972), *aff'd*, 33 NY2d 989, 353 NYS2d 962, 309 NE2d 425 (1974); *Wright v Ellsworth Partners, LLC*, 143 AD3d 1116, 39 NYS3d 289 (3d Dept 2016) (applying principle to general contractor); see *Leahy v Botnick*, 35 AD2d 898, 315 NYS2d 700 (3d Dept 1970). In contrast, the owner may be held liable

where it devised detailed construction and safety guidelines to be followed by the contractor and closely supervised and inspected the work, *Shaheen v International Business Machines Corp.*, 157 AD2d 429, 557 NYS2d 972 (3d Dept 1990), or where it maintained control over budgetary matters, had an employee on-site as the main construction supervision and had been notified of problems with the structure whose failure led to the accident, *Foote v Lyonsdale Energy Ltd. Partnership*, 23 AD3d 924, 805 NYS2d 163 (3d Dept 2005). Offering a general explanation of the job requirements and providing equipment such as a ladder or broom to the plaintiff does not constitute supervision or control in the performance of the work under Labor Law § 200, *Douglas v Beckstein*, 210 AD2d 680, 619 NYS2d 396 (3d Dept 1994); *Stephens v Tucker*, 184 AD2d 828, 584 NYS2d 667 (3d Dept 1992). However, an owner who provides defective equipment may be liable for the resulting injuries if it caused the defect or had actual or constructive notice of it, *Sochan v Mueller*, 162 AD3d 1621, 78 NYS3d 608 (4th Dept 2018); *Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460, 869 NYS2d 172 (2d Dept 2008); *Chowdhury v Rodriguez*, 57 AD3d 121, 867 NYS2d 123 (2d Dept 2008); see *Higgins v 1790 Broadway Associates*, 261 AD2d 223, 691 NYS2d 31 (1st Dept 1999). There was a question of fact as to whether the defendant owner exercised supervisory control over the work where the defendant allegedly placed ladder belonging to her on uneven ground and directed plaintiff to use the ladder to inspect damaged chimney, *Doskotch v Pisocki*, 168 AD3d 1174, 90 NYS3d 667 (3d Dept 2019).

The owner's mere presence at the job site is not sufficient to create liability, *Rivera v Ambassador Fuel and Oil Burner Corp.*, 45 AD3d 275, 845 NYS2d 25 (1st Dept 2007); *Lysiak v Murray Realty Co.*, 227 AD2d 746, 642 NYS2d 350 (3d Dept 1996); see *Vickers v Parcels*, 198 AD3d 1160, 155 NYS3d 622 (3d Dept 2021) (homeowner's presence at property at time of tree trimming accident does not create inference of supervisory control). Although the owners reviewed the progress of the work and participated in selecting the design of the house, the materials to be used and the layout of the landscaping, such activities did not rise to the requisite level of direction and control so as to bring them within the ambit of Labor Law § 200, *Richichi v Construction Management Technologies, Inc.*, 244 AD2d 540, 664 NYS2d 615 (2d Dept 1997); nor did liability arise from the owner's actions, on one occasion, of moving and assembling a scaffold that was not provided by the owner, *Ortega v Puccia*, 57 AD3d 54, 866 NYS2d 323 (2d Dept 2008).

C. Contractors

A contractor who provides general supervision and coordination of the work site will not be held liable if it does not control or direct the plaintiff's work, *Vasiliades v Lehrer McGovern & Bovis, Inc.*, 3 AD3d 400, 771 NYS2d 27 (1st Dept 2004). Thus, one of five prime contractors having only authority and responsibility to coordinate and direct progress of work by the others, with no power of supervision or control over the manner of work or safety precautions taken by the others, is not li-

able for the dangerous condition created by one of the others, particularly since the owner had its own project superintendent with such power, id; see also *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 445 NYS2d 127, 429 NE2d 805 (1981); *Karian v Anchor Motor Freight, Inc.*, 144 AD2d 777, 535 NYS2d 175 (3d Dept 1988); *Nowak v Smith & Mahoney, P.C.*, 110 AD2d 288, 494 NYS2d 449 (3d Dept 1985); *Pantori v Welsbach Corp.*, 43 AD2d 517, 348 NYS2d 767 (1st Dept 1973), mod, 34 NY2d 812, 359 NYS2d 47, 316 NE2d 333 (1974); *Hamill v Foster-Lipkins Corp.*, 41 AD2d 361, 342 NYS2d 539 (3d Dept 1973). A subcontractor's use and operation of its equipment while assisting a general contractor's work does not constitute authorization for the subcontractor to supervise, direct or control the activity when the subcontractor does not have the authority to correct unsafe conditions or to control the general contractor's activity, *Rice v Cortland*, 262 AD2d 770, 691 NYS2d 616 (3d Dept 1999); see *Ryder v Mount Loretto Nursing Home Inc.*, 290 AD2d 892, 736 NYS2d 792 (3d Dept 2002). An architect who has agreed to perform solely architectural services is not liable under Labor Law §§ 200, 240 and 241(6), *Houde v Barton*, 202 AD2d 890, 609 NYS2d 411 (3d Dept 1994).

Absent supervisory control over the injured employee's work, a contractor's notice of the injury-producing condition is not sufficient to impose liability for the employee's injury, *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 841 NYS2d 249 (1st Dept 2007). Furthermore, evidence that a general contractor had general supervisory responsibility for the project is not sufficient in the absence of proof that the general contractor controlled the manner or method of work in which the plaintiff was engaged at the time of the accident, *DeSimone v Structure Tone, Inc.*, 306 AD2d 90, 762 NYS2d 39 (1st Dept 2003). However, where there is evidence that the contractor had control over the methods of the subcontractors and other worksite employees in the sense that the contractor had the ability to coordinate the work activity of its subcontractors and the owner, had the capacity to exclude the owner from working in the area, or had the authority to direct either its subcontractors or the owner to not engage in an operation while another potentially hazardous activity was taking place within the immediate area, the contractor could be found liable under Labor Law § 200, *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816, 693 NE2d 1068 (1998); see *Sotarriba v 346 West 17th Street LLC*, 179 AD3d 599, 118 NYS3d 90 (1st Dept 2020) (although general contractor had no authority to exercise supervisory control over plaintiff's use of ladder, there was question of fact as to whether it had authority over the proper barricading of stairwell opening).

The fact that the general contractor agreed in its contract with the owner to "supervise" the work is not, by itself, sufficient to establish that the general contractor actually supervised or controlled the work, *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993); *Gray v Balling Const. Co., Inc.*, 239 AD2d 913, 659 NYS2d 630 (4th Dept 1997). However, the existence of such a contractual undertaking may create an issue of fact as to control, even where the

general contractor disclaims actual supervision of the subcontractors, *Ross v Curtis-Palmer Hydro-Electric Co.*, *supra*. Observing work and reporting safety violations do not, without more, indicate authority to supervise, control or direct an activity, *Decotes v Merritt Meridian Corp.*, 245 AD2d 864, 666 NYS2d 763 (3d Dept 1997).

A contractor that did not exercise supervision and control over the injured employee's work cannot be held liable merely because it had the responsibility to monitor job site safety or perform safety-related tasks, *O'Sullivan v IDI Const. Co., Inc.*, 7 NY3d 805, 822 NYS2d 745, 855 NE2d 1159 (2006). The same principle applies to a contractor hired to comply with New York City Administrative Code § 27-1009(d), which requires the designation and presence of a site safety coordinator on specified construction projects, *Hughes v Tishman Const. Corp.*, 40 AD3d 305, 836 NYS2d 86 (1st Dept 2007). Even a contractor's awareness of the specific condition that caused the accident is not, without more, sufficient to impose liability on the contractor under Labor Law § 200 or common-law negligence principles, *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 836 NYS2d 130 (1st Dept 2007). Further, the authority to stop work for safety reasons is not by itself a sufficient basis to impose liability on a contractor, *Debenedetto v Chetrit*, 190 AD3d 933, 140 NYS3d 569 (2d Dept 2021); *Hughes v Tishman Const. Corp.*, *supra*; *Peay v New York City School Const. Authority*, 35 AD3d 566, 827 NYS2d 189 (2d Dept 2006); *Dalanna v New York*, 308 AD2d 400, 764 NYS2d 429 (1st Dept 2003); *Custer v Cortland Housing Authority*, 266 AD2d 619, 697 NYS2d 739 (3d Dept 1999); *Ricotta v Praxis Biologics, Inc.*, 265 AD2d 878, 695 NYS2d 845 (4th Dept 1999); *Buccini v 1568 Broadway Associates*, 250 AD2d 466, 673 NYS2d 398 (1st Dept 1998); However, the authority to stop work may suffice where it is coupled with other factors, such as the contractor's previous inspection of the safety equipment and evidence that it was "watching" the injured worker's employer because of prior injuries, *Shaheen v Hueber-Breuer Const. Co., Inc.*, 4 AD3d 761, 772 NYS2d 156 (4th Dept 2004), or where the contractor participated in a recent decision to shut down the site due to inclement weather, the contractor was present at the work site every day and plaintiff worker consulted with the contractor's representative regarding the proper method for performing the work, *Fassett v Wegmans Food Markets, Inc.*, 66 AD3d 1274, 888 NYS2d 635 (3d Dept 2009). In *Hughes v Tishman Const. Corp.*, *supra*, the First Department stated that its earlier decisions in *Brennan v 42nd St. Development Project, Inc.*, 10 AD3d 302, 781 NYS2d 335 (1st Dept 2004), *Bush v Gregory/Madison Ave., LLC*, 308 AD2d 360, 764 NYS2d 262 (1st Dept 2003), *Freitas v New York City Transit Authority*, 249 AD2d 184, 672 NYS2d 101 (1st Dept 1998), and *Gawel v Consolidated Edison Co. of New York, Inc.*, 237 AD2d 138, 655 NYS2d 351 (1st Dept 1997), which suggested that the authority to stop work for safety reasons could suffice, are not consistent with the overarching principle that liability for common law negligence or violation of the duty imposed by Labor Law § 200 is imposed only on a general contractor or construction manager that controls the manner in which the plaintiff performed his or her work.

D. Agents and Others

A supervising engineer who is in control of the work and has charge of the project for the owner owes the same duty as does the owner to provide a safe place to work, *Persichilli v Triborough Bridge and Tunnel Authority*, 21 AD2d 819, 251 NYS2d 733 (2d Dept 1964), mod on other grounds, 16 NY2d 136, 262 NYS2d 476, 209 NE2d 802 (1965); see also *Hamill v Foster-Lipkins Corp.*, 41 AD2d 361, 342 NYS2d 539 (3d Dept 1973). But an inspection engineer owes no duty to provide a safe place to work unless it has control over the work being performed, *Becker v Tallamy, Van Kuren, Gertis & Associates*, 221 AD2d 1014, 634 NYS2d 282 (4th Dept 1995); *Carter v Vollmer Associates*, 196 AD2d 754, 602 NYS2d 48 (1st Dept 1993); *Hamby v High Steel Structures, Inc.*, 134 AD2d 884, 521 NYS2d 926 (4th Dept 1987). Nor is a company that furnishes security guards subject to the statutory duty imposed by Labor Law § 200 for an injury suffered by one of its employees in a client's premises, absent evidence that the security company had control over the premises or was under a duty to clean or inspect the premises, *Gomes v Revere Sugar Corp.*, 140 AD2d 582, 528 NYS2d 646 (2d Dept 1988). A party who merely employs a construction consultant at a work site is not liable under Labor Law § 200 because general supervision and presence at the work site to check on the progress of the work and compliance with building specifications does not constitute sufficient control or supervision, *Gielow v Rosa Coplon Home*, 251 AD2d 970, 674 NYS2d 551 (4th Dept 1998); see *Nevins v Essex Owners Corp.*, 276 AD2d 315, 714 NYS2d 38 (1st Dept 2000).

PJI 2:216A. Injured Employee—Violation of Industrial Rule—Vicarious Liability—Nondelegable Duty of Owner/Subcontractor—Labor Law § 241(6)

Plaintiff claims that defendant AB, the owner of the site, is liable for (his, her) injuries under Section 241(6) of the New York State Labor Law. Section 241(6) requires that all “areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein” The State Commissioner of Labor is authorized to make rules to give effect to this law. In this case, plaintiff claims [*state applicable Rule*] was violated. That Rule reads as follows: ____.

Under Labor Law § 241(6), the owner of an area where construction, excavation or demolition is taking place is liable for injury to a worker in that

area caused by the failure of a general contractor or a subcontractor to use reasonable care in constructing, shoring, equipping, or guarding the site or in arranging, operating or conducting the work in that area. The owner is liable for an injury due to the failure of a general contractor or subcontractor to use reasonable care even though the owner did not control or supervise the area or the work being done there and did not or could not know of any danger to plaintiff.

In this case, plaintiff claims that AB, the owner, is liable to (him, her) for (his, her) injury because of the failure of CD (contractor, subcontractor) to use reasonable care. The only evidence of CD's claimed failure to use reasonable care that you may consider in connection with the liability of AB to plaintiff, is evidence relating to the claimed violation of Rule ____ *[state applicable Rule]* by CD. Plaintiff claims that the Rule was violated because *[state plaintiff's contentions]*. Violation of this rule by CD (contractor, subcontractor) would constitute some evidence of CD's failure to use reasonable care. AB denies that this Rule was violated or that CD failed to use reasonable care. *[State owner's contentions.]*

In deciding whether AB, the owner, is liable to plaintiff because of the claimed failure of CD (contractor, subcontractor) to use reasonable care, you must consider all of the evidence submitted in connection with the charged violation of Rule *[state Rule number]*. If you find that there was a violation of Rule *[state Rule number]* and that such violation constituted a failure to use reasonable care and that the failure to use reasonable care was a substantial factor causing plaintiff's injuries, you will find for plaintiff against defendant AB *[add where appropriate:]* (on this issue). If you find that CD (contractor, subcontractor) did not violate Rule *[state Rule number]*, or that even though there was a violation it did not constitute a failure to use reasonable care, or, if there was a failure to use reasonable care, it was not a substantial factor in causing plaintiff's injuries, you will find for AB *[add where appropriate:]* (on this issue).

(If there is evidence of negligence on the part of plaintiff, the comparative negligence charge should be given, see PJI 2:36).

Comment

Caveat: Where plaintiff's Labor Law § 241(6) claim rests on several different provisions of the Industrial Code, each claimed violation should be separately submitted to the jury, see *Hernandez v Columbus Centre, LLC*, 50 AD3d 597, 857 NYS2d 84 (1st Dept 2008) (reversal required where four theories of liability were submitted in the form of general verdict but only one theory was supported by trial evidence).

Based on Labor Law § 241(6), *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816, 693 NE2d 1068 (1998); *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993); *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 493 NYS2d 102, 482 NE2d 898 (1985); *Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132, 433 NE2d 115 (1982); *Allen v Cloutier Const. Corp.*, 44 NY2d 290, 405 NYS2d 630, 376 NE2d 1276 (1978); *O'Leary v Raymond LeChase, Inc.*, 125 AD2d 991, 510 NYS2d 389 (4th Dept 1986); *Leahey v Turner Const. Co.*, 91 AD2d 599, 457 NYS2d 283 (1st Dept 1982); *Lagzdins v United Welfare Fund-Security Division Marriott Corp.*, 77 AD2d 585, 430 NYS2d 351 (2d Dept 1980); *Monroe v New York*, 67 AD2d 89, 414 NYS2d 718 (2d Dept 1979); see *Nagel v D & R Realty Corp.*, 99 NY2d 98, 752 NYS2d 581, 782 NE2d 558 (2002).

The charge applies only to a § 241(6) claim against an owner. Where the general contractor is also a defendant on the § 241(6) claim, the charge should be modified accordingly. In cases where defendant claims the statutory exemption for "owners of one and two-family dwellings who contract for but do not direct or control the work" and there are factual issues on the questions of direction and control, the following charge may be used:

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Under the Labor Law, "owners of one and two family dwellings who contract for but do not direct or control the work" on the dwelling are not liable. Defendant CD, the owner, claims that (he, she) should not be held liable because (he, she) did not direct or control the work. Direction and control means supervision and instruction of the (contractor EF, subcontractor GH or their employees) in the manner or method the work is to be performed. Merely directing where or when the work is to be performed or inspecting the work contracted for is

not the direction or control necessary to hold defendant CD liable. Nor are direction and control established merely by making suggestions or requests from time to time regarding how the work should be done.

Labor Law § 241 (6) provides: “All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The [Commissioner of Labor] may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.” The statute is a “hybrid” with the first sentence merely reiterating the common law-standards of care and, accordingly, providing no independent source for an owner’s or general contractor’s non-delegable duty, *Toussaint v Port Authority of New York and New Jersey*, 38 NY3d 89, 168 NYS3d 379, 188 NE3d 571 (2022); *Morris v Pavarini Const.*, 9 NY3d 47, 842 NYS2d 759, 874 NE2d 723 (2007). However, the second sentence of the statute, mandating compliance with the rules of the Commissioner of Labor, creates a nondelegable duty with respect to certain specific regulations, *Toussaint v Port Authority of New York and New Jersey*, supra; see this Comment, *infra*.

Labor Law § 241(6) imposes vicarious liability upon (1) owners for the negligent failure of contractors and subcontractors, their agents and employees, and (2) contractors for the negligent failure of subcontractors, to perform the statutory duty that “all areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places,” *Nagel v D & R Realty Corp.*, 99 NY2d 98, 752 NYS2d 581, 782 NE2d 558 (2002). The statute requires that all areas in which construction, excavation or demolition work is being performed be made reasonably safe, see *Garcia v 225 East 57th Street Owners, Inc.*, 96 AD3d 88, 942 NYS2d 533 (1st Dept 2012).

Recovery under Labor Law § 241 (6) must be based on a violation of the Industrial Code, which a plaintiff is required to specifically allege in the complaint or the bill of particulars, see *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993); *Pelonero v Sturm Roofing, LLC*, 175 AD3d 1062, 107 NYS3d 590 (4th Dept 2019). Unlike Labor Law § 240(1), this section does not impose absolute liability for any injury arising from its breach, but rather requires a determination as to whether the safety measures employed were “reasonable and adequate” under the circumstances, *Nagel v D & R Realty Corp.*, 99 NY2d 98, 752 NYS2d 581, 782 NE2d 558 (2002); *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816, 693

NE2d 1068 (1998); *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 493 NYS2d 102, 482 NE2d 898 (1985); *Tuohey v Gainsborough Studios, Inc.*, 183 AD2d 636, 586 NYS2d 103 (1st Dept 1992). It is, therefore, error to instruct the jury that a breach of the rules is tantamount to a statutory violation, *O'Leary v Raymond LeChase, Inc.*, 125 AD2d 991, 510 NYS2d 389 (4th Dept 1986). The Departments of the Appellate Division are divided on the issue of whether a plaintiff may be awarded summary judgment on a Labor Law § 241(6) cause of action. The First and Second Departments allow for summary judgment to be awarded to a § 241(6) plaintiff, *Reynoso v Bovis Lend Lease LMB, Inc.*, 125 AD3d 740, 4 NYS3d 55 (2d Dept 2015); *Lopez v New York City Dept. of Environmental Protection*, 123 AD3d 982, 999 NYS2d 848 (2d Dept 2014); *Ortega-Estrada v 215-219 West 145th Street LLC*, 118 AD3d 614, 987 NYS2d 845 (1st Dept 2014); *Melchor v Singh*, 90 AD3d 866, 935 NYS2d 106 (2d Dept 2011); *Harris v New York*, 83 AD3d 104, 923 NYS2d 2 (1st Dept 2011); *Vasquez v Urbahn Associates Inc.*, 79 AD3d 493, 918 NYS2d 1 (1st Dept 2010); *Hayden v 845 UN Ltd. Partnership*, 304 AD2d 499, 758 NYS2d 647 (1st Dept 2003), while the Third and Fourth Departments do not, taking the position that the violation of a regulation is only some evidence of negligence, *Marshall v Glenman Industrial & Commercial Contractor Corp.*, 117 AD3d 1124, 985 NYS2d 169 (3d Dept 2014); *Mulcaire v Buffalo Structural Steel Const. Corp.*, 45 AD3d 1426, 846 NYS2d 838 (4th Dept 2007); *Wells v British American Development Corp.*, 2 AD3d 1141, 770 NYS2d 161 (3d Dept 2003); *Puckett v Erie*, 262 AD2d 964, 693 NYS2d 780 (4th Dept 1999).

II. Nondelegable Duty

The statutory nondelegable duty of owners and general contractors arises out of the introductory, unnumbered paragraph of Section 241 providing that “all contractors and their agents, except owners of one and two family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements,” see *St. Louis v North Elba*, 16 NY3d 411, 923 NYS2d 391, 947 NE2d 1169 (2011); *Allen v Cloutier Const. Corp.*, 44 NY2d 290, 405 NYS2d 630, 376 NE2d 1276 (1978); *Dunlap v United Health Services Inc.*, 189 AD2d 1072, 593 NYS2d 339 (3d Dept 1993); *Sarvis v Maida*, 173 AD2d 1019, 569 NYS2d 997 (3d Dept 1991). The statutory non-delegable duty applies to owners and contractors even in Labor Law § 241(6) actions brought for violations of Industrial Code Provisions that refer only to duties of “employers,” *Rivera v Ambassador Fuel and Oil Burner Corp.*, 45 AD3d 275, 845 NYS2d 25 (1st Dept 2007).

An owner cannot escape liability by delegating responsibility for its duties under § 241(6) to its lessee, *Giacomazzo v Exxon Corp.*, 185 AD2d 145, 586 NYS2d 112 (1st Dept 1992); see *Crawford v Williams*, 198 AD2d 48, 603 NYS2d 456 (1st Dept 1993) (Labor Law § 241(6) applies to out-of-possession owners who exercise no control or supervision over work); *Sergio v Benjolo N.V.*, 168 AD2d 235, 562 NYS2d 476 (1st Dept

1990). Section 241(6) also imposes liability upon a general contractor for the negligence of a subcontractor, even in the absence of control or supervision of the work site, *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816, 693 NE2d 1068 (1998); *Allen v Cloutier Const. Corp.*, 44 NY2d 290, 405 NYS2d 630, 376 NE2d 1276 (1978). Moreover, since an owner or general contractor's liability under Labor Law § 241(6) is not dependent on its personal capacity to prevent or cure a dangerous condition, the absence of actual or constructive notice of the condition is irrelevant, *Wrighten v ZHN Contracting Corp.*, 32 AD3d 1019, 822 NYS2d 115 (2d Dept 2006) (disapproving *Bradley v Morgan Stanley & Co., Inc.*, 21 AD3d 866, 800 NYS2d 620 (2d Dept 2005), and *Bommarito v Park Ave. Plaza Co.*, 307 AD2d 944, 763 NYS2d 472 (2d Dept 2003)).

While the owner or general contractor may not avoid liability under Labor Law § 241 by delegating the work, the work may, in fact, be delegated. Where the work is delegated to a third party, the third party has concomitant authority to supervise and control the work delegated and becomes an "agent" of the owner or general contractor for purposes of Labor Law § 241, *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 445 NYS2d 127, 429 NE2d 805 (1981); *Hajba v Silander*, 222 AD2d 813, 634 NYS2d 786 (3d Dept 1995); *McGlynn v Brooklyn Hospital-Caledonian Hosp.*, 209 AD2d 486, 619 NYS2d 54 (2d Dept 1994); *Davis v Lenox School*, 151 AD2d 230, 541 NYS2d 814 (1st Dept 1989). For a discussion of the circumstances under which a person or entity will be deemed to be an "agent" for purposes of the Labor Law, see Introductory Statement—Injured Employees' Rights Under the Labor Law, preceding PJI 2:216.

Indemnification or contribution by one primarily liable for the injury is not precluded by the fact that the duty under Labor Law §§ 240, 241 is non-delegable, *Allen v Cloutier Const. Corp.*, 44 NY2d 290, 405 NYS2d 630, 376 NE2d 1276 (1978); *Kelly v Diesel Const. Division of Carl A. Morse, Inc.*, 35 NY2d 1, 358 NYS2d 685, 315 NE2d 751 (1974); see *Glielmi v Toys R Us, Inc.*, 62 NY2d 664, 476 NYS2d 283, 464 NE2d 981 (1984); *Pazmino v Woodside Development Co.*, 212 AD2d 520, 622 NYS2d 299 (2d Dept 1995); PJI 2:275. Whether an owner who is only vicariously liable is entitled to common-law indemnification from a subcontractor is dependent upon whether the subcontractor is found liable for the occurrence, *Damon v Starkweather*, 185 AD2d 633, 585 NYS2d 906 (4th Dept 1992); *Young v Casabonne Bros., Inc.*, 145 AD2d 244, 538 NYS2d 348 (3d Dept 1989). Although a party which has itself actually participated to some degree in the wrongdoing cannot recover under the doctrine of implied indemnity, the mere occasional presence of an owner or general contractor at the work site is not commensurate with participating in the wrongdoing, *Pazmino v Woodside Development Co.*, *supra*.

III. Requirements of a Labor Law § 241(6) Claim

A. Applicability of Statute

1. Accident Site

While the introductory language to Labor Law § 241(6) appears to limit the application of the ensuing subdivisions to building sites, the application of the statute, due to its legislative history, is broader, *Joblon v Solow*, 91 NY2d 457, 672 NYS2d 286, 695 NE2d 237 (1998) (statute not limited to accidents on building construction site); *Mosher v State*, 80 NY2d 286, 590 NYS2d 53, 604 NE2d 115 (1992); *Celestine v New York*, 59 NY2d 938, 466 NYS2d 319, 453 NE2d 548 (1983) (statutory duty not limited to “building” sites but extends to any construction site); *Ciancio v Woodlawn Cemetery Ass’n*, 249 AD2d 86, 671 NYS2d 466 (1st Dept 1998) (grave an “excavation” within purview of statute); *Tilkins v Niagara Falls*, 52 AD2d 306, 383 NYS2d 758 (4th Dept 1976). In cases involving the application of Labor Law § 241(6) to a particular site, the statute is given an expansive interpretation so that the liability of an owner or contractor extends not only to the specific area where work is performed but throughout the construction site, *Reinitz v Arc Elec. Const. Co., Inc.*, 104 AD2d 247, 483 NYS2d 821 (3d Dept 1984); see *Fassett v Wegmans Food Markets, Inc.*, 66 AD3d 1274, 888 NYS2d 635 (3d Dept 2009) (statute applies to passageways and platforms); *Zito v Occidental Chemical Corp.*, 259 AD2d 1015, 688 NYS2d 307 (4th Dept 1999) (statute applies to accidents occurring on passageways or walkways designated for workers reporting for work). Subsequent to *Joblon v Solow*, *supra*, the Court of Appeals held that the Industrial Code definition of “construction work” in Section 23-1.4(b)(13), which includes maintenance, must be construed consistently with the Court’s understanding that Labor Law § 241(6) covers industrial accidents that occur in the context of construction, demolition and excavation, but not routine maintenance, *Nagel v D & R Realty Corp.*, 99 NY2d 98, 752 NYS2d 581, 782 NE2d 558 (2002) (statute does not apply to laborer injured while performing two-year safety test on elevator); *Wein v Amato Properties, LLC*, 30 AD3d 506, 816 NYS2d 370 (2d Dept 2006) (statute inapplicable to worker injured while replacing safety valve on boiler at existing residential building).

The statutory duty may attach to an area where materials or equipment is being readied for use, see *St. John v Westwood-Squibb Pharmaceuticals, Inc.*, 138 AD3d 1501, 31 NYS3d 720 (4th Dept 2016); *Gonnerman v Huddleston*, 78 AD3d 993, 913 NYS2d 670 (2d Dept 2010); *Rossi v Mount Vernon Hosp.*, 265 AD2d 542, 697 NYS2d 164 (2d Dept 1999); *Higgins v E.I. du Pont de Nemours Co.*, 186 AD2d 1011, 588 NYS2d 674 (4th Dept 1992) (liability may be imposed where plaintiff is traveling to and from trailer containing tools and provisions essential for the performance of his work), to passageways leading to the work site, *Whalen v New York*, 270 AD2d 340, 704 NYS2d 305 (2d Dept 2000), or the restrooms designated for use by workers, *Locke v URS Architecture & Engineering-New York, P.C.*, 202 AD3d 505, 163 NYS3d 38 (1st Dept 2022). Liability may arise under the statute even where

the ramp, passageway or other instrumentality that led to the accident was not erected for workers' use, *Gherardi v New York*, 49 AD3d 280, 852 NYS2d 126 (1st Dept 2008). The non-delegable duty may extend to off-site areas which the parties have contractually defined as the construction site, *Gerrish v 56 Leonard LLC*, 147 AD3d 511, 48 NYS3d 32 (1st Dept 2017), *aff'd*, 30 NY3d 1125, 71 NYS3d 411, 94 NE3d 899 (2018). However, liability may not be imposed for an injury that took place in a parking lot that was not contained within, contiguous to, or an integral part of the construction site, *Sprague v Louis Picciano, Inc.*, 100 AD2d 247, 474 NYS2d 591 (3d Dept 1984). Additionally, liability may not be imposed for an accident that took place while the worker was engaged in fabricating steel bridge components at his employer's facility rather than at the construction site itself, *Davis v Wind-Sun Const., Inc.*, 70 AD3d 1383, 894 NYS2d 621 (4th Dept 2010); see *Flores v ERC Holding LLC*, 87 AD3d 419, 928 NYS2d 7 (1st Dept 2011).

In *Mosher v State*, 80 NY2d 286, 590 NYS2d 53, 604 NE2d 115 (1992), the statute was held applicable to injuries sustained by a worker who, in the course of resurfacing a state road, was riding in the back of a truck stacking traffic cones when the truck suddenly stopped, causing her to fall forward and sustain injuries, see also *Ares v State*, 80 NY2d 959, 590 NYS2d 874, 605 NE2d 361 (1992) (statute applicable to highway construction project); *Gonnerman v Huddleston*, 78 AD3d 993, 913 NYS2d 670 (2d Dept 2010) (area used to assemble lights for installation to improve highway lighting). In *Joblon v Solow*, 91 NY2d 457, 672 NYS2d 286, 695 NE2d 237 (1998), Labor Law § 241(6) was held applicable to injuries sustained by an electrician who fell from a ladder while chopping a hole through a concrete wall with a hammer and chisel and routing a conduit pipe and wire through the hole to install a wall clock.

2. *Type of Work Leading to Accident*

In addressing whether Labor Law § 241(6) applies to an accident at a particular site, courts have generally held that the statute's scope is governed by 12 NYCRR 23-1.4(b)(13), which defines construction work to include "[a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures," see *Saint v Syracuse Supply Co.*, 25 NY3d 117, 8 NYS3d 229, 30 NE3d 872 (2015); *Emery v Steinway, Inc.*, 178 AD3d 613, 116 NYS3d 227 (1st Dept 2019); *Pittman v S.P. Lenox Realty, LLC*, 91 AD3d 738, 937 NYS2d 101 (2d Dept 2012); *Enos v Werlatone, Inc.*, 68 AD3d 713, 890 NYS2d 109 (2d Dept 2009); *Love v New York State Thruway Authority*, 17 AD3d 1000, 794 NYS2d 166 (4th Dept 2005) (three-month-long sandblasting and painting project on highway bridge constitutes "construction" within meaning of § 23-1.4(b)(13)); *Piccione v 1165 Park Ave., Inc.*, 258 AD2d 357, 685 NYS2d 242 (1st Dept 1999) (replacing ballast and sockets of fluorescent light fixture and disconnecting, stripping, and reconnecting wires constitutes "repairs" within meaning of § 23-1.4(b)(13)); see also *St. Louis v North Elba*, 16 NY3d 411, 923 NYS2d 391, 947 NE2d 1169 (2011) (noting that, under § 23-1.4(b)(13), "construction work" includes "pipe and conduit laying").

Additionally, the courts have relied on 12 NYCRR § 23-1.4(b)(16), which defines “demolition” as “work incidental to or associated with the total or partial dismantling of or razing of a building or other structure including the removing or dismantling of machinery or other equipment,” *Ramirez v Metropolitan Transp. Authority*, 106 AD3d 799, 965 NYS2d 156 (2d Dept 2013); *Wade v Atlantic Cooling Tower Services, Inc.*, 56 AD3d 547, 867 NYS2d 489 (2d Dept 2008) (disassembling pipes of defunct sprinkler system attached to rooftop cooling tower).

In *Nagel v D & R Realty Corp.*, 99 NY2d 98, 752 NYS2d 581, 782 NE2d 558 (2002), the Court held that Section 23-1.4(b)(13)’s definition of “construction work” must be construed consistently with the fact that Labor Law § 241(6) covers industrial accidents that occur in the context of construction, demolition and excavation, and thus does not cover other routine “maintenance” outside that context. The Court distinguished its earlier decision in *Mosher v State*, 80 NY2d 286, 590 NYS2d 53, 604 NE2d 115 (1992), where it held that Labor Law § 241(6) was not limited to building sites and applied to plaintiff’s claim for injuries sustained while repaving a highway. The Court noted that, in contrast to its decision in *Mosher*, the injuries plaintiff sustained in *Nagel* did not occur in the context of construction, demolition or excavation at any site. Although the applicability of Labor Law § 241(6) is not limited to building sites, the work in which the plaintiff was engaged must have affected the structural integrity of the building or structure or have been an integral part of the construction of a building or structure, *Cantalupo v Arco Plumbing & Heating, Inc.*, 194 AD3d 686, 148 NYS3d 224 (2d Dept 2021); *Doran v JP Walsh Realty Group, LLC*, 189 AD3d 1363, 134 NYS3d 787 (2d Dept 2020). Labor Law § 241(6) encompasses routine maintenance in the context of construction, demolition and excavation, see *Pasquale v Buffalo*, 255 AD2d 874, 680 NYS2d 140 (4th Dept 1998).

In the following cases, the activity was deemed not to be within the coverage of Labor Law § 241(6): *Jock v Fien*, 80 NY2d 965, 590 NYS2d 878, 605 NE2d 365 (1992) (fabricating mold as part of normal product manufacturing process); *Whitaker v Norman*, 146 AD2d 938, 536 NYS2d 916 (3d Dept 1989), *aff’d*, 75 NY2d 779, 552 NYS2d 86, 551 NE2d 579 (1989) (blasting operations not involving building or construction activity); *Marney v Cornell Kent II Holdings, LLC*, 194 AD3d 917, 149 NYS3d 184 (2d Dept 2021) (engineer injured by drill while performing investigatory soil tests for possible future excavation, which was separate phase of the project); *Cantalupo v Arco Plumbing & Heating, Inc.*, 194 AD3d 686, 148 NYS3d 224 (2d Dept 2021) (replacement of 500-pound division plate on air conditioning unit); *Doran v JP Walsh Realty Group, LLC*, 189 AD3d 1363, 134 NYS3d 787 (2d Dept 2020) (tree removal work); *Olarte v Morgan*, 148 AD3d 918, 49 NYS3d 532 (2d Dept 2017) (tree trimming unrelated to construction); *Simon v Granite Bldg. 2, LLC*, 114 AD3d 749, 980 NYS2d 489 (2d Dept 2014) (wallpapering not enumerated activity where no proof that activity part of larger construction project); *Lavigne v Glens Falls Cement Co., Inc.*, 92 AD3d 1182, 939 NYS2d 172 (3d Dept 2012) (replacement of previously

installed cable); *Flores v ERC Holding LLC*, 87 AD3d 419, 928 NYS2d 7 (1st Dept 2011) (fabricating and loading of steel beams on to track for transportation to remote work site); *Crossett v Wing Farm, Inc.*, 79 AD3d 1334, 912 NYS2d 751 (3d Dept 2010) (tree removal project not related to construction on adjacent property); *Len v State*, 74 AD3d 1597, 906 NYS2d 622 (3d Dept 2010) (removing debris, which routinely accumulated, caught in movable dam parts); *Enos v Werlatone, Inc.*, 68 AD3d 713, 890 NYS2d 109 (2d Dept 2009) (tree removal project not related to any enumerated activity); *Moll v Brandwood, LLC*, 67 AD3d 1364, 890 NYS2d 223 (4th Dept 2009) (removal of processed soil from construction site); *Caban v Maria Estela Houses I Associates, L.P.*, 63 AD3d 639, 882 NYS2d 97 (1st Dept 2009) (repairing exterior floodlights); *Pakenham v Westmere Realty, LLC*, 58 AD3d 986, 871 NYS2d 456 (3d Dept 2009) (investigating heating system malfunction in rooftop heating unit); *Wormuth v Freeman Interiors, Ltd.*, 34 AD3d 1329, 824 NYS2d 855 (4th Dept 2006); *Diaz v Chrysler*, 33 AD3d 581, 822 NYS2d 136 (2d Dept 2006) (installing video system in minivan); *Morzillo v State*, 26 AD3d 315, 809 NYS2d 537 (2d Dept 2006) (correcting problem that caused power outage); *Anderson v Schwartz*, 24 AD3d 234, 808 NYS2d 26 (1st Dept 2005) (removing temporary sign bolted to exterior of building); *Hodges v Boland's Excavating and Topsoil, Inc.*, 24 AD3d 1089, 807 NYS2d 421 (3d Dept 2005) (mining activities); *Anderson v Olympia & York Tower B Co.*, 14 AD3d 520, 789 NYS2d 190 (2d Dept 2005) (replacing worn-out bearings in air-handling unit); *Lioce v Theatre Row Studios*, 7 AD3d 493, 776 NYS2d 89 (2d Dept 2004) (designing lighting plan and installing lights for theatrical production); *Sarigul v New York Telephone Co.*, 4 AD3d 168, 772 NYS2d 653 (1st Dept 2004) (stripping insulation from cable wire); *Goad v Southern Elec. Intern., Inc.*, 304 AD2d 887, 758 NYS2d 184 (3d Dept 2003) (replacement of main steam valve as part of maintenance work not connected to construction, demolition or excavation); *Peluso v 69 Tiemann Owners Corp.*, 301 AD2d 360, 755 NYS2d 17 (1st Dept 2003) (examination of electrical control panel in conjunction with adjusting elevator); *Yong Ju Kim v Herbert Const. Co., Inc.*, 275 AD2d 709, 713 NYS2d 190 (2d Dept 2000) (attempting to locate cause of malfunctioning outlet); *Rogala v Van Bourgondien*, 263 AD2d 535, 693 NYS2d 204 (2d Dept 1999) (installing and replacing window screens); *Coates v Kraft Foods Inc.*, 263 AD2d 734, 693 NYS2d 711 (3d Dept 1999) (checking oil and water levels of refrigeration units and jump-starting units); *Molloy v 750 7th Ave. Associates*, 256 AD2d 61, 681 NYS2d 253 (1st Dept 1998) (changing elevator contacts and cables, putting new chips in computer boards and painting and cleaning elevator motor room); *Agli v Turner Const. Co., Inc.*, 246 AD2d 16, 676 NYS2d 54 (1st Dept 1998) (maintenance functions); *Perchinsky v State*, 232 AD2d 34, 660 NYS2d 177 (3d Dept 1997) (stringing wire to hang kites as part of decorating interior of structure); *Phillips v New York*, 228 AD2d 570, 644 NYS2d 764 (2d Dept 1996) (repairing "loader" at landfill) (abrogated on other grounds by, *Misicki v Caradonna*, 12 NY3d 511, 882 NYS2d 375, 909 NE2d 1213 (2009)); *Vernieri v Empire Realty Co.*, 219 AD2d 593, 631 NYS2d 378 (2d Dept 1995) (moving sign from manufacturing plant to sidewalk to raise it above building); *Walton v Devi Corp.*, 215 AD2d 60, 632 NYS2d

898 (3d Dept 1995) (removing trees that obstructed motel sign); *Robinson v New York*, 211 AD2d 600, 622 NYS2d 28 (1st Dept 1995) (abrogated on other grounds by, *Coleman v New York*, 91 NY2d 821, 666 NYS2d 553, 689 NE2d 523 (1997)) (replacing rail on subway tracks); *Dumoulin v Oval Wood Dish Corp.*, 211 AD2d 883, 621 NYS2d 705 (3d Dept 1995) (harvesting of logs from a timber lot solely for purpose selling them as lumber); *Henneberry v Buffalo*, 206 AD2d 882, 615 NYS2d 153 (4th Dept 1994) (unloading rapid transit car); *Bosse v Hornell*, 197 AD2d 893, 602 NYS2d 294 (4th Dept 1993) (inspection work); *Warsaw v Eastern Rock Products, Inc.*, 193 AD2d 1115, 599 NYS2d 207 (4th Dept 1993) (repairing machinery at repair shop); *Kesselbach v Liberty Haulage, Inc.*, 182 AD2d 741, 582 NYS2d 739 (2d Dept 1992) (installation of antenna on rooftop); *Lozo v Crown Zellerbach Corp.*, 142 AD2d 949, 530 NYS2d 373 (4th Dept 1988); *Malczewski v Cannon Design, Inc.*, 125 AD2d 941, 510 NYS2d 339 (4th Dept 1986) (moving computer equipment); *Jaroszewicz v Facilities Development Corp.*, 115 AD2d 159, 495 NYS2d 498 (3d Dept 1985) (architect not liable where electrician injured after completion and issuance of certificate of acceptance since "construction" was complete).

The following cases held the activity covered by Labor Law § 241(6): *Saint v Syracuse Supply Co.*, 25 NY3d 117, 8 NYS3d 229, 30 NE3d 872 (2015) (altering billboard by installing wooded extensions to its frame); *Nucci v Suffolk*, 204 AD3d 817, 166 NYS3d 672 (2d Dept 2022) (where worker's ladder shifted due to strong gust of wind while he was boarding up windows of vacant house); *Seem v Premier Camp Company, LLC*, 200 AD3d 921, 161 NYS3d 117 (2d Dept 2021) (dump truck plaintiff was operating toppled over while in process of unloading 60,000 pounds of gravel); *Tamarez De Jesus v Metro-North Commuter Railroad*, 159 AD3d 951, 73 NYS3d 581 (2d Dept 2018) (tree cutting as preparatory step to effectuating repairs to catenary wires); *Foots v Consolidated Bldg. Contractors, Inc.*, 119 AD3d 1324, 989 NYS2d 723 (4th Dept 2014) (installing industrial laundry equipment as part of larger renovation project); *Dixon v Waterways at Bay Pointe Home Owners Ass'n, Inc.*, 112 AD3d 884, 978 NYS2d 85 (2d Dept 2013) (painting is activity enumerated in § 23-1.4(b)(13) and, when conducted as preparation for painting, power-washing building is "construction work" covered by Labor Law § 241(6)); *Johnson v Ebidenergy, Inc.*, 60 AD3d 1419, 875 NYS2d 677 (4th Dept 2009) (installing metering equipment over six-hour period and performing numerous installation tasks); *Wade v Atlantic Cooling Tower Services, Inc.*, 56 AD3d 547, 867 NYS2d 489 (2d Dept 2008) (disassembling pipes of defunct sprinkler system attached to rooftop cooling tower); *Rivera v Ambassador Fuel and Oil Burner Corp.*, 45 AD3d 275, 845 NYS2d 25 (1st Dept 2007) (cleaning of fuel tank as part of contract to install new boiler); *Juchniewicz v Merex Food Corp.*, 46 AD3d 623, 848 NYS2d 255 (2d Dept 2007) (repairing refrigeration unit at refrigerated warehouse by rewiring and replacing several parts); *Murray v Lancaster Motorsports, Inc.*, 27 AD3d 1193, 812 NYS2d 726 (4th Dept 2006) (delivering drywall to building under construction); *Griffin v New York City Transit Authority*, 16 AD3d 202, 791 NYS2d 98 (1st Dept 2005) (performing punchlist work by testing recently installed fans); *Hotaling v Corning Inc.*, 12 AD3d 1064, 784

NYS2d 802 (4th Dept 2004) (installation of audio and visual equipment in previously constructed auditorium); *Shields v General Elec. Co.*, 3 AD3d 715, 771 NYS2d 249 (3d Dept 2004) (fabrication and welding of duct to be installed in building under construction).

In the following case, there was a question of fact as to whether the activity was covered by Labor Law § 241(6): *Krencik v Oakgrove Construction, Inc.*, 186 AD3d 1006, 129 NYS3d 567 (4th Dept 2020) (issue of fact as to whether tree removal was related to ongoing culvert construction work); *Emery v Steinway, Inc.*, 178 AD3d 613, 116 NYS3d 227 (1st Dept 2019) (plaintiff injured while moving single ceiling tile out of way to snake cable through fully installed drop ceiling).

3. Integral to work rule

With respect to certain Industrial Code provisions, an entity otherwise subject to liability under Labor Law § 241(6) for injuries sustained by a worker alleging violation of a section of the Industrial Code may be protected if the injury was caused by a thing or condition that was an integral part of the work, see *O'Sullivan v IDI Const. Co., Inc.*, 7 NY3d 805, 822 NYS2d 745, 855 NE2d 1159 (2006) (claim based on 12 NYCRR §§ 23-1.7[e][1] and [2] failed where plaintiff tripped over electrical pipe or conduit that was integral part of the construction); *Bazdaric v Almah Partners LLC*, 203 AD3d 643, 166 NYS3d 135 (1st Dept 2022) (claim based on 12 NYCRR § 23-1.7[d] barred by integral to work defense where plaintiff tripped on plastic covering intentionally placed on escalator to protect it from dripping paint); *Krzyzanowski v New York*, 179 AD3d 479, 118 NYS3d 10 (1st Dept 2020) (declining to follow *Singh v 1221 Ave. Holdings, LLC*, 127 AD3d 607, 8 NYS3d 129 (1st Dept 2015) that integral to work defense is not applicable to claims under § 23-1.7[e][1]); *Conlon v Carnegie Hall Society, Inc.*, 159 AD3d 655, 70 NYS3d 833 (1st Dept 2018); but see *Hageman v Home Depot U.S.A., Inc.*, 45 AD3d 730, 846 NYS2d 302 (2d Dept 2007) (liability based on a violation of § 23-1.7[b] not precluded merely because the foreign substance which caused accident was part of the work being performed). The integral to work rule also has been applied to a fall into an alleged hazardous opening under § 23-1.7(b), see *Salazar v Novalex Contracting Corp.*, 18 NY3d 134, 936 NYS2d 624, 960 NE2d 393 (2011). The defense applies to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may be performing at the time of the accident, *Bazdaric v Almah Partners LLC*, *supra*; *Krzyzanowski v New York*, *supra*. In making the ultimate determination as to whether the object or material at issue is integral to the work, a court should not inquire as to whether the material at issue was the best (or a poor) choice to accomplish the work at hand, *Bazdaric v Almah Partners LLC*, *supra*.

B. Supervision, Control and Notice

Supervision of the work, control of the work site or actual or constructive notice of a violation of the Industrial Code is not necessary

to impose vicarious liability against owners and general contractors, so long as someone in the construction chain was negligent, see *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816, 693 NE2d 1068 (1998); *Lois v Flintlock Const. Services, LLC*, 137 AD3d 446, 27 NYS3d 120 (1st Dept 2016); *Mugavero v Windows By Hart, Inc.*, 69 AD3d 694, 894 NYS2d 448 (2d Dept 2010); *Zeigler-Bonds v Structure Tone, Inc.*, 245 AD2d 80, 664 NYS2d 799 (1st Dept 1997) (no need to allege notice by owner or GC in 241(6) claim); *Tuohey v Gainsborough Studios, Inc.*, 183 AD2d 636, 586 NYS2d 103 (1st Dept 1992); see also *Rapp v Zandri Const. Corp.*, 165 AD2d 639, 569 NYS2d 994 (3d Dept 1991); *Miller v Perillo*, 71 AD2d 389, 422 NYS2d 424 (1st Dept 1979); *Monroe v New York*, 67 AD2d 89, 414 NYS2d 718 (2d Dept 1979). However, where a subcontractor has been sued in its capacity as an agent of the owner or general contractor, liability under Labor Law § 241(6) depends upon whether the subcontractor had the authority to control and supervise the portion of the work activity that brought about the injury, *Harris v Hueber-Breuer Construction Co., Inc.*, 67 AD3d 1351, 890 NYS2d 235 (4th Dept 2009).

Negligence may be established by evidence of a violation of an applicable Industrial Code provision, *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816, 693 NE2d 1068 (1998). Several cases under Labor Law § 241(6) have required a showing that “someone within the chain of the construction project” had notice of the condition and was negligent, see *DeStefano v Amtad New York, Inc.*, 269 AD2d 229, 703 NYS2d 34 (1st Dept 2000) (plaintiffs Labor Law § 241(6) claim premised on violation of 12 NYCRR 23-1.7(d) properly dismissed absent evidence that “someone within chain of construction project” had notice of snow on which plaintiff slipped); see also *Marshall v Glenman Industrial & Commercial Contractor Corp.*, 117 AD3d 1124, 985 NYS2d 169 (3d Dept 2014) (liability under § 241[6] could attach if defendant was negligent, and someone working on renovation project created or had notice of hazardous condition); *McCague v Walsh Const.*, 225 AD2d 530, 638 NYS2d 752 (2d Dept 1996) (granting defendant’s motion for summary judgment dismissing Labor Law § 241(6) cause of action because there was no evidence that violation of regulation existed for sufficient length of time for it to be discovered and remedied); but see *Amirr v Calcagno Const. Co.*, 257 AD2d 585, 684 NYS2d 280 (2d Dept 1999) (alleged lack of notice of snow-covered roof is not defense to cause of action under Labor Law § 241(6)). It would appear that notice to someone in the construction chain may be a relevant element where the hazard causing the accident was not created by the construction work.

However, prime contractors are liable only if they are acting as the agents of the owner or general contractor and have been given the authority to supervise and control the work being performed at the time of the injury, *Decotes v Merritt Meridian Corp.*, 245 AD2d 864, 666 NYS2d 763 (3d Dept 1997); see *Wells v British American Development Corp.*, 2 AD3d 1141, 770 NYS2d 161 (3d Dept 2003); *Hornicek v William H. Lane Inc.*, 265 AD2d 631, 696 NYS2d 557 (3d Dept 1999). A subcontractor’s use and operation of its equipment while assisting a

general contractor's work does not constitute authorization for the subcontractor to supervise, direct or control the activity when the subcontractor did not have the authority to correct unsafe conditions or to control the general contractor's activity, *Rice v Cortland*, 262 AD2d 770, 691 NYS2d 616 (3d Dept 1999). Similarly, professional engineers may not be held liable under Section 241(6) where the engineers did not direct or control the work other than planning and design, see *Labor Law § 241(9)*; *Santoro v American Airlines, Inc.*, 170 AD2d 206, 565 NYS2d 105 (1st Dept 1991). That an engineer had an obligation to inspect the work is insufficient to impose liability under the statute, where the engineer had no authority to direct that actions be taken in response to its inspection or to control the work, *Suriano v New York*, 240 AD2d 486, 658 NYS2d 654 (2d Dept 1997); *Carter v Vollmer Associates*, 196 AD2d 754, 602 NYS2d 48 (1st Dept 1993); see *Becker v Tallamy, Van Kuren, Gertis & Associates*, 221 AD2d 1014, 634 NYS2d 282 (4th Dept 1995). An architect who has agreed to perform solely architectural services is not liable under *Labor Law §§ 200, 240 and 241(6)*, *Houde v Barton*, 202 AD2d 890, 609 NYS2d 411 (3d Dept 1994).

IV. Comparative Fault

In actions brought under *Labor Law § 241(6)* or (7), comparative fault is a defense, *CPLR 1411*; *St. Louis v North Elba*, 16 NY3d 411, 923 NYS2d 391, 947 NE2d 1169 (2011); *Misicki v Caradonna*, 12 NY3d 511, 882 NYS2d 375, 909 NE2d 1213 (2009); *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816, 693 NE2d 1068 (1998); *Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132, 433 NE2d 115 (1982); see *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 493 NYS2d 102, 482 NE2d 898 (1985); *Tuohey v Gainsborough Studios, Inc.*, 183 AD2d 636, 586 NYS2d 103 (1st Dept 1992). Where the claim is brought under *Labor Law § 241(6)* or (7), it is error to charge that plaintiff's fault is no defense, *Leahey v Turner Const. Co.*, 91 AD2d 599, 457 NYS2d 283 (1st Dept 1982). In contrast, where liability is premised upon *Labor Law § 240* or *Labor Law § 241* (subdivisions 1 through 5), a "flat and unvarying duty" is imposed upon the owner and contractor, despite any contributory fault on the part of the worker, *Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880, 488 NE2d 810 (1985), quoting *Zimmer v Chemung County Performing Arts, Inc.*, *supra*; see *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 606 NYS2d 127, 626 NE2d 912 (1993); *Stolt v General Foods Corp.*, 81 NY2d 918, 597 NYS2d 650, 613 NE2d 556 (1993). However, other defensive theories based on the worker's conduct may be available. For a discussion of these theories, see Comment following PJI 2:217.

For a charge as to comparative fault, see PJI 2:36; see also *Rodriguez v New York*, 31 NY3d 312, 76 NYS3d 898, 101 NE3d 366 (2018).

V. Industrial Code Regulations

A. In General

The second sentence of *Labor Law § 241(6)* as well as subdivisions

7 and 8 authorize the Commissioner of Labor (formerly the Industrial Board) to make rules to carry into effect the provisions of this subdivision, Labor Law § 241(6); see *Nagel v D & R Realty Corp.*, 99 NY2d 98, 752 NYS2d 581, 782 NE2d 558 (2002); *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816, 693 NE2d 1068 (1998); *Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132, 433 NE2d 115 (1982); *Allen v Cloutier Const. Corp.*, 44 NY2d 290, 405 NYS2d 630, 376 NE2d 1276 (1978). However, the fact that a particular Industrial Code rule refers only to duties of “employers” does not negate the non-delegable duty imposed on owners and contractors under Labor Law § 241(6), *Johnson v Ebidenergy, Inc.*, 60 AD3d 1419, 875 NYS2d 677 (4th Dept 2009) (citing 12 NYCRR § 23-1.3); *Rivera v Ambassador Fuel and Oil Burner Corp.*, 45 AD3d 275, 845 NYS2d 25 (1st Dept 2007). In addition, the definitions in the rules of the Commissioner may be relied on in interpreting the language of the statute, *Joblon v Solow*, 91 NY2d 457, 672 NYS2d 286, 695 NE2d 237 (1998); *Jock v Fien*, 80 NY2d 965, 590 NYS2d 878, 605 NE2d 365 (1992); *Benevento v Buffalo*, 74 AD3d 1738, 902 NYS2d 864 (4th Dept 2010) (work on construction crew assigned to dig holes for planting trees “excavation” work within meaning of 12 NYCRR § 23-1.4(b)(19)); *Piccione v 1165 Park Ave., Inc.*, 258 AD2d 357, 685 NYS2d 242 (1st Dept 1999) (replacing ballast and sockets of fluorescent light fixture and disconnecting, stripping, and reconnecting wires constitute “repairs” within meaning of § 23-1.4(b)(13)). Provisions of the Industrial Code that refer only to the duty of employers also impose a duty on owners, *Rice v Cortland*, 262 AD2d 770, 691 NYS2d 616 (3d Dept 1999); *Adams v Owens-Corning Fiberglass Corp.*, 260 AD2d 877, 688 NYS2d 788 (3d Dept 1999); *Snowden v New York City Transit Authority*, 248 AD2d 235, 670 NYS2d 32 (1st Dept 1998). A defendant seeking summary judgment dismissing a Labor Law § 241(6) claim must demonstrate that it did not violate the Industrial Code regulations on which the claim is based, that the cited regulations are not applicable to the facts of the case or that the alleged violation was not a proximate cause of the accident, *Winters v Uniland Development Corporation*, 174 AD3d 1293, 105 NYS3d 728 (4th Dept 2019); *Mugavero v Windows By Hart, Inc.*, 69 AD3d 694, 894 NYS2d 448 (2d Dept 2010); *Holly v Chautauqua*, 63 AD3d 1558, 881 NYS2d 741 (4th Dept 2009), *rev’d*, 13 NY3d 931, 895 NYS2d 308, 922 NE2d 897 (2010).

Violation of municipal regulations may not form the basis of liability under Labor Law § 241(6), although such violation may constitute some evidence of negligence in a common-law negligence or Labor Law § 200 claim, *Dowd v New York*, 40 AD3d 908, 837 NYS2d 668 (2d Dept 2007). The Court of Appeals has concluded that regulations contained in Part 12 of the Industrial Code cannot serve as a predicate for a Labor Law § 241(6) cause of action unless the relied-upon regulation is specifically incorporated into Part 23, *Nostrom v A.W. Chesterton Co.*, 15 NY3d 502, 914 NYS2d 725, 940 NE2d 551 (2010). The Third Department has held that regulations that were not adopted pursuant to 12 NYCRR Part 23 may not serve as a basis for liability under Labor Law § 241(6), *Creamer v Amsterdam High School*, 241 AD2d 589, 659 NYS2d 560 (3d Dept 1997) (§§ 56-12.1(g), 12-1.5(c) and 29 CFR

1910.132(c) may not serve as predicate to § 241(6) claim). In light of *Nostrom*, the case law from the Second and Fourth Departments holding that regulations contained in Part 12 may serve as a predicate for Labor Law § 241(6) liability must be viewed with caution, as only those particular Part 12 regulations that are specifically incorporated into Part 23 can provide a basis for liability under § 241(6). Previously, both the Second and Fourth Departments recognized Labor Law § 241(6) causes of action for violations of Parts 12 and 19 of the Industrial Code, *Piazza v Frank L. Ciminelli Const. Co., Inc.*, 2 AD3d 1345, 770 NYS2d 504 (4th Dept 2003); *Neumire v Kraft Foods, Inc.*, 291 AD2d 784, 737 NYS2d 457 (4th Dept 2002) (violation of 12 NYCRR § 12-1.9); *Rzepka v 50 E. 78th Corp.*, 262 AD2d 298, 691 NYS2d 102 (2d Dept 1999) (violation of 12 NYCRR § 12-19.32); *McCune v Black River Constructors*, 225 AD2d 1078, 639 NYS2d 203 (4th Dept 1996) (violation of 12 NYCRR § 19.4(a)); *Chavious v Friends Academy*, 213 AD2d 509, 624 NYS2d 180 (2d Dept 1995) (violations of 12 NYCRR §§ 19.4 and 19.32).

OSHA regulations do not impose a non-delegable duty on an owner or general contractor and therefore may not be used as a predicate for a Labor Law § 241(6) claim, *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816, 693 NE2d 1068 (1998); *Holly v Chautauqua*, 63 AD3d 1558, 881 NYS2d 741 (4th Dept 2009), rev'd, 13 NY3d 931, 895 NYS2d 308, 922 NE2d 897 (2010); *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 796 NYS2d 684 (2d Dept 2005); see *Holly v Chautauqua*, 63 AD3d 1558, 881 NYS2d 741 (4th Dept 2009), rev'd on other grounds, 13 NY3d 931, 895 NYS2d 308, 922 NE2d 897 (2010); *Vernieri v Empire Realty Co.*, 219 AD2d 593, 631 NYS2d 378 (2d Dept 1995); *McGrath v Lake Tree Village Associates*, 216 AD2d 877, 629 NYS2d 358 (4th Dept 1995); *McSweeney v Rochester Gas & Elec. Corp.*, 216 AD2d 878, 629 NYS2d 356 (4th Dept 1995); *Landry v General Motors Corp., Cent. Foundry Div.*, 210 AD2d 898, 621 NYS2d 255 (4th Dept 1994); *Pellescki v Rochester*, 198 AD2d 762, 605 NYS2d 692 (4th Dept 1993)). OSHA does not preempt a cause of action under Labor Law § 241(6), *Irwin v St. Joseph's Intercommunity Hosp.*, 236 AD2d 123, 665 NYS2d 773 (4th Dept 1997); see *Dalaba v Schenectady*, 61 AD3d 1151, 876 NYS2d 744 (3d Dept 2009) (owner's compliance with OSHA regulations does not defeat plaintiff's prima facie showing of Labor Law § 240(1) violation).

B. Expert Evidence

In most instances, the interpretation of rules promulgated by the Commissioner of Labor presents a question of law for the court, *Morris v Pavarini Const.*, 9 NY3d 47, 842 NYS2d 759, 874 NE2d 723 (2007); *Rivera v 15 Broad Street, LLC*, 76 AD3d 621, 906 NYS2d 333 (2d Dept 2010); see *Kelmendi v 157 Hudson Street, LLC*, 137 AD3d 567, 27 NYS3d 532 (1st Dept 2016); *Torkel v NYU Hospitals Center*, 63 AD3d 587, 883 NYS2d 8 (1st Dept 2009). However, where the meaning of specialized terms in regulations is in issue, the court may entertain evidence, including expert opinions, to aid its determination, *id.* Thus, in *Morris v Pavarini Const.*, *supra*, the Court of Appeals held that the

lower court should consider the opinions of experts in the construction of concrete walls in determining whether Industrial Code § 23-2.2(a), which requires that forms be “properly braced or tied together so as to maintain position and shape,” can sensibly be applied to anything but completed forms, see also *Morris v Pavarini Const.*, 22 NY3d 668, 985 NYS2d 202, 8 NE3d 317 (2014) (affirming Appellate Division decision after remand granting plaintiff summary judgment on basis of expert’s testimony). An expert may also testify that a particular condition or omission violated a rule or statute, *Franco v Jay Cee of New York Corp.*, 36 AD3d 445, 827 NYS2d 143 (1st Dept 2007).

C. Effect of Rule Violation

Violation of the Commissioner’s rules is merely some evidence of negligence, *Toussaint v Port Authority of New York and New Jersey*, 38 NY3d 89, 168 NYS3d 379, 188 NE3d 571 (2022); *Misicki v Caradonna*, 12 NY3d 511, 882 NYS2d 375, 909 NE2d 1213 (2009); *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816, 693 NE2d 1068 (1998); *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 493 NYS2d 102, 482 NE2d 898 (1985); *Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132, 433 NE2d 115 (1982); *Simon v Schenectady North Congregation of Jehovah’s Witnesses*, 132 AD2d 313, 522 NYS2d 343 (3d Dept 1987); see *Wells v British American Development Corp.*, 2 AD3d 1141, 770 NYS2d 161 (3d Dept 2003); *Hammond v International Paper Co.*, 161 AD2d 914, 557 NYS2d 477 (3d Dept 1990) (triable issue of fact as to whether it was impossible for defendant to comply with literal dictates of applicable rule); *O’Leary v Raymond LeChase, Inc.*, 125 AD2d 991, 510 NYS2d 389 (4th Dept 1986) (error to instruct jury that breach of rules tantamount to statutory violation). Thus, once it has been alleged that a concrete specification of the rules applicable to the facts of the case has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff’s injury, *Rizzuto v L.A. Wenger Contracting Co., Inc.*, *supra*. If proven, the general contractor or owner is vicariously liable without regard to its fault, *id.*

In *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993), the Court of Appeals held that a violation of an administrative regulation is a threshold to liability under Labor Law § 241(6). In *Murtha v Integral Const. Corp.*, 253 AD2d 637, 677 NYS2d 338 (1st Dept 1998), however, the court declined to dismiss plaintiff’s Labor Law § 241(6) cause of action merely because plaintiff did not identify the specific code violations until he filed his opposition papers to the defendant’s motion for summary judgment.

The Departments of the Appellate Division are divided on the issue of whether a plaintiff may be awarded summary judgment on a Labor Law § 241(6) cause of action. The First and Second Departments allow for summary judgment to be awarded to a § 241(6) plaintiff, *Favaloro v Port Authority of New York & New Jersey*, 191 AD3d 524, 143 NYS3d 4 (1st Dept 2021); *Stigall v State*, 189 AD3d 469, 136 NYS3d 275 (1st

Dept 2020); *Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 44 NYS3d 388 (1st Dept 2017); *Reynoso v Bovis Lend Lease LMB, Inc.*, 125 AD3d 740, 4 NYS3d 55 (2d Dept 2015); *Lopez v New York City Dept. of Environmental Protection*, 123 AD3d 982, 999 NYS2d 848 (2d Dept 2014); *Ortega-Estrada v 215-219 West 145th Street LLC*, 118 AD3d 614, 987 NYS2d 845 (1st Dept 2014); *Melchor v Singh*, 90 AD3d 866, 935 NYS2d 106 (2d Dept 2011); *Harris v New York*, 83 AD3d 104, 923 NYS2d 2 (1st Dept 2011); *Vasquez v Urbahn Associates Inc.*, 79 AD3d 493, 918 NYS2d 1 (1st Dept 2010); *Hayden v 845 UN Ltd. Partnership*, 304 AD2d 499, 758 NYS2d 647 (1st Dept 2003), while the Third and Fourth Departments do not, taking the position that the violation of a regulation is only some evidence of negligence, *Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 18 NYS3d 251 (4th Dept 2015); *Vanderwall v 1255 Portland Ave. LLC*, 128 AD3d 1446, 8 NYS3d 760 (4th Dept 2015); *Marshall v Glenman Industrial & Commercial Contractor Corp.*, 117 AD3d 1124, 985 NYS2d 169 (3d Dept 2014); *Mulcaire v Buffalo Structural Steel Const. Corp.*, 45 AD3d 1426, 846 NYS2d 838 (4th Dept 2007); *Wells v British American Development Corp.*, 2 AD3d 1141, 770 NYS2d 161 (3d Dept 2003); *Puckett v Erie*, 262 AD2d 964, 693 NYS2d 780 (4th Dept 1999).

D. Requirement of a Specific Regulation

In *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993), the Court of Appeals held that an action may be maintained under Labor Law § 241(6) only where the regulation plaintiff claims was violated mandates compliance with “concrete specifications”; regulations which only establish “general safety standards” by invoking general descriptive terms are not a legally sufficient predicate for an action, see *St. Louis v North Elba*, 16 NY3d 411, 923 NYS2d 391, 947 NE2d 1169 (2011); *Morris v Pavarini Const.*, 9 NY3d 47, 842 NYS2d 759, 874 NE2d 723 (2007); *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816, 693 NE2d 1068 (1998). The rule or regulation alleged to have been breached must be a specific, positive command, *Toussaint v Port Authority of New York and New Jersey*, 38 NY3d 89, 168 NYS3d 379, 188 NE3d 571 (2022); *Ross v Curtis-Palmer Hydro-Electric Co.*, *supra*. The *Ross* Court observed that general terms such as “adequate,” “effective,” “proper,” “safe,” and “suitable” are used frequently in the Industrial Code. It held that it would “seriously distort” the scheme for liability to impose vicarious liability upon a non-supervising owner or general contractor based on a broad, non-specific standard. A breach of regulations that impose an affirmative duty to correct or repair unsafe conditions may be the subject of a claim under Labor Law § 241(6), *Misicki v Caradonna*, 12 NY3d 511, 882 NYS2d 375, 909 NE2d 1213 (2009). Further, specific provisions within a particular regulation may be sufficient to support a Labor Law § 241(6) cause of action even if other provisions within the same regulation contain only general standards, *Misicki v Caradonna*, *supra*.

In an action based on Labor Law § 241(6), the trial court must determine, as a threshold matter, whether the administrative regulations cited by plaintiff satisfy the criteria established in *Ross v Curtis-*

Palmer Hydro-Electric Co., 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993); see *Messina v New York*, 300 AD2d 121, 752 NYS2d 608 (1st Dept 2002); *Penta v Related Companies, L.P.*, 286 AD2d 674, 730 NYS2d 140 (2d Dept 2001); *Millard v Ogdensburg*, 274 AD2d 953, 710 NYS2d 507 (4th Dept 2000); *Stasierowski v Conbow Corp.*, 258 AD2d 914, 685 NYS2d 545 (4th Dept 1999). In addition, the court must determine whether the regulation is applicable to the facts of the case.

E. Applicability

In addition to ascertaining whether the relied-upon regulation is sufficiently specific, the court must determine whether the regulation is applicable to the facts of the case. In this regard, Industrial Code regulations should be sensibly interpreted and applied to effectuate their purpose of protecting construction laborers against hazards in the workplace, *St. Louis v North Elba*, 16 NY3d 411, 923 NYS2d 391, 947 NE2d 1169 (2011); *Boots v Bette & Cring, LLC*, 124 AD3d 1119, 3 NYS3d 141 (3d Dept 2015); *Brownrigg v New York City Housing Authority*, 119 AD3d 504, 990 NYS2d 34 (2d Dept 2014). Accordingly, the preferred rule is to take into consideration the function of a piece of equipment identified in a regulation, and not merely the name, when determining the applicability of a regulation, *St. Louis v North Elba*, supra; *Sheng Hai Tong v K and K 7619, Inc.*, 144 AD3d 887, 41 NYS3d 266 (2d Dept 2016); *McCoy v Metropolitan Transp. Authority*, 75 AD3d 428, 904 NYS2d 50 (1st Dept 2010). This approach accounts for those circumstances where a slightly different machine is utilized for the same risky objective that is perhaps more frequently or more efficiently achieved by the machine designated by name in the Code, *St. Louis v North Elba*, supra. A defendant seeking dismissal on the ground that the relied-upon regulation is not applicable to the facts of the case has the burden to establish in the first instance that the regulation is inapplicable, *Piazza v Frank L. Ciminelli Const. Co., Inc.*, 2 AD3d 1345, 770 NYS2d 504 (4th Dept 2003); see *Caudill v Rochester Institute of Technology*, 125 AD3d 1392, 4 NYS3d 408 (4th Dept 2015). Whether a regulation applies to a particular condition or circumstance is a question of law for the court, *Harrison v State*, 88 AD3d 951, 931 NYS2d 662 (2d Dept 2011); see *Boots v Bette & Cring, LLC*, supra.

A plaintiff's failure to identify a qualifying regulation in the complaint or bill of particulars may serve as a basis for summary dismissal of a Labor Law § 241(6) claim, *Walker v Metro-North Commuter R.R.*, 11 AD3d 339, 783 NYS2d 362 (1st Dept 2004); *Reilly v Newireen Associates*, 303 AD2d 214, 756 NYS2d 192 (1st Dept 2003). Moreover, plaintiff's reference to an Industrial Code subpart that contains many separate regulations, some specific and some setting forth only general safety standards, is insufficient to defeat defendant's motion for summary judgment, *Rought v Price Chopper Operating Co., Inc.*, 73 AD3d 1414, 901 NYS2d 418 (3d Dept 2010). However, summary judgment can be defeated where plaintiff cites concrete and relevant provisions from a subpart, *id.* Additionally, in the absence of unfair surprise, the error may be rectified by amendment, even after a note of issue has been

filed, *Dowd v New York*, 40 AD3d 908, 837 NYS2d 668 (2d Dept 2007); *Harris v Rochester Gas & Elec. Corp.*, 11 AD3d 1032, 783 NYS2d 733 (4th Dept 2004); *Walker v Metro-North Commuter R.R.*, *supra*; *Padilla v Frances Schervier Housing Development Fund Corp.*, 303 AD2d 194, 758 NYS2d 3 (1st Dept 2003); see *Sheng Hai Tong v K and K 7619, Inc.*, 144 AD3d 887, 41 NYS3d 266 (2d Dept 2016); *Przyborowski v A & M Cook, LLC*, 120 AD3d 651, 992 NYS2d 56 (2d Dept 2014) (failure to identify Industrial Code provision in complaint and bill of particulars not fatal to Labor Law § 241[6] claim where belated reliance on provisions involves no new factual allegations or theories of liability and caused no prejudice to defendant); *Klimowicz v Powell Cove Associates, LLC*, 111 AD3d 605, 975 NYS2d 419 (2d Dept 2013) (same); *Ross v DD 11th Ave., LLC*, 109 AD3d 604, 971 NYS2d 304 (2d Dept 2013) (same); *Ramirez v Metropolitan Transp. Authority*, 106 AD3d 799, 965 NYS2d 156 (2d Dept 2013); *Smith v Nestle Purina Petcare Co.*, 105 AD3d 1384, 966 NYS2d 292 (4th Dept 2013); *Velasquez v 795 Columbus LLC*, 103 AD3d 541, 959 NYS2d 491 (1st Dept 2013) (appellate court considered rule not cited in plaintiff's summary judgment motion, where rule was referred to in complaint and bill of particulars and its applicability was apparent on record and outcome could not have been avoided if brought to defendant's attention on motion).

The following is a listing of cases discussing the specificity and/or applicability of various regulations since the Court of Appeals decision in *Ross*. When dealing with a regulation that is not contained in Part 23 of the Industrial Code, *Nostrom v A.W. Chesterton Co.*, 15 NY3d 502, 914 NYS2d 725, 940 NE2d 551 (2010), should be consulted. Moreover, regulations contained in Part 12 of the Code can only serve as a predicate for a Labor Law § 241(6) action where the relied-upon regulation is specifically incorporated into Part 23, *id.* Caveat: It should be noted that Part 19 of the Industrial Code, which is discussed in some of the cases cited below, was repealed effective October 1, 1997.

Specificity and Applicability of Industrial Code Regulations.

9 NYCRR 713—Stairs, Doors and Exits—*Dombrowski v Schwartz*, 217 AD2d 914, 629 NYS2d 924 (4th Dept 1995) (regulation was not promulgated by the Commissioner of Labor and therefore may not support a Labor Law § 241(6) cause of action).

12 NYCRR part 3—Tree or Brush Cutting, Trimming or Removal Around or Near Power Lines or Power Facilities—*Mamo v Rochester Gas and Elec. Corp.*, 209 AD2d 948, 619 NYS2d 426 (4th Dept 1994) (abrogated on other grounds by, *McGregor v Bravo*, 251 AD2d 1002, 674 NYS2d 240 (4th Dept 1998)) (“regulations concerning safety measures to be employed in trimming trees [12 NYCRR 3] do not apply to persons . . . trimming trees on behalf of a public service corporation”).

12 NYCRR § 12-1.3(f)—Control of Air Contaminants-

General requirements; Definitions; Confined space—*Pittman v S.P. Lenox Realty, LLC*, 119 AD3d 846, 989 NYS2d 359 (2d Dept 2014) (§ 12-1.3(f), which defines “confined space” as “a tank, vault or similar enclosed structure or space with restricted means of egress, such as a manhole or trap door, which is so enclosed and of such volume that natural ventilation through openings provided will not prevent the accumulation of dangerous air contaminants nor supply sufficient oxygen to protect the life, health and safety of any person occupying such structure or space,” inapplicable to apartment in which plaintiff was refinishing floors); *Cerverizzo v New York*, 116 AD3d 469, 983 NYS2d 515 (1st Dept 2014) (§ 12-1.3(f) does not require that space be “manhole,” “trap door,” or area accessible only through narrow opening; although top of tank was open to air, access was “restricted” because 20-foot ladder needed to enter and exit tank).

12 NYCRR § 12-1.4—Prevention of air contamination—*Nostrom v A.W. Chesterton Co.*, 15 NY3d 502, 914 NYS2d 725, 940 NE2d 551 (2010) (§ 12-1.4(b)(3) and (4) cannot serve as predicates for liability under Labor Law § 241(6)); *Piazza v Frank L. Ciminelli Const. Co., Inc.*, 2 AD3d 1345, 770 NYS2d 504 (4th Dept 2003) (§ 12-1.4(a), which requires that air contaminants be kept at the lowest practicable level and (b)(1) and (b)(2), requiring employers to comply with rules regarding contaminants and to give employees safety instructions, are not sufficiently specific to support Labor Law § 241(6) claim).

12 NYCRR § 12-1.5(a)—Personal protective equipment; Personal respiratory protective equipment—*Cerverizzo v New York*, 116 AD3d 469, 983 NYS2d 515 (1st Dept 2014) (§ 12-1.5(a)(1)) which limits use of personal respirators in lieu of other control methods only to emergencies or during repair or maintenance or with approval of Industrial Board, inapplicable to plaintiff’s bracket installation work); *Piazza v Frank L. Ciminelli Const. Co., Inc.*, 2 AD3d 1345, 770 NYS2d 504 (4th Dept 2003) (§ 12-1.5(a)(1) and (a)(2), which requires use of board-approved personal respiratory protective equipment, are not sufficiently specific to support Labor Law § 241(6) cause of action).

12 NYCRR § 12-1.6—Personal protective equipment; Personal respiratory protective equipment—*Nostrom v A.W. Chesterton Co.*, 15 NY3d 502, 914 NYS2d 725, 940 NE2d 551 (2010) (§ 12-1.6(a) cannot serve as a predicate for liability under Labor Law § 241(6)); *Piazza v Frank L. Ciminelli Const. Co., Inc.*, 2 AD3d 1345, 770 NYS2d 504 (4th Dept 2003).

12 NYCRR § 12-1.9—Entering confined spaces—*Cerverizzo v New York*, 116 AD3d 469, 983 NYS2d 515 (1st Dept 2014) (§ 12-1.9(a)(1), which forbids entrance into confined spaces where dangerous air contaminants are present and requires

approved respirators if entry is required by an emergency situation, inapplicable to plaintiff's bracket installation work performed in aeration tank); *Rivera v Ambassador Fuel and Oil Burner Corp.*, 45 AD3d 275, 845 NYS2d 25 (1st Dept 2007) (§ 12-1.9, which prescribes safety rules and standards for workers entering confined spaces, sufficiently specific to support Labor Law § 241(6) cause of action and applicable to accident involving cleaning of fuel tank in unventilated room); *Piazza v Frank L. Ciminelli Const. Co., Inc.*, 2 AD3d 1345, 770 NYS2d 504 (4th Dept 2003) (§ 12-1.9(a)(1), (b)(5) and (b)(6) are sufficiently specific to support Labor Law § 241(6) cause of action).

12 NYCRR 19.4—Eye protection—*Chavious v Friends Academy*, 213 AD2d 509, 624 NYS2d 180 (2d Dept 1995) (regulation constitutes specific directive of the Industrial Code).

12 NYCRR 19.4(a)—Eye protection—*McCune v Black River Constructors*, 225 AD2d 1078, 639 NYS2d 203 (4th Dept 1996) (question of fact whether defendants violated § 19.4(a) which requires eye protection in certain activities).

12 NYCRR 19.32—Grinding and polishing machinery—*Chavious v Friends Academy*, 213 AD2d 509, 624 NYS2d 180 (2d Dept 1995) (regulation constitutes specific directive of the Industrial Code).

12 NYCRR 21.3(d)—Protection of Persons Employed at Window Cleaning; Structural requirements; Equipment and procedures; Defective windows and structures—*Padovano v Teddy's Realty Associates, Ltd.*, 56 AD3d 444, 866 NYS2d 743 (2d Dept 2008) (§ 21.3(d), which states that window cleaners may not be permitted to clean windows if the window or its supporting structures have defects or damage impairing its structural strength or if the window cannot be opened easily, applicable where worker fell out of window after losing his balance in trying to open it and there was evidence that premises owner warned worker of problems in opening window).

12 NYCRR part 23—Protection in Construction, Demolition and Excavation Operations—*Mamo v Rochester Gas and Elec. Corp.*, 209 AD2d 948, 619 NYS2d 426 (4th Dept 1994) (abrogated on other grounds by, *McGregor v Bravo*, 251 AD2d 1002, 674 NYS2d 240 (4th Dept 1998)) ("specific regulatory standards are not met . . . by reference to 12 NYCRR part 23").

12 NYCRR 23-1.2—Protection in Construction, Demolition and Excavation Operations; Finding of fact—*McGrath v Lake Tree Village Associates*, 216 AD2d 877, 629 NYS2d 358 (4th Dept 1995) (§ 23-1.2 is a general provision and is not a basis for liability under § 241(6)); *Stairs v State Street*

Associates L.P., 206 AD2d 817, 615 NYS2d 478 (3d Dept 1994) (same); see *Doyne v Barry, Bette & Led Duke Inc.*, 246 AD2d 756, 668 NYS2d 58 (3d Dept 1998) (same).

12 NYCRR 23-1.2(c)—Protection in Construction, Demolition and Excavation Operations; Findings of Fact—*Gordineer v Orange*, 205 AD2d 584, 613 NYS2d 247 (2d Dept 1994) (§ 23-1.2(c) is a general provision of the Industrial Code).

12 NYCRR 23-1.2(e)—Protection in Construction, Demolition and Excavation Operations; Findings of fact—*Hasty v Solvay Mill Ltd. Partnership*, 306 AD2d 892, 760 NYS2d 795 (4th Dept 2003) (§ 23-1.2(e) not sufficiently specific to support a Labor Law § 241(6) claim); *Biszick v Ninnie Const. Corp.*, 209 AD2d 661, 619 NYS2d 146 (2d Dept 1994) (§ 23-1.2(e) related to general safety standards); *Narrow v Crane-Hogan Structural Systems Inc.*, 202 AD2d 841, 609 NYS2d 372 (3d Dept 1994) (same); see *Schwab v A.J. Martini Inc.*, 288 AD2d 654, 732 NYS2d 474 (3d Dept 2001) (same).

12 NYCRR 23-1.3—Protection in Construction, Demolition and Excavation Operations; Application—*Williams v White Haven Memorial Park, Inc.*, 227 AD2d 923, 643 NYS2d 787 (4th Dept 1996) (§ 23-1.3 is general provision and thus does not provide a basis for liability under Labor Law § 241(6)); *McGrath v Lake Tree Village Associates*, 216 AD2d 877, 629 NYS2d 358 (4th Dept 1995) (same).

12 NYCRR 23-1.4(a)—Protection in Construction, Demolition and Excavation Operations; Definitions; General descriptive terms—*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993) (§ 23-1.4(a) is not a specific, positive command).

12 NYCRR § 23-1.4(b)(13)—Protection in Construction, Demolition and Excavation Operations; Definitions; Construction Work—*Dixson v Waterways at Bay Pointe Home Owners Ass’n, Inc.*, 112 AD3d 884, 978 NYS2d 85 (2d Dept 2013) (§ 23-1.4(b)(13), which enumerates activities constituting “construction” under Labor Law § 241(6) and includes painting, encompasses power-washing building in preparation for painting).

12 NYCRR 23-1.4(b)(17)—Protection in Construction, Demolition and Excavation Operations; Definitions; Designated person—*Cunha v Crossroads II*, 131 AD3d 440, 15 NYS3d 153 (2d Dept 2015) (§ 23-1.4[b][17], which defines the term “designated person” as person selected and directed by employer or its agent to perform specific task or job, does not encompass loader operator in absence of evidence that operator was selected and directed by employer to operate loader); *Vander-*

wall v 1255 Portland Ave. LLC, 128 AD3d 1446, 8 NYS3d 760 (4th Dept 2015) (plaintiff's supervisor was "designated person" under § 23-1.4[b][17] authorized to operate excavator; supervisor was superintendent of plaintiff's employer, had his own key to excavator, and possessed supervisory authority over plaintiff and work site).

12 NYCRR 23-1.5—Protection in Construction, Demolition and Excavation Operations; General responsibility of employers—*Trombley v DLC Elec., LLC*, 134 AD3d 1343, 21 NYS3d 498 (3d Dept 2015) (§ 23-1.5, which requires "reasonable and adequate" protection and that machinery be in "good repair" and "safe," too general to serve as predicate for Labor Law § 241[6] claim); *Martinez v 342 Property LLC*, 128 AD3d 408, 8 NYS3d 309 (1st Dept 2015) (same); *Timmons v Barrett Paving Materials, Inc.*, 83 AD3d 1473, 920 NYS2d 545 (4th Dept 2011) (§ 23-1.5 sets forth only general safety standard); *Balladares v Southgate Owners Corp.*, 40 AD3d 667, 835 NYS2d 693 (2d Dept 2007) (§ 23-1.5 inapplicable where worker injured as result of basement floor collapse during demolition of brick wall with jackhammer); *Mahoney v Madeira Associates*, 32 AD3d 1303, 822 NYS2d 190 (4th Dept 2006) (§ 23-1.5 sets forth only general safety standard); *Murray v Lancaster Motorsports, Inc.*, 27 AD3d 1193, 812 NYS2d 726 (4th Dept 2006) (same); *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 796 NYS2d 684 (2d Dept 2005) (same); *Hasty v Solvay Mill Ltd. Partnership*, 306 AD2d 892, 760 NYS2d 795 (4th Dept 2003) (same); *Maldonado v Townsend Ave. Enterprises*, 294 AD2d 207, 741 NYS2d 696 (1st Dept 2002) (same); *Basile v ICF Kaiser Engineers Corp.*, 227 AD2d 959, 643 NYS2d 854 (4th Dept 1996) (same); *McGrath v Lake Tree Village Associates*, 216 AD2d 877, 629 NYS2d 358 (4th Dept 1995) (same); *Stairs v State Street Associates L.P.*, 206 AD2d 817, 615 NYS2d 478 (3d Dept 1994) (same); see *White v Sperry Supply and Warehouse Inc.*, 225 AD2d 130, 649 NYS2d 236 (3d Dept 1996); *Mazzu v Benderson Development Co., Inc.*, 224 AD2d 1009, 637 NYS2d 540, 5430 (4th Dept 1996) (same).

12 NYCRR 23-1.5(a)—Protection in Construction, Demolition and Excavation Operations; General responsibility of employers; Health and safety protection required—*Pereira v Quogue Field Club of Quogue*, 71 AD3d 1104, 898 NYS2d 220 (2d Dept 2010) (§ 23-1.5(a), which provides that employers must provide safe work areas, equipment and methods as well as competent supervisors, not sufficiently specific to support Labor Law § 241(6) cause of action); *Wilson v Niagara University*, 43 AD3d 1292, 842 NYS2d 819 (4th Dept 2007) (§ 23-1.5(a) not sufficiently specific to support Labor Law § 241(6) cause of action); *Williams v White Haven Memorial Park, Inc.*, 227 AD2d 923, 643 NYS2d 787 (4th Dept 1996) (same); *Adamczyk v Hillview Estates Development Corp.*, 226

AD2d 1049, 641 NYS2d 925 (4th Dept 1996) (same); *Dombrowski v Schwartz*, 217 AD2d 914, 629 NYS2d 924 (4th Dept 1995) (same); *Knudsen v Pentzien Inc.*, 209 AD2d 909, 619 NYS2d 192 (3d Dept 1994) (same); *Gordineer v Orange*, 205 AD2d 584, 613 NYS2d 247 (2d Dept 1994) (same); *Narrow v Crane-Hogan Structural Systems Inc.*, 202 AD2d 841, 609 NYS2d 372 (3d Dept 1994) (same); but see *McCormack v Helmsley-Spear, Inc.*, 233 AD2d 203, 649 NYS2d 697 (1st Dept 1996) (§ 23-1.5(a) applicable where plaintiff fell due to mixed wet cement and mortar debris on scaffold).

12 NYCRR 23-1.5(b)—Protection in Construction, Demolition and Excavation Operations; General responsibility of employers; General requirement of competency—*Gualpa v Canarsie Plaza, LLC*, 144 AD3d 1088, 42 NYS3d 293 (2d Dept 2016) (§ 23-1.5[b], which provides that, where Part 23 requires work to be done by or under the supervision of a designated person, an employer shall designate as such person only such an employee as a reasonable and prudent person experienced in construction, demolition or excavation work would consider competent to perform such work, cannot serve as a predicate for Labor Law § 241[6] liability because it is a general safety provision).

12 NYCRR 23-1.5(c)(1)—Protection in Construction, Demolition and Excavation Operations; General responsibility of employers; Condition of equipment and safeguards—*Gasques v State*, 15 NY3d 869, 910 NYS2d 415, 937 NE2d 79 (2010) (§ 23-1.5(c)(1), which provides that “[n]o employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition,” not sufficiently specific to support Labor Law § 241(6) cause of action); but see *Sancino v Metropolitan Transportation Authority*, 184 AD3d 534, 124 NYS3d 534 (1st Dept 2020) (§ 23-1.5(c) potentially applicable where wheel of dumpster plaintiff was pushing allegedly broke, causing dumpster to topple and injure plaintiff’s toe).

12 NYCRR 23-1.5(c)(2)—Protection in Construction, Demolition and Excavation Operations; General responsibility of employers; Condition of equipment and safeguards—*Williams v White Haven Memorial Park, Inc.*, 227 AD2d 923, 643 NYS2d 787 (4th Dept 1996) (§ 23-1.5(c)(2) is a general provision and thus does not provide a basis for liability under Labor Law § 241(6)); *Vernieri v Empire Realty Co.*, 219 AD2d 593, 631 NYS2d 378 (2d Dept 1995) (same).

12 NYCRR 23-1.5(c)(3)—Protection in Construction, Demolition and Excavation Operations; General responsibility of employers; Condition of equipment and safeguards—*Nicholson v Sabey Data Center Properties, LLC*,

205 AD3d 620, 169 NYS3d 292 (1st Dept 2022) (§ 23-1.5(c)(3), which provides that all safety devices, safeguards and equipment in use shall be kept operable, and shall be immediately repaired or removed if damaged, potentially applicable where pallet jack allegedly engaged suddenly and jumped back, propelling plaintiff backwards); Section § 23-1.5(c)(3) provides that all safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged, *Ormsbee v Time Warner Realty Inc.*, 203 AD3d 630, 166 NYS3d 130 (1st Dept 2022) (§ 23-1.5[c](3) applicable where hydraulic pump failure caused lid of gang box to suddenly fall); *Lopez v New York*, 203 AD3d 405, 160 NYS3d 585 (1st Dept 2022) (§ 23-1.5[c](3) potentially applicable where whip check failed to reduce movement of air hose, causing hose to strike plaintiff in face); *Viruet v Purvis Holdings LLC*, 198 AD3d 587, 156 NYS3d 25 (1st Dept 2021) (§ 23-1.5(c)(3), which provides that all safety devices, safeguards and equipment in use shall be kept operable, and shall be immediately repaired or removed if damaged, applicable where visibly defective grinder lacking blade, safety guard, side handle, and cut-off switch spontaneously cut off and then turned back on without plaintiff engaging the power switch); *Palaguachi v Idlewild 228th Street, LLC*, 197 AD3d 1321, 153 NYS3d 585 (2d Dept 2021) (§ 23-1.5(c)(3) potentially applicable where plaintiff fell when his allegedly broken kneepad shifted, causing him to fall); *Shaw v Scepter, Inc.*, 187 AD3d 1662, 133 NYS3d 709 (4th Dept 2020) (§ 23-1.5[c](3) sufficiently specific to support Labor Law § 241(6) action and potentially applicable where man lift plaintiff was operating toppled from back of flatbed truck upon discovery or actual notice); *Cruz v 1142 Bedford Avenue, LLC*, 192 AD3d 859, 145 NYS3d 77 (2d Dept 2021) (§ 23-1.5[c](3), which provides that all safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged, applicable where plaintiff injured by malfunctioning table saw lacking protective guard or spreader); *Salerno v Diocese of Buffalo*, 161 AD3d 1522, 76 NYS3d 347 (4th Dept 2018) (same); *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 22 NYS3d 545 (2d Dept 2015) (same); *Becerra v Promenade Apartments Inc.*, 126 AD3d 557, 6 NYS3d 42 (1st Dept 2015) (same); but see *Williams v White Haven Memorial Park, Inc.*, 227 AD2d 923, 643 NYS2d 787 (4th Dept 1996) (§ 23-1.5(c)(3) is general provision and thus does not provide basis for liability under Labor Law § 241(6)); see *Zaino v Rogers*, 153 AD3d 763, 59 NYS3d 770 (2d Dept 2017) (§ 23-1.5[c](3) not applicable in light of more specific provision applicable to particular equipment involved in accident).

12 NYCRR 23-1.6—Protection in Construction, Demolition and Excavation Operations; Responsibility of

employees—*Balladares v Southgate Owners Corp.*, 40 AD3d 667, 835 NYS2d 693 (2d Dept 2007) (§ 23-1.6, which requires employees to observe regulations and utilize provided safety equipment, inapplicable where worker injured as result of basement floor collapse during demolition of brick wall with jackhammer); *Lawyer v Rotterdam Ventures Inc.*, 204 AD2d 878, 612 NYS2d 682 (3d Dept 1994) (§ 23-1.6 not applicable where plaintiff, while erecting sign on front of building, fell from ladder when it slipped and collapsed).

12 NYCRR 23-1.7—Protection in Construction, Demolition and Excavation Operations; Protection from general hazards—*Brownell v Blue Seal Feeds, Inc.*, 89 AD3d 1425, 932 NYS2d 623 (4th Dept 2011) (§ 23-1.7 inapplicable to stack of rebar from which plaintiff fell, since stack of rebar is not a working level above ground requiring a stairway, ramp or runway); *Pereira v Quogue Field Club of Quogue*, 71 AD3d 1104, 898 NYS2d 220 (2d Dept 2010) (§ 23-1.7 not shown applicable where plaintiff was injured when he tried to use uncovered string-pull starter to start steamroller and his hand was pulled into rapidly moving pulley); *Tomyuk v Junefield Ass'n*, 57 AD3d 518, 868 NYS2d 731 (2d Dept 2008) (§ 23-1.7 sufficiently specific to support Labor Law § 241(6) cause of action and applicable where worker fell off wooden scaffold while working on one-family home); *Heizman v Long Island Lighting Co.*, 251 AD2d 289, 674 NYS2d 59 (2d Dept 1998) (§ 23-1.7 not applicable where plaintiff was allegedly injured when his foot became entangled in some brush at base of pole as he was getting ready to ascend pole); *Lysiak v Murray Realty Co.*, 227 AD2d 746, 642 NYS2d 350 (3d Dept 1996) (§ 23-1.7 not applicable to tree-felling work); *Bryant v General Elec. Co.*, 221 AD2d 687, 633 NYS2d 410 (3d Dept 1995) (plaintiff sufficiently alleged violation of 12 NYCRR 23-1.7 by contending that platform on which he was working was in slippery condition).

12 NYCRR 23-1.7(a)—Protection in Construction, Demolition and Excavation Operations; Protection from general hazards; Overhead hazards—Section 23-1.7(a) prescribes standards for overhead protection for work and passage areas normally exposed to falling material or objects, see *Peters v Structure Tone, Inc.*, 204 AD3d 522, 166 NYS3d 632 (1st Dept 2022) (issue of fact whether shaft where plaintiff was working was normally exposed to falling material or objects within meaning of § 23-1.7(a)); *Moncayo v Curtis Partition Corp.*, 106 AD3d 963, 965 NYS2d 593 (2d Dept 2013) (§ 23-1.7(a) inapplicable); *Timmons v Barrett Paving Materials, Inc.*, 83 AD3d 1473, 920 NYS2d 545 (4th Dept 2011) (§ 23-1.7(a) inapplicable where no evidence that area in which plaintiff was working was normally exposed to falling material or objects); *Gonzalez v Glenwood Mason Supply Co., Inc.*, 41 AD3d 338, 839 NYS2d 74 (1st Dept 2007) (§ 23-1.7(a)(1), which prescribes

standards for overhead protection for work and passage areas normally exposed to falling material or objects, inapplicable to areas underneath stationary hoists); *Belcastro v Hewlett-Woodmere Union Free School Dist. No. 14*, 286 AD2d 744, 730 NYS2d 535 (2d Dept 2001) (§ 23-1.7(a) applicable where plaintiff, while working at ground level, was struck by piece of wood that allegedly fell or was thrown off roof); *Murtha v Integral Const. Corp.*, 253 AD2d 637, 677 NYS2d 338 (1st Dept 1998) (§ 23-1.7(a)(1) contains specific positive commands sufficient to satisfy § 241(6)); *Amato v State*, 241 AD2d 400, 660 NYS2d 576 (1st Dept 1997) (§ 23-1.7(a), although sufficiently specific, was not applicable where there was no evidence that plaintiff was injured in area where workers were “normally exposed to falling objects” and where overhead work was not primary focus of worksite); *Klien v Monroe*, 219 AD2d 846, 632 NYS2d 343 (4th Dept 1995) (§ 23-1.7(a)(1) applies to areas where workers are normally exposed to falling objects and, therefore, does not apply where plaintiff was struck by a metal window curtain frame that had previously been placed by plaintiff and two co-workers on a three-foot high concrete wall where it was to be installed); *Knudsen v Pentzien Inc.*, 209 AD2d 909, 619 NYS2d 192 (3d Dept 1994) (plaintiff was cutting branches from a felled tree when he was struck by a falling tree that had been cut by another logger; § “23-1.7(a) is not applicable to tree-felling work”; rather, it “contemplates protection against falling objects associated with other overhead activity under different circumstances”).

12 NYCRR § 23-1.7(a)(1)—Protection in Construction, Demolition and Excavation Operations; Protection from general hazards; Overhead hazards—*Rivas-Pichardo v 292 Fifth Avenue Holdings, LLC*, 198 AD3d 826, 156 NYS3d 85 (2d Dept 2021) (§ 23-1.7[a][1], which prescribes standards for overhead protection for work and passage areas normally exposed to falling material or objects, potentially applicable where plaintiff struck by bricks dumped down elevator shaft being used as debris chute); *Baptiste v RLP-East, LLC*, 182 AD3d 444, 122 NYS3d 292 (1st Dept 2020) (§ 23-1.7[a] applicable where wood plank struck plaintiff in area exposed to falling objects from floor above); *Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 995 NYS2d 95 (2d Dept 2014) (§ 23-1.7[a] applicable to accident that occurred in alleyway traversed by plaintiff, provided alleyway normally exposed to falling material or objects); *Marin v AP-Amsterdam 1661 Park LLC*, 60 AD3d 824, 875 NYS2d 242 (2d Dept 2009) (§ 23-1.7(a)(1) inapplicable where plaintiff was struck on head by previously attached bracket which became dislodged; work site was not one “normally exposed” to falling brackets; court distinguished § 23-1.8(c)(1), which requires only “a danger of being struck by falling objects”); *Parrales v Wonder Works Const. Corp.*, 55 AD3d 579, 864 NYS2d 325 (2d Dept 2008) (§ 23-1.7(a)(1) applicable

where worker removing debris from bottom of elevator shaft injured by piece of wood that fell from higher floor); *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 841 NYS2d 249 (1st Dept 2007) (§ 23-1.7(a)(1), not applicable where elevator-shaft worker not normally exposed to hazard of dislodged falling counterweights); *Roosa v Cornell Real Property Servicing, Inc.*, 38 AD3d 1352, 831 NYS2d 784 (4th Dept 2007) (§ 23-1.7(a) sufficiently specific to support Labor Law § 241(6) cause of action; evidence of prior incidents of branches falling from trees sufficient to create question of fact as to whether work site was “normally exposed to falling material or objects”); *Boyle v 42nd Street Development Project, Inc.*, 38 AD3d 404, 835 NYS2d 7 (1st Dept 2007) (§ 23-1.7(a)(1) not valid basis for Labor Law § 241(6) cause of action where open, uncovered shaft was reasonably needed for hoisting steel stringers); *Perillo v Lehigh Const. Group, Inc.*, 17 AD3d 1136, 795 NYS2d 808 (4th Dept 2005) (§ 23-1.7(a)(1) not applicable where plaintiff not normally exposed to falling material or objects); *McLaughlin v Malone & Tate Builders, Inc.*, 13 AD3d 859, 787 NYS2d 157 (3d Dept 2004) (§ 23-1.7(a)(1) not applicable where worker not normally exposed to falling objects injured by block accidentally pushed from fourth to third level of scaffold); *Zervos v New York*, 8 AD3d 477, 779 NYS2d 106 (2d Dept 2004) (§ 23-1.7(a)(1) is sufficiently specific to support Labor Law § 241(6) cause of action).

12 NYCRR 23-1.7(a)(2)—Protection in Construction, Demolition and Excavation; Protection from general hazards; Overhead hazards—*Allan v DHL Exp. (USA), Inc.*, 99 AD3d 828, 952 NYS2d 275 (2d Dept 2012) (§ 23-1.7(a)(2), which requires provision of barricades, fencing or the equivalent to prevent persons lawfully frequenting areas exposed to falling material or objects from inadvertently entering such areas, does not apply to areas where employees are required to work); *Perillo v Lehigh Const. Group, Inc.*, 17 AD3d 1136, 795 NYS2d 808 (4th Dept 2005) (§ 23-1.7(a)(2) inapplicable where plaintiff was “required to work or pass” in or through area where he or she was struck by falling object); *McLaughlin v Malone & Tate Builders, Inc.*, 13 AD3d 859, 787 NYS2d 157 (3d Dept 2004) (§ 23-1.7(a)(2) not applicable where worker not normally exposed to falling objects injured by block accidentally pushed from fourth to third level of scaffold).

12 NYCRR 23-1.7(b)—Protection in Construction, Demolition and Excavation Operations; Protection from general hazards; Falling hazards; Hazardous openings—*Reyes v Astoria 31st Street Developers, LLC*, 190 AD3d 872, 139 NYS3d 352 (2d Dept 2021) (§ 23-1.7(b), which requires that every hazardous opening be guarded by a substantial cover fastened in place or by a safety rail installed in compliance with the Industrial Code, inapplicable where plaintiff fell to

bottom of nine-foot hill after unsuccessfully attempting to help coworkers manually pass long piece of rebar across excavation site); *Ramirez v Metropolitan Transp. Authority*, 106 AD3d 799, 965 NYS2d 156 (2d Dept 2013) (§ 23-1.7(b) inapplicable to accident occurring when plank in catwalk used over elevated subway track broke; Rule applies to hazardous openings, not elevated hazards); *Harris v Hueber-Breuer Const. Co., Inc.*, 67 AD3d 1351, 890 NYS2d 235 (4th Dept 2009) (§ 23-1.7(b) inapplicable where plaintiff injured while attempting to descend multi-level scaffold with allegedly inadequate planking, since plaintiff did not fall into hazardous opening); *Kaletka v New York State Elec. & Gas Corp.*, 41 AD3d 1257, 837 NYS2d 824 (4th Dept 2007) (§ 23-1.7(b) inapplicable where worker stepped out of lowered aerial bucket and fell into old drainage ditch overgrown with weeds; ditch wholly unrelated to demolition project); *Bell v Bengomo Realty, Inc.*, 36 AD3d 479, 829 NYS2d 42 (1st Dept 2007) (§ 23-1.7(b) concerns protections against falls from elevate area to lower area through openings large enough for person to fit through; evidence that coworker already in trench when plaintiff fell sufficient to show violation); *Dzieran v 1800 Boston Road, LLC*, 25 AD3d 336, 808 NYS2d 36 (1st Dept 2006) (citing § 23-1.7(b)(1)(iii)(a)) (§ 23-1.7(b) inapplicable where plaintiff's fall was less than 15 feet); *Gottstine v Dunlop Tire Corp.*, 272 AD2d 863, 709 NYS2d 259 (4th Dept 2000) (§ 23-1.7(b), a sufficiently specific safety standard, applicable where plaintiff, while traversing checkerboard rebar mat above pit, slipped and fell through 12-inch by 12-inch hole in mat); *Boss v Integral Const. Corp.*, 249 AD2d 214, 672 NYS2d 92 (1st Dept 1998) (§ 23-1.7(b), although sufficiently specific, did not apply where plaintiff did not fall into a "hazardous opening").

12 NYCRR 23-1.7(b)(1)—Protection in Construction, Demolition and Excavation Operations; Protection from general hazards; Falling hazards; Hazardous openings—Section 23-1.7(b)(1) requires that every hazardous opening be guarded by a substantial cover fastened in place or by a safety railing installed in compliance with the Industrial Code, see *Salazar v Novalex Contracting Corp.*, 18 NY3d 134, 936 NYS2d 624, 960 NE2d 393 (2011) (§ 23-1.7(b)(1), which requires that every hazardous opening be guarded by a substantial cover fastened in place or by a safety railing installed in compliance with the Industrial Code, inapplicable where covering the opening in question would have been inconsistent with an integral part of the job); *Lazo v New York State Thruway Authority*, 204 AD3d 774, 167 NYS3d 119 (2d Dept 2022) (§ 23-1.7(b)(1) inapplicable where plaintiff lost his footing while walking on beam in "jump box"); *Rooney v D.P. Consulting Corp.*, 204 AD3d 428, 166 NYS3d 155 (1st Dept 2022) (§ 23-1.7(b)(1)(i) potentially applicable where plaintiff tripped on wooden ramp lacking safety railing after making changes to elevator in preparation

of renovation work); *Mejia v 69 Mamaroneck Road Corp.*, 203 AD3d 815, 164 NYS3d 207 (2d Dept 2022) (§ 23-1.7(b)(1)(i) applicable where plaintiff fell through uncovered and unguarded opening in roof that was concealed by ice and water shield); *Greca v Choice Associates LLC*, 200 AD3d 415, 154 NYS3d 780 (1st Dept 2021) (§ 23-1.7(b)(1)(i) applicable where piece of wood placed as temporary path shifted, causing plaintiff to fall though open area between beams); *Guaman v 178 Court Street, LLC*, 200 AD3d 655, 159 NYS3d 454 (2d Dept 2021) (issue of fact as to whether § 23-1.7(b)(1)(i) was violated and whether such violation proximately caused accident where plaintiff allegedly fell through uncovered stairwell opening); *Favaloro v Port Authority of New York & New Jersey*, 191 AD3d 524, 143 NYS3d 4 (1st Dept 2021) (§ 23-1.7[b][1] not applicable where plaintiff stepped on unsecured plywood, causing plywood to fly up and plaintiff to fall into hole up to his hip; regulation applies only to openings deep enough for a person to fall all the way through); *Sotarriba v 346 West 17th Street LLC*, 179 AD3d 599, 118 NYS3d 90 (1st Dept 2020) (§ 23-1.7(b)(1) applicable to uncovered stairwell opening); *Gurewitz v New York*, 175 AD3d 658 (2d Dept 2019) (§ 23-1.7(b)(1) inapplicable where perimeter fence fell onto plaintiffs, as protective railing was installed and plaintiff did not fall into opening); *Brown v New York Presbyterian Healthcare System, Inc.*, 123 AD3d 612, 999 NYS2d 66 (1st Dept 2014) (§ 23-1.7[b][1][i] applicable to openings that a person can fall through in his or her entirety; but not applicable where plaintiff fell in hole in flatbed trailer up to plaintiff's hip); *Wrobel v Pendleton*, 120 AD3d 963, 991 NYS2d 218 (4th Dept 2014) (§ 23-1.7[b][1][i] sufficiently specific to support Labor Law § 241[6] claim, and applies to any hazardous opening into which person may step or fall provided opening is of significant depth and size; applicable where plaintiff fell into hole three or four feet deep); *Bisram v Long Island Jewish Hosp.*, 116 AD3d 475, 983 NYS2d 518 (1st Dept 2014) (§ 23-1.7(b)(1)(i) inapplicable where plaintiff fell between beams beneath unsecured metal decking; beams not "hazardous opening"); *Alonzo v Safe Harbors of the Hudson Housing Development Fund Co., Inc.*, 104 AD3d 446, 961 NYS2d 91 (1st Dept 2013) (§ 23-1.7(b)(1)(i) and (ii) sufficiently specific to support Labor Law § 241(6) claim; rules violated where plaintiff fell into unguarded hole that was actively being used in connection with construction); *Cerverizzo v New York*, 111 AD3d 535, 975 NYS2d 338 (1st Dept 2013) (§ 23-1.7(b)(1)(i) inapplicable where hole plaintiff stepped into not large enough for person to fit through); *Allan v DHL Exp. (USA), Inc.*, 99 AD3d 828, 952 NYS2d 275 (2d Dept 2012) (§ 23-1.7(b)(1) applies only to hazardous openings, not elevated hazards); *Coleman v Crumb Rubber Mfrs.*, 92 AD3d 1128, 940 NYS2d 170 (3d Dept 2012) (opening must be of significant depth and size to fall within regulation's protection); *Landon v Austin*, 88 AD3d 1127, 931 NYS2d 424 (3d Dept 2011) (§ 23-1.7(b)(1) inapplicable where

worker fell off roof, since edge of roof does not qualify as hazardous opening); *Pope v Safety and Quality Plus, Inc.*, 74 AD3d 1040, 903 NYS2d 124 (2d Dept 2010) (§ 23-1.7(b)(1), inapplicable where worker fell from unguarded edge of elevated concrete platform while walking and talking to foreman; platform edge not “hazardous opening”); *Barillaro v Beechwood RB Shorehaven, LLC*, 69 AD3d 543, 894 NYS2d 434 (2d Dept 2010) (§ 23-1.7(b)(1) sufficiently specific to support Labor Law § 241(6) cause of action, but 1½ to 2-foot-deep trench not “hazardous opening” within meaning of rule); *Forschner v Jucca Co.*, 63 AD3d 996, 883 NYS2d 63 (2d Dept 2009) (§ 23-1.7(b)(1), applies only to hazardous openings; regulation inapplicable where plaintiff fell when joist gave way); *Urban v No. 5 Times Square Development, LLC*, 62 AD3d 553, 879 NYS2d 122 (1st Dept 2009) (§ 23-1.7(b)(1) inapplicable to 10- to 12-inch gap, which is not a hazardous opening); *Romeo v Property Owner (USA) LLC*, 61 AD3d 491, 877 NYS2d 48 (1st Dept 2009) (§ 23-1.7(b)(1) inapplicable to opening created when 2’ by 2’ tile resting 18 inches above subfloor became dislodged; opening did not present significant depth and size); *Hernandez v Columbus Centre, LLC*, 50 AD3d 597, 857 NYS2d 84 (1st Dept 2008) (§ 23-1.7(b)(1) inapplicable where opening in planks that buckled under plaintiff was not large enough for a person to fit through); *Pilato v Nigel Enterprises, Inc.*, 48 AD3d 1133, 850 NYS2d 799 (4th Dept 2008) (§ 23-1.7(b)(1) applicable where plaintiff claimed that he fell between ceiling joists); *Rookwood v Hyde Park Owners Corp.*, 48 AD3d 779, 853 NYS2d 127 (2d Dept 2008) (§ 23-1.7(b)(1) inapplicable where plaintiff fell from stairway landing); *Kaleta v New York State Elec. & Gas Corp.*, 41 AD3d 1257, 837 NYS2d 824 (4th Dept 2007) (§ 23-1.7(b) inapplicable where worker stepped out of lowered aerial bucket and fell into old drainage ditch overgrown with weeds; ditch wholly unrelated to demolition project); *Dooley v Peerless Importers, Inc.*, 42 AD3d 199, 837 NYS2d 720 (2d Dept 2007) (§ 23-1.7(b)(1) inapplicable where worker fell from floating platform into creek); *Godoy v Baisley Lumber Corp.*, 40 AD3d 920, 837 NYS2d 682 (2d Dept 2007) (§ 23-1.7(b)(1) inapplicable where plaintiff working on elevated loading dock fell through unsecured doors to ground 20 feet below); *Balladares v Southgate Owners Corp.*, 40 AD3d 667, 835 NYS2d 693 (2d Dept 2007) (§ 23-1.7(b)(1) inapplicable where worker injured by falling into hole as result of basement floor collapse during demolition of brick wall with jackhammer); *Garlow v Chappaqua Cent. School Dist.*, 38 AD3d 712, 832 NYS2d 627 (2d Dept 2007) (§ 23-1.7(b)(1) inapplicable where plaintiff fell from top of concrete wall, since there was no hole or hazardous opening where plaintiff was walking); *Bonse v Katrine Apartment Associates*, 28 AD3d 990, 813 NYS2d 578 (3d Dept 2006) (§ 23-1.7(b)(1) sufficiently specific and potentially applicable to accident in which plaintiff stepped down and broke through both subflooring and sheetrock ceiling of first floor); *Scarso v M.G. General*

Const. Corp., 16 AD3d 660, 792 NYS2d 546 (2d Dept 2005) (§ 23-1.7(b)(1) sufficiently specific to support Labor Law § 241(6) cause of action and applies where worker fell into excavation); *Olsen v James Miller Marine Service, Inc.*, 16 AD3d 169, 791 NYS2d 92 (1st Dept 2005) (§ 23-1.7(b)(1) sufficiently specific to support Labor Law § 241(6) cause of action and potentially applicable where worker injured when plywood covering hole over which he was standing slid, causing him to fall into hole); *Wells v British American Development Corp.*, 2 AD3d 1141, 770 NYS2d 161 (3d Dept 2003) (§ 23-1.7(b)(1) potentially applicable where plaintiff's evidence indicated that elevator pit opening, which was adjacent to his work area, was large enough for a person to fall through); *Contrera v Geshner Realty Corp.*, 1 AD3d 111, 766 NYS2d 200 (1st Dept 2003) (§ 23-1.7(b)(1) inapplicable to welder's work in replacing wooden staircase with iron one); *Messina v New York*, 300 AD2d 121, 752 NYS2d 608 (1st Dept 2002) (§ 23-1.7(b)(1) is not applicable to drainpipe opening approximately 12 inches in diameter and eight inches deep); *D'Egidio v Frontier Ins. Co.*, 270 AD2d 763, 704 NYS2d 750 (3d Dept 2000) (§ 23-1.7(b)(1)(i) applies only to openings of significant depth and size); *O'Connor v Lincoln Metrocenter Partners, L.P.*, 266 AD2d 60, 698 NYS2d 632 (1st Dept 1999) (§ 23-1.7(b)(1)(i) provides a basis for liability under Labor Law § 241(6)); *Williams v G.H. Development and Const. Co. Inc.*, 250 AD2d 959, 672 NYS2d 937 (3d Dept 1998) (§ 23-1.7(b)(1)(ii) provides a basis for liability under Labor Law § 241(6)); *Bennion v Goodyear Tire & Rubber Co.*, 229 AD2d 1003, 645 NYS2d 195 (4th Dept 1996) (§ 23-1.7(b)(1) inapplicable where plaintiff, who was standing above drop ceiling, lost his balance, fell and landed straddling the rafter upon which he was standing with his right foot going through a ceiling panel); *Mazzu v Bender-son Development Co., Inc.*, 224 AD2d 1009, 637 NYS2d 540 (4th Dept 1996) (plaintiff and co-worker were carrying scaffold between building and swimming pool at building renovation project when plaintiff stepped on edge of pool, the tile cracked, and he fell to bottom of pool; § 23-1.7(b)(1) is specific and applicable to plaintiff's fall); *DeLong v State Street Associates L.P.*, 211 AD2d 891, 621 NYS2d 172 (3d Dept 1995) (plaintiff fell while painting side of building located on slope of hill upon which a series of descending level terrace areas had been constructed; § 23-1.7(b)(1), although not general, was inapplicable because the elevation difference that caused plaintiff's fall was not an "opening"); see also *Milanesi v Kellerman*, 41 AD3d 1058, 838 NYS2d 256 (3d Dept 2007) (where unsecured top section of second-floor stairway collapsed causing plaintiff to fall into building's basement through a hole in first floor, question of fact was presented as to whether failure to cover hole in violation of § 23-1.7(b)(1) was a proximate cause of injuries).

12 NYCRR 23-1.7(b)(1)(iii)(a)—Protection in Construction, Demolition and Excavation Operations; Protection

from general hazards; Falling hazards, Hazardous openings; Protection for employees required to work close to edges of hazardous openings—*Salazar v Novalex Contracting Corp.*, 72 AD3d 418, 897 NYS2d 423 (1st Dept 2010) (§ 23-1.7(b)(1), which requires planking to be placed at least 15 feet beneath hazardous openings where workers are required to work close to edge of such openings, applies only where opening must remain open for work to progress; rule inapplicable where worker spreading fresh concrete on basement floor fell into trench that was not being filled with concrete at that time), *rev'd* on other grounds, 18 NY3d 134, 936 NYS2d 624, 960 NE2d 393 (2011).

12 NYCRR 23-1.7(b)(2)—Protection in Construction, Demolition and Excavation Operations; Protection from general hazards; Falling hazards; Bridge or highway overpass construction—Section 23-1.7(b)(2) requires provision and use of approved safety belts for persons employed at elevations greater than 30 feet above land or water during bridge or highway overpass construction or at any elevation during structural or construction work performed over highways or railroads open to public traffic, or in the alternative to safety belts, scaffolds, platforms or approved life nets meeting certain requirements, see *Lazo v New York State Thruway Authority*, 204 AD3d 774, 167 NYS3d 119 (2d Dept 2022) (no violation of § 23-1.7(b)(2) where plaintiff was provided with approved safety belt).

12 NYCRR 23-1.7(c)—Protection in Construction, Demolition and Excavation Operations; Protection from general hazards; Drowning hazards—*Collado v New York*, 72 AD3d 458, 900 NYS2d 10 (1st Dept 2010) (§ 23-1.7(c), which requires that manned boat, equipped as prescribed, continuously patrol area beneath work location at all times when any person is exposed to drowning hazard and further requires that such boat must be available for prompt rescue where workers are exposed to hazard of falling into water beneath work location, potentially applicable where worker fell from fender system at base of bridge; evidence was that fender was place from which work was performed).

12 NYCRR 23-1.7(d)—Protection in Construction, Demolition and Excavation Operations; Protection from general hazards; Slipping hazards—§ 23-1.7(d), which provides that “[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition,” and that “[i]ce, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing,” was held sufficiently specific to

support a Labor Law § 241(6) cause of action and applicable or potentially applicable in the following cases: *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816, 693 NE2d 1068 (1998) (provision is specific or “concrete specification”); *Schutt v Dynasty Transportation of Ohio, Inc.*, 203 AD3d 858, 164 NYS3d 645 (2d Dept 2022) (where plaintiff slipped on spilled oil, causing hydraulic jack to topple onto him, issue of fact as to whether floor of box truck was type of surface contemplated by statute); *Toalongo v Almarwa Center, Inc.*, 202 AD3d 1128, 164 NYS3d 162 (2d Dept 2022) (plaintiff allegedly slipped on water, ice, and debris in stairwell while coworkers were passing him steel beam); *Lapinsky v Extell Development Company*, 202 AD3d 478, 163 NYS3d 500 (1st Dept 2022) (issue of fact whether plaintiff who slipped snow and ice was in a defined walkway); *Tolk v 11 West 42 Realty Investors, L.L.C.*, 201 AD3d 491, 160 NYS3d 237 (1st Dept 2022) (staircase constituted passageway where workers generally used it instead of single-stop elevator which was generally used only for delivering construction material); *Venezia v LTS 711 11th Avenue*, 201 AD3d 493, 159 NYS3d 430 (1st Dept 2022) (issue of fact as to whether snow and ice cleared and if so, whether location of accident was passageway); *Gancarz v Brooklyn Pier 1 Residential Owner, L.P.*, 190 AD3d 955, 140 NYS3d 268 (2d Dept 2021) (plaintiff allegedly slipped on wet paper on concrete surface located in basement, which constituted “floor” within meaning of § 23-1.7(d)); *Ohadi v Magnetic Construction Group Corp.*, 182 AD3d 474, 122 NYS3d 612 (1st Dept 2020) (issue of fact as to whether staircase plaintiff allegedly fell down was work area); *Potenzo v New York*, 189 AD3d 705, 139 NYS3d 156 (1st Dept 2020) (plaintiff entitled to summary judgment where he slipped on ice while walking on unpaved path between security guard booth and worksite entrance); *Baum v Javen Construction Co., Inc.*, 195 AD3d 1378, 150 NYS3d 183 (4th Dept 2021) (parking lot functioned as “passageway” but issue of fact as to whether defendant discharged duty by salting snow and ice prior to accident); *Pereira v New School*, 148 AD3d 410, 48 NYS3d 391 (1st Dept 2017) (plaintiff allegedly slipped on concrete deposited on piece of plywood; concrete not integral to work; question of fact as to “passageway”); *Jackson v Heitman Funds/191 Colonie LLC*, 111 AD3d 1208, 976 NYS2d 283 (3d Dept 2013) (membrane roll allegedly slipped and dropped because of ice on roof); *Harasim v Eljin Const. of New York, Inc.*, 106 AD3d 642, 966 NYS2d 387 (1st Dept 2013) (plaintiff allegedly slipped on stairway that was sole means of access to work site); *Burnett v New York*, 104 AD3d 437, 961 NYS2d 81 (1st Dept 2013) (wet subway rail bed through which worker had to walk to reach work area constituted “floor, passageway or walkway”); *Velasquez v 795 Columbus LLC*, 103 AD3d 541, 959 NYS2d 491 (1st Dept 2013) (plaintiff allegedly slipped on mud, rocks and water at construction site while working on concrete floor; mud not part of floor or integral to plaintiff’s work); *Fassett v*

Wegmans Food Markets, Inc., 66 AD3d 1274, 888 NYS2d 635 (3d Dept 2009) (worker slipped on mud accumulated on battery cover of backhoe, which served as step and only means of access to backhoe cab); Mergenhagen v Dish Network Service L.L.C., 64 AD3d 1170, 883 NYS2d 405 (4th Dept 2009) (worker allegedly slipped and fell from roof of residence while installing satellite dish); Conklin v Triborough Bridge and Tunnel Authority, 49 AD3d 320, 855 NYS2d 54 (1st Dept 2008) (worker allegedly slipped on muddy cross-piece of “chicken ladder” used as ramp to gain access to employer’s shanty); Kwang Ho Kim v D & W Shin Realty Corp., 47 AD3d 616, 852 NYS2d 138 (2d Dept 2008) (plaintiff working alone in rain on unsecured ladder); Hageman v Home Depot U.S.A., Inc., 45 AD3d 730, 846 NYS2d 302 (2d Dept 2007) (provision applicable even though alleged slipping hazard was integral part of work); Smith v Fayetteville-Manlius Cent. School Dist., 32 AD3d 1253, 822 NYS2d 832 (4th Dept 2006) (possible slippery condition of ladder); Partridge v Waterloo Cent. School Dist., 12 AD3d 1054, 784 NYS2d 767 (4th Dept 2004) (question of fact whether presence of loose cardboard on countertop created slippery condition on elevated work surface); Earl v Starwood Ceruzzi Saratoga, LLC, 9 AD3d 879, 780 NYS2d 461 (4th Dept 2004) (tiles covered with mastic remover where question of fact existed as to whether plaintiff slipped on tiles and whether it was improper for mastic to be on tiles); Brown v Ciminelli-Cowper, Inc., 2 AD3d 1308, 770 NYS2d 260 (4th Dept 2003) (scissor lift is functional equivalent of scaffold and within purview of rule); Giglio v St. Joseph Intercommunity Hosp., 309 AD2d 1266, 765 NYS2d 77 (4th Dept 2003) (plaintiff slipped and fell in stairway at construction site); Beltrone v New York, 299 AD2d 306, 749 NYS2d 271 (2d Dept 2002) (deck of crane used to reach work area is “platform”); Roppolo v Mitsubishi Motor Sales of America, Inc., 278 AD2d 149, 718 NYS2d 322 (1st Dept 2000) (plaintiff injured on building roof used in ordinary course of occupant’s business); McCormack v Helmsley-Spear, Inc., 233 AD2d 203, 649 NYS2d 697 (1st Dept 1996) (mixed wet cement and mortar debris on scaffold); Cottone v Dormitory Authority of State of N.Y., 225 AD2d 1032, 639 NYS2d 631 (4th Dept 1996) (plaintiff fell on plywood laid on ground, regulation does not require that work surface be elevated); Ciraolo v Melville Court Associates, 221 AD2d 582, 634 NYS2d 205 (2d Dept 1995) (fall from permanently installed ladder); Colucci v Equitable Life Assur. Soc. of U.S., 218 AD2d 513, 630 NYS2d 515 (1st Dept 1995) (plaintiff slipped on food left on floor as he stepped from ladder); Durfee v Eastman Kodak Co., 212 AD2d 971, 624 NYS2d 704 (4th Dept 1995) (fall on slippery roof).

In the following cases § 23-1.7(d) was deemed sufficiently specific to support a Labor Law § 241(6) cause of action but was held inapplicable to the particular facts: Biaca-Neto v Boston Road II Housing Development Fund Corporation, 176 AD3d 1, 107 NYS3d 7 (1st Dept 2019) (scaffold crossbar is not

working surface required for walking or standing), *aff'd* as modified on other grounds 34 NY3d 1166, 121 NYS3d 753, 144 NE3d 363 (2020); *Bazdaric v Almah Partners LLC*, 203 AD3d 643, 166 NYS3d 135 (1st Dept 2022) (painter precluded from recovering for tripping accident on heavy-duty plastic covering placed on escalator to protect it from dripping paint as plastic was integral to plaintiff's work); *Singh v 180 Varick, LLC*, 203 AD3d 1194, 163 NYS3d 455 (2d Dept 2022) (plaintiff fell from ladder due to his own loss of balance); *Fonck v New York*, 198 AD3d 874, 156 NYS3d 308 (2d Dept 2021) (wet and slippery work surface was not related to happening of plaintiff's tripping accident); *Goya v Longwood Housing Development Fund Company, Inc.*, 192 AD3d 581, 146 NYS3d 59 (1st Dept 2021) (fire escape ladder used to access roof was not floor, passageway, walkway, scaffold, or other working surface); *St. John v Westwood-Squibb Pharmaceuticals, Inc.*, 138 AD3d 1501, 31 NYS3d 720 (4th Dept 2016) (parking lot not covered location); *Trombley v DLC Elec., LLC*, 134 AD3d 1343, 21 NYS3d 498 (3d Dept 2015) (plaintiff's injuries caused by trip over exposed conduits, not slippery condition); *Carrera v Westchester Triangle Housing Development Fund Corp.*, 116 AD3d 585, 984 NYS2d 339 (1st Dept 2014) (area where plaintiff tripped not passageway); *Stier v One Bryant Park LLC*, 113 AD3d 551, 979 NYS2d 65 (1st Dept 2014) (unsecured masonite not slipping hazard); *Smith v Nestle Purina Petcare Co.*, 105 AD3d 1384, 966 NYS2d 292 (4th Dept 2013) ("grain dust" on which plaintiff slipped was very condition he was charged with removing); *Rodriguez v Dormitory Authority of State*, 104 AD3d 529, 962 NYS2d 102 (1st Dept 2013) (accident allegedly caused by one of several scattered scaffold clips, which was not "foreign substance"); *Croussett v Chen*, 102 AD3d 448, 958 NYS2d 105 (1st Dept 2013) (no evidence of slippery floor or that masonite that covered ceramic floor was foreign substance that caused slippery footing); *Bannister v LPCiminelli, Inc.*, 93 AD3d 1294, 940 NYS2d 749 (4th Dept 2012) (regulation not applicable to open courtyard, which was not defined walkway, passageway or path); *Cook v Orchard Park Estates, Inc.*, 73 AD3d 1263, 902 NYS2d 674 (3d Dept 2010) (plaintiff slipped on snow-covered plastic, which is not "tripping hazard"; further, regulation not applicable to open area between sidewalk and building); *Monterroza v State University Const. Fund*, 56 AD3d 629, 869 NYS2d 113 (2d Dept 2008) (worker fell onto concrete platform after attempting to climb out of wet dumpster); *Riley v J.A. Jones Contracting, Inc.*, 54 AD3d 744, 865 NYS2d 225 (2d Dept 2008) (worker tripped on brick while standing on elevated scaffold; question of fact whether brick taken from demolished wall was part of work or debris); *Talbot v Jetview Properties, LLC*, 51 AD3d 1396, 857 NYS2d 411 (4th Dept 2008) (worker slipped in parking lot); *Farrell v Blue Circle Cement, Inc.*, 13 AD3d 1178, 787 NYS2d 773 (4th Dept 2004) (accident occurred on truck scale rather than "floor, passageway,

walkway, scaffold, platform or other elevated surface”); *Gaisor v Gregory Madison Ave., LLC*, 13 AD3d 58, 786 NYS2d 158 (1st Dept 2004) (worker slipped on snow, which was very condition he was charged with remedying); *Bruder v 979 Corp.*, 307 AD2d 980, 763 NYS2d 667 (2d Dept 2003) (staircase in open and common area remote from work site not “passageway”); *Lessard v Niagara Mohawk Power Corp.*, 277 AD2d 941, 715 NYS2d 816 (4th Dept 2000) (plaintiff fell from tracks of construction vehicle, which are not elevated working surface); *Gielow v Rosa Coplon Home*, 251 AD2d 970, 674 NYS2d 551 (4th Dept 1998) (plaintiff did not slip on foreign substance but on muddy ground that was exposed to elements); *Boss v Integral Const. Corp.*, 249 AD2d 214, 672 NYS2d 92 (1st Dept 1998) (regulation inapplicable where no evidence of slippery condition); *Scarupa v Lockport Energy Associates, L.P.*, 245 AD2d 1038, 667 NYS2d 561 (4th Dept 1997) (plaintiff fell not in “passageway” but in common area or open yard in front of or between buildings; additionally, plaintiff slipped on muddy ground that was exposed to the elements, not foreign substance); *Gist v Central School Dist. No. 1*, 234 AD2d 976, 651 NYS2d 818 (4th Dept 1996) (water sealant on which plaintiff slipped not foreign substance, but was part of new roof being constructed); *Basile v ICF Kaiser Engineers Corp.*, 227 AD2d 959, 643 NYS2d 854 (4th Dept 1996) (stack of pipes on which plaintiff fell did not constitute passageway or elevated work area; slippery substance on which plaintiff slid integral to pipe and not foreign substance); *McGrath v Lake Tree Village Associates*, 216 AD2d 877, 629 NYS2d 358 (4th Dept 1995) (regulation inapplicable to dirt-pile condition in common areas or open yard in front of or between buildings).

The so-called “storm in progress rule” does not apply to a Labor Law § 241(6) claim based on a violation of 12 NYCRR 23-1.7(d), *Rothschild v Faber Homes, Inc.*, 247 AD2d 889, 668 NYS2d 793 (4th Dept 1998). This section imposes upon owners and general contractors a duty to remove ice and snow while construction is in progress, *id.* The First Department has held that a worker who was injured as a result of slipping on an overnight accumulation of snow may recover under Labor Law § 241(6) only upon a showing that “someone within the chain of the construction project” had notice of the accumulation, *DeStefano v Amtad New York, Inc.*, 269 AD2d 229, 703 NYS2d 34 (1st Dept 2000). However, the Second Department has held that a general contractor’s lack of notice of a snow condition on a roof was not a defense to a Labor Law § 241(6) claim, *Amirr v Calcagno Const. Co.*, 257 AD2d 585, 684 NYS2d 280 (2d Dept 1999).

12 NYCRR 23-1.7(e)—Protection in Construction, Demolition and Excavation Operations; Protection from general hazards; Tripping and other hazards—§ 23-1.7(e) was deemed sufficiently specific to support a Labor Law § 241(6)

cause of action in the following cases: *Giglio v St. Joseph Intercommunity Hosp.*, 309 AD2d 1266, 765 NYS2d 77 (4th Dept 2003); *Kvandal v Westminster Presbyterian Soc. of Buffalo, Inc.*, 254 AD2d 818, 678 NYS2d 185 (4th Dept 1998); *Adams v Glass Fab, Inc.*, 212 AD2d 972, 624 NYS2d 705 (4th Dept 1995) (§ 23-1.7(e) is sufficiently specific); see *Deleo v JPMorgan Chase & Co.*, 199 AD3d 482, 154 NYS3d 417 (1st Dept 2021) (question of fact as to whether bottle cap on which plaintiff slipped and fell was part of accumulation of debris).

In the following cases, § 23-1.7(e) was held inapplicable to the particular facts: *Trombley v DLC Elec., LLC*, 134 AD3d 1343, 21 NYS3d 498 (3d Dept 2015) (conduits over which plaintiff tripped were integral part of construction and therefore not tripping hazard under regulation); *Costa v State*, 123 AD3d 648, 997 NYS2d 690 (2d Dept 2014) (plaintiff did not trip, and three- to four-foot high pile of logs on which he lost his footing was not tripping hazard); *Stier v One Bryant Park LLC*, 113 AD3d 551, 979 NYS2d 65 (1st Dept 2014) (unsecured masonite not tripping hazard); *Velasquez v 795 Columbus LLC*, 103 AD3d 541, 959 NYS2d 491 (1st Dept 2013) (plaintiff allegedly slipped on mud, rocks and water at construction site); *Cook v Orchard Park Estates, Inc.*, 73 AD3d 1263, 902 NYS2d 674 (3d Dept 2010) (plaintiff slipped on snow-covered plastic in open area between sidewalk and building); *Venezia v State*, 57 AD3d 522, 868 NYS2d 710 (2d Dept 2008) (plaintiff tripped on rebar that was integral part of work); *Farrell v Blue Circle Cement, Inc.*, 13 AD3d 1178, 787 NYS2d 773 (4th Dept 2004) (worker slipped after attempting to step down 2½ feet to truck scale surface); accident not caused by tripping hazard); *Madir v 21-23 Maiden Lane Realty, LLC*, 9 AD3d 450, 780 NYS2d 369 (2d Dept 2004) (plaintiff injured while he and co-employee attempted to move long, heavy metal object on floor that was obstructing area); *Scotfield v Trustees Of Union College*, 288 AD2d 807, 734 NYS2d 262 (3d Dept 2001) (open concrete area, littered with crushed stones, between equipment trailer and building under construction); *Bale v Pyron Corp.*, 256 AD2d 1128, 684 NYS2d 393 (4th Dept 1998) (plaintiff slipped on ice rather than obstruction such as dirt or debris); *Bauer v Niagara Mohawk Power Corp.*, 249 AD2d 948, 672 NYS2d 567 (4th Dept 1998) (fall in common area off roadway that extended around perimeter of premises not defined as walkway or passageway).

12 NYCRR 23-1.7(e)(1)—Protection in Construction, Demolition and Excavation Operations; Protection from general hazards; Tripping and other hazards; Passageways—§ 23-1.7(e)(1), which requires that “passageways” be kept free from accumulations of debris and other tripping hazards, was deemed sufficiently specific to support a Labor Law § 241(6) cause of action in the following cases: *Marshall v Glenman Industrial & Commercial Contractor Corp.*, 117 AD3d

1124, 985 NYS2d 169 (3d Dept 2014); *Mugavero v Windows By Hart, Inc.*, 69 AD3d 694, 894 NYS2d 448 (2d Dept 2010); *Scannell v Mt. Sinai Medical Center*, 256 AD2d 214, 683 NYS2d 18 (1st Dept 1998); *Herman v St. John's Episcopal Hosp.*, 242 AD2d 316, 678 NYS2d 635 (2d Dept 1997).

In the following cases, § 23-1.7(e)(1) was held applicable or potentially applicable to the particular facts: *Nicholson v Sabey Data Center Properties, LLC*, 205 AD3d 620, 169 NYS3d 292 (1st Dept 2022) (pallet jack allegedly engaged suddenly and jumped back, propelling plaintiff backwards and causing him to trip on loose pipe); *Armental v 401 Park Avenue South Associates, LLC*, 182 AD3d 405, 121 NYS3d 259 (1st Dept 2020) (issue of fact as to whether accident was caused by violation of regulation); *Sancino v Metropolitan Transportation Authority*, 184 AD3d 534, 124 NYS3d 534 (1st Dept 2020) (area where accident occurred was passageway for purposes of that provision); *Kaufman v Capital One Bank (USA) N.A.*, 188 AD3d 461, 131 NYS3d 887 (1st Dept 2020) (section applicable not only when hazard causes worker to trip or slip but where object being pushed becomes stuck on obstruction, causing it to tip over and injure worker); *Krzyzanowski v New York*, 179 AD3d 479, 118 NYS3d 10 (1st Dept 2020) (issue of fact as to whether masonite laid on floor was protective floor covering integral to work being done by plaintiff who was on site to perform painting); *Prevost v One City Block LLC*, 155 AD3d 531, 65 NYS3d 172 (1st Dept 2017) (where plaintiff slipped on loose piece of sprinkler pipe there was question of fact as to whether accident occurred in "passageway" or open area); *Pereira v New School*, 148 AD3d 410, 48 NYS3d 391 (1st Dept 2017) (plaintiff slipped on wet concrete and tripped on rebar; question of fact as to whether plaintiff's accident occurred in passageway); *Lois v Flintlock Const. Services, LLC*, 137 AD3d 446, 27 NYS3d 120 (1st Dept 2016) (plaintiff fell while walking in two- to three-foot space between two large piles of debris, which space he was required to pass through in order to access job site; whether accident characterized as slip and fall or trip and fall not dispositive); *Caudill v Rochester Institute of Technology*, 125 AD3d 1392, 4 NYS3d 408 (4th Dept 2015) (plaintiff stepped on softball-sized rock or clump of hard dirt while descending earthen ramp into trench); *Marshall v Glenman Industrial & Commercial Contractor Corp.*, 117 AD3d 1124, 985 NYS2d 169 (3d Dept 2014) (plaintiff, while utilizing a passageway commonly used by workers, tripped over projecting piece of sharp metal); *Carrera v Westchester Triangle Housing Development Fund Corp.*, 116 AD3d 585, 984 NYS2d 339 (1st Dept 2014) (plaintiff slipped and tripped in outdoor area on ground composed of dirt and rocks; rock on which plaintiff may have tripped was part of ground surface and cannot be considered accumulated debris); *DePaul v N.Y. Brush LLC*, 114 AD3d 609, 981 NYS2d 75 (1st Dept 2014) (accident occurred in open working area); *Harasim v Eljin Const. of New York, Inc.*, 106 AD3d

642, 966 NYS2d 387 (1st Dept 2013) (plaintiff allegedly slipped on stairway that was sole means of access to work site); *Crousett v Chen*, 102 AD3d 448, 958 NYS2d 105 (1st Dept 2013) (plaintiff testified that he cleared away electrical coils, boxes and other materials from work area before beginning work); *Aragona v State*, 74 AD3d 1260, 905 NYS2d 237 (2d Dept 2010) (questions of fact as to whether corridor created by lumber and construction material constituted “passageway” and whether padeye welded to deck of work barge was integral part of construction); *Kerins v Vassar College*, 293 AD2d 514, 740 NYS2d 400 (2d Dept 2002) (question of fact as to whether double doors used by workers to gain access from one worksite to another); *Colucci v Equitable Life Assur. Soc. of U.S.*, 218 AD2d 513, 630 NYS2d 515 (1st Dept 1995) (food left on floor on which plaintiff slipped constitutes “dirt” or “debris”); see *Smith v Monroe*, 229 AD2d 984, 645 NYS2d 258 (4th Dept 1996) (question of fact as to whether § 23-1.7(e)(1) applicable where plaintiff fell while walking down side of anchor trench).

In the following cases, § 23-1.7(e)(1) was held inapplicable to the particular facts: *Bazdaric v Almah Partners LLC*, 203 AD3d 643, 166 NYS3d 135 (1st Dept 2022) (painter precluded from recovering for tripping accident on heavy-duty plastic covering placed on escalator to protect it from dripping paint as plastic was integral to plaintiff’s work; escalator was work area, not passageway); *Kefaloukis v Mayer*, 197 AD3d 470, 148 NYS3d 906 (2d Dept 2021) (accident site not passageway where plaintiff tripped over bucket in middle of room); *Fonck v New York*, 198 AD3d 874, 156 NYS3d 308 (2d Dept 2021) (pool construction area not passageway); *Gancarz v Brooklyn Pier 1 Residential Owner, L.P.*, 190 AD3d 955, 140 NYS3d 268 (2d Dept 2021) (plaintiff allegedly slipped on wet paper in basement of construction site, which was open area and not passageway); *Singh v Manhattan Ford Lincoln, Inc.*, 188 AD3d 506, 132 NYS3d 287 (1st Dept 2020) (debris plaintiff slipped on located in open area and not passageway); *Mooney v BP/CG Center II, LLC*, 179 AD3d 490, 117 NYS3d 206 (1st Dept 2020) (single screw did not constitute accumulation of dirt and debris); *Spencer v Term Fulton Realty Corp.*, 183 AD3d 441, 123 NYS3d 599 (1st Dept 2020) (where plaintiff was injured when wheels of cart he was pushing became stuck, since neither he nor cart tripped or slipped); *St. John v Westwood-Squibb Pharmaceuticals, Inc.*, 138 AD3d 1501, 31 NYS3d 720 (4th Dept 2016) (parking lot not covered location); *DePaul v N.Y. Brush LLC*, 114 AD3d 609, 981 NYS2d 75 (1st Dept 2014) (despite evidence that defective plank was used by workers to get from street to jobsite, accident occurred in open working area); *Rodriguez v Dormitory Authority of State*, 104 AD3d 529, 962 NYS2d 102 (1st Dept 2013) (accident allegedly caused by one of several scaffold clips scattered in open working area); *Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 961 NYS2d 634 (4th Dept 2013) (passageway under regulation is defined

walkway or pathway used to traverse between discrete areas; parking lot not passageway because it was not defined and sidewalk at issue not passageway because plaintiff not using it to travel between work areas or between work area and parking lot where his vehicle was parked); *Johnson v 923 Fifth Ave. Condominium*, 102 AD3d 592, 959 NYS2d 146 (1st Dept 2013) (area of sidewalk where plaintiff was unloading materials not “passageway”); *Cody v State*, 82 AD3d 925, 919 NYS2d 55 (2d Dept 2011) (accident site was not a passageway but an open work area to which regulation did not apply); *Lech v Castle Village Owners Corp.*, 79 AD3d 819, 913 NYS2d 713 (2d Dept 2010) (sidewalk bridge, onto which scaffold was lowered, not passageway); *Aragona v State*, 74 AD3d 1260, 905 NYS2d 237 (2d Dept 2010) (padeye welded to deck of work barge not “sharp projection”); *Venezia v State*, 57 AD3d 522, 868 NYS2d 710 (2d Dept 2008) (plaintiff tripped on rebar that was integral part of work); *Verel v Ferguson Elec. Const. Co., Inc.*, 41 AD3d 1154, 838 NYS2d 280 (4th Dept 2007) (plaintiff working in large open area, not passageway; protruding electrical conduits over which plaintiff tripped were integral part of construction); *Burkowski v Structure Tone, Inc.*, 40 AD3d 378, 836 NYS2d 130 (1st Dept 2007) (plaintiff injured while working across room measuring 18 feet by 20 feet); *Smith v Hines GS Properties, Inc.*, 29 AD3d 433, 815 NYS2d 82 (1st Dept 2006) (open area between building under construction and materials storage trailers not passageway or walkway under § 23-1.7(e)(1), but might be “working area” under § 23-1.7(e)(2) because area provided workers’ only access to materials and, as such, was routinely traversed by workers; court notes conflict with decision in *Muscarella v Herbert Const. Co., Inc.*, 265 AD2d 264, 697 NYS2d 35 (1st Dept 1999)); *Appelbaum v 100 Church L.L.C.*, 6 AD3d 310, 774 NYS2d 705 (1st Dept 2004) (site of accident not “passageway”); *Dalanna v New York*, 308 AD2d 400, 764 NYS2d 429 (1st Dept 2003) (outdoor, 50-foot-long concrete slab regularly traversed to bring pipes to work area was “common, open area between job site and street” and not “passageway”); *Conway v Beth Israel Medical Center*, 262 AD2d 345, 691 NYS2d 576 (2d Dept 1999) (storage room not “passageway”); *Dacchille v Metropolitan Life Ins. Co.*, 262 AD2d 149, 692 NYS2d 47 (1st Dept 1999) (wire mesh storage area not “passageway”); *Maynard v De Curtis*, 252 AD2d 908, 676 NYS2d 340 (3d Dept 1998) (outdoors dirt pathway not “passageway”); *Cafarella v Harrison Radiator Div. of General Motors*, 237 AD2d 936, 654 NYS2d 910 (4th Dept 1997) (truck bed not “passageway”); *Adams v Glass Fab, Inc.*, 212 AD2d 972, 624 NYS2d 705 (4th Dept 1995) (“plaintiff not in passageway when he tripped”).

12 NYCRR 23-1.7(e)(2)—Protection in Construction, Demolition and Excavation Operations; Protection from general hazards; Tripping and other hazards; Working

areas—§ 23-1.7(e)(2), which requires that floors and similar work areas be kept free from materials and dirt and debris and from scattered tools and materials and from sharp projections, was deemed sufficiently specific to support a Labor Law § 241(6) cause of action in the following cases: *Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 71 NYS3d 31 (1st Dept 2018); *Lopez v New York City Dept. of Environmental Protection*, 123 AD3d 982, 999 NYS2d 848 (2d Dept 2014); *McDonagh v Victoria's Secret, Inc.*, 9 AD3d 395, 781 NYS2d 525 (2d Dept 2004); *O'Hare v New York*, 280 AD2d 458, 720 NYS2d 523 (2d Dept 2001); *White v Sperry Supply and Warehouse Inc.*, 225 AD2d 130, 649 NYS2d 236 (3d Dept 1996); *Baker v International Paper Co.*, 226 AD2d 1007, 641 NYS2d 206 (3d Dept 1996). In *McGrath v Lake Tree Village Associates*, 216 AD2d 877, 629 NYS2d 358 (4th Dept 1995), the court held that § 23-1.7(e)(2) applies to specific work areas such as floors, platforms and defined passageways, and not to common areas or an open yard in front of or between buildings.

In the following cases, § 23-1.7(e)(2) was held applicable or potentially applicable to the particular facts: *Nicholson v Sabey Data Center Properties, LLC*, 205 AD3d 620, 169 NYS3d 292 (1st Dept 2022) (pallet jack allegedly engaged suddenly and jumped back, propelling plaintiff backwards and causing him to trip on loose pipe; evidence of four or five loose pipes on floor may support finding of "scattered" material); *Ohadi v Magnetic Construction Group Corp.*, 182 AD3d 474, 122 NYS3d 612 (1st Dept 2020) (where plaintiff allegedly fell down staircase after slipping on dust and wet paint); *Armental v 401 Park Avenue South Associates, LLC*, 182 AD3d 405, 121 NYS3d 259 (1st Dept 2020) (issue of fact where plaintiff allegedly tripped on pile of loose pipes obstructing doorway); *Sande v Trinity Centre LLC*, 188 AD3d 505, 135 NYS3d 389 (1st Dept 2020) (fact that plaintiff tripped on electric box concealed by debris does not alter fact that debris was cause of accident); *Kaufman v Capital One Bank (USA) N.A.*, 188 AD3d 461, 131 NYS3d 887 (1st Dept 2020) (§ 23-1.7(e)(2) potentially applicable where dumpster plaintiff was pushing allegedly toppled after becoming stuck in door saddle; issue of fact as to whether accident caused by sharp projection); *Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 71 NYS3d 31 (1st Dept 2018) (where plaintiff injured when he stepped into hole in room strewn with construction debris and garbage, inference could be drawn that the debris and garbage obstructed his view of hole); *Lois v Flintlock Const. Services, LLC*, 137 AD3d 446, 27 NYS3d 120 (1st Dept 2016) (plastic tarp on which plaintiff slipped was not integral part of work); *Lopez v New York City Dept. of Environmental Protection*, 123 AD3d 982, 999 NYS2d 848 (2d Dept 2014) (plaintiff fell backward and was impaled by uncapped piece of vertical rebar); *Kolb v Lambert*, 116 AD3d 492, 983 NYS2d 551 (1st Dept 2014) (plaintiff tripped and fell over a 1- to 1 1/4-inch flooring differential in entranceway between kitchen and living

room during house renovation); *Gonzalez v Magestic Fine Custom Home*, 115 AD3d 798, 982 NYS2d 344 (2d Dept 2014) (question of fact as to whether electrical cable or wire on which plaintiff tripped was integral part of construction); *Smith v Nestle Purina Petcare Co.*, 105 AD3d 1384, 966 NYS2d 292 (4th Dept 2013) (worker tripped over hose); *Rodriguez v Dormitory Authority of State*, 104 AD3d 529, 962 NYS2d 102 (1st Dept 2013) (plaintiff allegedly tripped and fell on scaffold clips scattered across working area); *Riley v J.A. Jones Contracting, Inc.*, 54 AD3d 744, 865 NYS2d 225 (2d Dept 2008) (worker tripped on brick while working on scaffold; worker's supervisor allegedly refused to allow removal of bricks to conceal his own error); *Verel v Ferguson Elec. Const. Co., Inc.*, 41 AD3d 1154, 838 NYS2d 280 (4th Dept 2007) (plaintiff tripped over protruding electrical conduits, which were not dirt, debris or scattered material or tools); *Tighe v Hennegan Const. Co., Inc.*, 48 AD3d 201, 850 NYS2d 417 (1st Dept 2008) (electrician injured by debris accumulated as result of demolition; debris not integral part of work being performed by electrician); *Singh v Young Manor, Inc.*, 23 AD3d 249, 804 NYS2d 65 (1st Dept 2005) (plaintiff stepped on nail near pile of debris that had been accumulating for several days; hazard not integral part of plaintiff's work in light of accumulated debris); *Beltrone v New York*, 299 AD2d 306, 749 NYS2d 271 (2d Dept 2002) (leaking oil constitutes "debris"); *Canning v Barney's New York*, 289 AD2d 32, 734 NYS2d 116 (1st Dept 2001) (areas through which plaintiff was required to pass to reach work area constitutes "working area"); *Boss v Integral Const. Corp.*, 249 AD2d 214, 672 NYS2d 92 (1st Dept 1998) (piece of sheetrock on which plaintiff tripped constituted "debris" and "scattered material"); *Cafarella v Harrison Radiator Div. of General Motors*, 237 AD2d 936, 654 NYS2d 910 (4th Dept 1997) (plaintiff fell in rear bed of dump truck); *McCormack v Helmsley-Spear, Inc.*, 233 AD2d 203, 649 NYS2d 697 (1st Dept 1996) (mixed cement and mortar debris on scaffold); *McAndrew v Tennessee Gas Pipeline Co.*, 216 AD2d 876, 628 NYS2d 991 (4th Dept 1995) (plaintiff tripped over piece of wood partially buried in trench); see *Dowd v New York*, 40 AD3d 908, 837 NYS2d 668 (2d Dept 2007) (question of fact as to whether piece of wood embedded in trench or bent nail protruding from wood were "sharp projections"); see also *Smith v Hines GS Properties, Inc.*, 29 AD3d 433, 815 NYS2d 82 (1st Dept 2006) (open area between building under construction and materials storage trailers not a passageway or walkway under § 23-1.7(e)(1), but might be a "working area" under § 23-1.7(e)(2) because area provided workers' only access to materials and, as such, was routinely traversed by workers; court notes conflict with decision in *Muscarella v Herbert Const. Co., Inc.*, 265 AD2d 264, 697 NYS2d 35 (1st Dept 1999)).

In the following cases, § 23-1.7(e)(2) was held inapplicable to the particular facts: *Mateo v Iannelli Construction Co. Inc.*, 201

AD3d 411, 156 NYS3d 721 (1st Dept 2022) (air duct that plaintiff fell over was integral part of demolition work by plaintiff's employer); *Fonck v New York*, 198 AD3d 874, 156 NYS3d 308 (2d Dept 2021) (concealed pipe and plastic vapor barrier over which plaintiff tripped were permanent and integral part of what was being constructed and not debris or scattered materials); *Corona v HHSC 13th St. Dev. Corp.*, 197 AD3d 1025, 153 NYS3d 448 (1st Dept 2021) (where plaintiff's eye became impaled on tree guard after he slipped on wet two-by-fours, § 23-1.7(e)(2) not applicable because tree guard bore no relation to work being performed); *Kefaloukis v Mayer*, 197 AD3d 470, 148 NYS3d 906 (2d Dept 2021) (carpentry and painting tools were positioned for and consistent with work being performed and were not "scattered"); *Mooney v BP/CG Center II, LLC*, 179 AD3d 490, 117 NYS3d 206 (1st Dept 2020) (single screw on floor did not constitute sharp projection); *Spencer v Term Fulton Realty Corp.*, 183 AD3d 441, 123 NYS3d 599 (1st Dept 2020) (iron rods on floor, on which cart plaintiff was pushing allegedly became stuck, were integral to work); *St. John v Westwood-Squibb Pharmaceuticals, Inc.*, 138 AD3d 1501, 31 NYS3d 720 (4th Dept 2016) (parking lot did not constitute work area); *Desena v North Shore Hebrew Academy*, 119 AD3d 631, 989 NYS2d 505 (2d Dept 2014) (injuries caused by heavy block falling onto plaintiff's foot from unsecured pile on pallet); *Carrera v Westchester Triangle Housing Development Fund Corp.*, 116 AD3d 585, 984 NYS2d 339 (1st Dept 2014) (plaintiff slipped and tripped in outdoor area on ground composed of dirt and rocks; rock on which plaintiff may have tripped was part of ground surface and cannot be considered accumulated debris); *Harasim v Eljin Const. of New York, Inc.*, 106 AD3d 642, 966 NYS2d 387 (1st Dept 2013) (plaintiff alleged that he slipped on stairway but not over dirt, debris, scattered tools or sharp projections in work area); *Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 964 NYS2d 144 (1st Dept 2013) (accident involving collapse of floor not caused by scattered materials or tools); *Johnson v 923 Fifth Ave. Condominium*, 102 AD3d 592, 959 NYS2d 146 (1st Dept 2013) (even if sidewalk were deemed floor, platform or similar area where people work or pass, piece of plywood laid over sidewalk to protect it was integral part of work, not loose or scattered material); *Croussett v Chen*, 102 AD3d 448, 958 NYS2d 105 (1st Dept 2013) (plaintiff testified that he cleared away electrical coils, boxes and other materials from work area before beginning work); *Mendoza v Highpoint Associates, IX, LLC*, 83 AD3d 1, 919 NYS2d 129 (1st Dept 2011) (pipe with which plaintiff collided not tripping hazard, since it was in work area prior to commencement of work, not left there as a result of the work performed); *Cody v State*, 82 AD3d 925, 919 NYS2d 55 (2d Dept 2011) (lumber over which plaintiff-carpenter tripped was integral to plaintiff's work); *Lech v Castle Village Owners Corp.*, 79 AD3d 819, 913 NYS2d 713 (2d Dept 2010) (brick over which plaintiff tripped was integral part

of plaintiff's work); *Pope v Safety and Quality Plus, Inc.*, 74 AD3d 1040, 903 NYS2d 124 (2d Dept 2010) (worker fell from unguarded edge of elevated concrete platform while walking and talking to foreman); *Urban v No. 5 Times Square Development, LLC*, 62 AD3d 553, 879 NYS2d 122 (1st Dept 2009) (10- to 12-inch gap between building and catwalk not a condition that would cause tripping); *Hageman v Home Depot U.S.A., Inc.*, 45 AD3d 730, 846 NYS2d 302 (2d Dept 2007) (alleged tripping hazard integral part of work); *Romeo v Property Owner (USA) LLC*, 61 AD3d 491, 877 NYS2d 48 (1st Dept 2009) (opening created when a 2' by 2' tile resting 18 inches above subfloor became dislodged); *Santo v Scro*, 43 AD3d 897, 841 NYS2d 627 (2d Dept 2007) (bowed plank in scaffold on which plaintiff was working); *Vital v New York*, 43 AD3d 309, 842 NYS2d 363 (1st Dept 2007) (transient paper such as sandwich wrapper); *Burkowski v Structure Tone, Inc.*, 40 AD3d 378, 836 NYS2d 130 (1st Dept 2007) (accident resulting from four-foot-high stack of tiles of kind then being installed on floor of room where accident occurred); *Piazza v Frank L. Ciminelli Const. Co., Inc.*, 2 AD3d 1345, 770 NYS2d 504 (4th Dept 2003) (inhalation hazards from air contaminants); *Salinas v Barney Skanska Const. Co.*, 2 AD3d 619, 769 NYS2d 559 (2d Dept 2003) (debris created by plaintiff and co-workers integral part of work); *Dalanna v New York*, 308 AD2d 400, 764 NYS2d 429 (1st Dept 2003) (outdoor, 50-foot-long concrete slab regularly traversed to bring pipes to work area might qualify as "working area," but protruding bolt on which worker tripped was not "dirt," "debris," "scattered tools and materials" or "sharp projection"); *Harvey v Morse Diesel Intern., Inc.*, 299 AD2d 451, 750 NYS2d 117 (2d Dept 2002) (plaintiff electrician tripped over cable with which she was working); *Muscarella v Herbert Const. Co., Inc.*, 265 AD2d 264, 697 NYS2d 35 (1st Dept 1999) (open area where worker walked from job site to construction area was not floor, platform or similar working surface covered by rule); *Conway v Beth Israel Medical Center*, 262 AD2d 345, 691 NYS2d 576 (2d Dept 1999) (storage room not "working area" and dolly not "scattered tool"); *Dacchille v Metropolitan Life Ins. Co.*, 262 AD2d 149, 692 NYS2d 47 (1st Dept 1999) (wire mesh storage area not "working area"); *Sharrow v Dick Corp.*, 233 AD2d 858, 649 NYS2d 281 (4th Dept 1996) (object on which plaintiff fell was integral part of work); *Adams v Glass Fab, Inc.*, 212 AD2d 972, 624 NYS2d 705 (4th Dept 1995) (wire mesh placed on floor area where concrete was to be poured integral part of floor being constructed and not dirt, debris or scattered tools and materials).

12 NYCRR 23-1.7(f)—Protection in Construction, Demolition and Excavation Operations; Protection from general hazards; Vertical passage—*Sotarriba v 346 West 17th Street LLC*, 179 AD3d 599, 118 NYS3d 90 (1st Dept 2020) (§ 23-1.7(f), which requires that stairways, ramps or runways be

provided “as the means of access to working levels above or below ground,” not applicable to unguarded stairwell opening not being used as a means of access to the work areas); *Sawczynsyn v New York University*, 158 AD3d 510, 73 NYS3d 131 (1st Dept 2018) (§ 23-1.7[f] not applicable where plaintiff was traversing makeshift ramp bridging distance between truck bed and loading dock, which descended a vertical distance of 8 to 12 inches); *Sochan v Mueller*, 162 AD3d 1621, 78 NYS3d 608 (4th Dept 2018) (§ 23-1.7[f], which requires that stairways, ramps or runways be provided “as the means of access to working levels above or below ground,” sufficiently specific to support Labor Law § 241(6) cause of action and potentially applicable where plaintiff injured in process of accessing elevated loft area); *Trombley v DLC Elec., LLC*, 134 AD3d 1343, 21 NYS3d 498 (3d Dept 2015) (§ 23-1.7[f] not applicable where plaintiff not ascending or descending to different level); *Carrera v Westchester Triangle Housing Development Fund Corp.*, 116 AD3d 585, 984 NYS2d 339 (1st Dept 2014) (§ 23-1.7(f) not potentially applicable where area in which plaintiff slipped and tripped did not require plaintiff to gain access to working levels above or below ground); *Garcia v Neighborhood Partnership Housing Development Fund Co., Inc.*, 113 AD3d 494, 980 NYS2d 6 (1st Dept 2014) (§ 23-1.7(f), which requires that stairways, ramps or runways be provided “as the means of access to working levels above or below ground,” potentially applicable where it was unclear whether collapse caused by defective staircase or defective surrounding frame); *Harasim v Eljin Const. of New York, Inc.*, 106 AD3d 642, 966 NYS2d 387 (1st Dept 2013) (plaintiff allegedly slipped on stairway that was sole means of access to work site); *Harrison v State*, 88 AD3d 951, 931 NYS2d 662 (2d Dept 2011) (§ 23-1.7(f) inapplicable to worker injured while standing on deck of tugboat while attempting to move object from pier onto deck; deck was not a working level below ground); *Intelisano v Sam Greco Const., Inc.*, 68 AD3d 1321, 890 NYS2d 683 (3d Dept 2009) (§ 23-1.7(f) mandates specific conduct that may have been violated by failure to provide ladder to employee who had to climb to reach top of 10-foot high bundles resting on flatbed); *Harris v Hueber-Breuer Const. Co., Inc.*, 67 AD3d 1351, 890 NYS2d 235 (4th Dept 2009) (§ 23-1.7(f) applicable where plaintiff injured while attempting to descend multi-tier scaffold with allegedly inadequate planking); *Torkel v NYU Hospitals Center*, 63 AD3d 587, 883 NYS2d 8 (1st Dept 2009) (§ 23-1.7(f), where ramp merely bridged height differential between sidewalk curb and adjacent road surface); *McGarry v CVP 1 LLC*, 55 AD3d 441, 866 NYS2d 76 (1st Dept 2008) (§ 23-1.7(f) applicable where worker fell through unsafe temporary staircase used to access different working levels at work site); *Lee v Astoria Generating Co., L.P.*, 55 AD3d 124, 863 NYS2d 164 (1st Dept 2008), rev'd on other grounds, 13 NY3d 382, 892 NYS2d 294, 920 NE2d 350 (2009) (§ 23-1.7(f) potentially applicable where worker had to

climb approximately 15 feet to reach access hatch and then lower himself through hatch onto turbine shell and down to base of exhaust well, falling approximately eight feet in the process); *Conklin v Triborough Bridge and Tunnel Authority*, 49 AD3d 320, 855 NYS2d 54 (1st Dept 2008) (§ 23-1.7(f) applicable where worker allegedly slipped on muddy cross-piece of “chicken ladder” used as ramp and as sole access to employer’s shanty); *Amantia v Barden & Robeson Corp.*, 38 AD3d 1167, 833 NYS2d 784 (4th Dept 2007) (§ 23-1.7(f) inapplicable where worker fell while descending from cargo floor of truck, which was not a working level above ground); *Lavore v Kir Munsey Park 020, LLC*, 40 AD3d 711, 835 NYS2d 708 (2d Dept 2007) (§ 23-1.7(f) inapplicable where plaintiff fell when descending from side of truck bed, which was approximately five feet from ground); *Miano v Skyline New Homes Corp.*, 37 AD3d 563, 830 NYS2d 257 (2d Dept 2007) (§ 23-1.7(f) sufficiently specific to support Labor Law § 241(6) cause of action and applicable where worker fell backwards while descending temporary wooden forms he was using as means of access to basement worksite); *Farrell v Blue Circle Cement, Inc.*, 13 AD3d 1178, 787 NYS2d 773 (4th Dept 2004) (§ 23-1.7(f) inapplicable where accident occurred on truck scale, which is not above-ground working level requiring stairway, ramp or runway); *Smith v M.V. Woods Const. Co.*, 309 AD2d 1155, 764 NYS2d 749 (4th Dept 2003) (§ 23-1.7(f) may be used as predicate for recovery for back injury sustained when, as a result of a violation of the rule, injured worker was forced to throw cinder blocks up over his head and onto scaffold); *Gielow v Rosa Coplon Home*, 251 AD2d 970, 674 NYS2d 551 (4th Dept 1998) (§ 23-1.7(f) sets forth specific standards of conduct, but does not apply where plaintiff was not injured while attempting to access working levels above or below ground); *Akins v Baker*, 247 AD2d 562, 669 NYS2d 63 (2d Dept 1998) (§ 23-1.7(f) sets forth specific standards of conduct sufficient to support Labor Law § 241(6) cause of action).

12 NYCRR 23-1.7(g)—Protection in Construction, Demolition and Excavation Operations; Protection from general hazards; Air contaminated or oxygen deficient work areas—*Pittman v S.P. Lenox Realty, LLC*, 119 AD3d 846, 989 NYS2d 359 (2d Dept 2014) (§ 23-1.7(g), which requires testing of unventilated, confined areas where dangerous air contaminants may be present or where oxygen supply may be insufficient before any person is permitted or suffered to work in the area, inapplicable where defendant demonstrated that air contaminants not present and accident occurred in apartment, not in unventilated confined area such as a sewer, pit, tank, chimney or space with restricted means of egress) (citing §§ 12-1.3(f) and 23-2.8(a) [both defining “confined space”]); *Cerverizzo v New York*, 116 AD3d 469, 983 NYS2d 515 (1st Dept 2014) (§ 23-1.7(g), which requires testing of unventilated, confined ar-

eas where dangerous air contaminants may be present or where oxygen supply may be insufficient, applicable to empty aeration tank used to aerate and clean sewage; “confined” area, which is defined in § 12-1.3(f) as an area having “restricted means of egress,” does not require that space be accessible only through narrow opening; although top of tank was open to air, access was “restricted” because 20-foot ladder was needed to enter and exit tank); *Rivera v Ambassador Fuel and Oil Burner Corp.*, 45 AD3d 275, 845 NYS2d 25 (1st Dept 2007) (§ 23-1.7(g) sufficiently specific to support Labor Law § 241(6) cause of action and applicable to accident involving cleaning of fuel tank in unventilated room); *Osorio v Kenart Realty, Inc.*, 35 AD3d 561, 826 NYS2d 645 (2d Dept 2006) (§ 23-1.7(g) inapplicable where plaintiff testified that alleged contaminants were not present prior to commencement of work); *Mazzocchi v International Business Machines, Inc.*, 294 AD2d 151, 742 NYS2d 217 (1st Dept 2002) (discussing plaintiff’s failure to allege claim based on violation of § 23-1.7(g)).

12 NYCRR 23-1.7(h)—Protection in Construction, Demolition and Excavation Operations; Protection from General Hazards; Corrosive substances—*Flores v Infrastructure Repair Service, LLC*, 115 AD3d 543, 982 NYS2d 103 (1st Dept 2014) (§ 23-1.7(h), which provides that corrosive substances or chemicals be stored and used so as to not endanger any person, and requires protective equipment for use with corrosive substances or chemicals, inapplicable where unrefuted expert evidence showed that hot rubberized asphalt is not a corrosive or chemical substance); *Welsh v Cranesville Block Co. Inc.*, 258 AD2d 759, 685 NYS2d 825 (3d Dept 1999) (§ 23-1.7(h) provides basis for Labor Law § 241(6) cause of action).

12 NYCRR 23-1.8—Protection in Construction, Demolition and Excavation Operations; Personal protective equipment—*Pereira v Quogue Field Club of Quogue*, 71 AD3d 1104, 898 NYS2d 220 (2d Dept 2010) (§ 23-1.8, which mandates provision of certain personal safety equipment, not shown applicable where plaintiff was injured when he tried to use uncovered string-pull starter to start steamroller and his hand was pulled into rapidly moving pulley).

12 NYCRR 23-1.8(a)—Protection in Construction, Demolition and Excavation Operations; Personal protective equipment; Eye protection—*Langer v MTA Capital Construction Company*, 184 AD3d 401, 125 NYS3d 694 (1st Dept 2020) (§ 23-1.8[a], which requires that protective equipment be furnished when activity involves foreseeable risk of eye injury, sufficiently specific to support Labor Law § 241[6] cause of action, but inapplicable where plaintiff’s injuries were not the result of improper eyewear); *Pilato v Nigel Enterprises, Inc.*, 48 AD3d 1133, 850 NYS2d 799 (4th Dept 2008) (§ 23-

1.8(a) inapplicable where worker's eye injury allegedly occurred when he fell between ceiling joists and hit his face); *Fresco v 157 East 72nd Street Condominium*, 2 AD3d 326, 769 NYS2d 536 (1st Dept 2003) (whether there was a violation of § 23-1.8(a) is ordinarily a question of fact); *McByrne v Ambassador Construction Co., Inc.*, 290 AD2d 243, 736 NYS2d 17 (1st Dept 2002) (question of fact whether defendants violated § 23-1.8(a) where wire at work site struck plaintiff in eye); *McCune v Black River Constructors*, 225 AD2d 1078, 639 NYS2d 203 (4th Dept 1996) (question of fact whether defendants violated § 23-1.8(a) where plaintiff was drilling a hole in a concrete wall when he was struck in eye); *Crawford v Williams*, 198 AD2d 48, 603 NYS2d 456 (1st Dept 1993) (evidence at trial that plaintiff's employer directed plaintiff to do demolition work without safety glasses was sufficient to show a violation of 12 NYCRR 23-1.8(a)).

12 NYCRR 23-1.8(c)(1)—Protection in Construction, Demolition and Excavation Operations; Personal protective equipment; Protective apparel; Head protection—*Santana v MMF 1212 Assoc L.L.C.*, 190 AD3d 505, 135 NYS3d 825 (1st Dept 2021) (§ 23-1.8[c][1], which requires that workers be provided with approved safety hats when working in an area “where there is a danger of being struck by falling objects or materials,” potentially applicable where portion of ceiling allegedly fell on worker performing demolition work in apartment bathroom); *Emery v Steinway, Inc.*, 178 AD3d 613, 116 NYS3d 227 (1st Dept 2019) (§ 23-1.8[c][1] is sufficiently specific to support a Labor Law § 241[6] cause of action); *Rutkowski v New York Convention Center Development Corp.*, 146 AD3d 686, 46 NYS3d 54 (1st Dept 2017) (same); *Seales v Trident Structural Corp.*, 142 AD3d 1153, 38 NYS3d 49 (2d Dept 2016) (triable issues whether work on site had progressed to point that there was no longer danger of being struck by falling objects or materials); *Jackson v Heitman Funds/191 Colonie LLC*, 111 AD3d 1208, 976 NYS2d 283 (3d Dept 2013) (§ 23-1.8(c)(1) inapplicable where plaintiff was struck in head by handle of a roll carrier that moved rapidly upward when the roll carrier slipped on icy roof; plaintiff's expert did not state that plaintiff's work subjected him to type of hazards that would require hard hat); *Marin v AP-Amsterdam 1661 Park LLC*, 60 AD3d 824, 875 NYS2d 242 (2d Dept 2009) (§ 23-1.8(c)(1) potentially applicable where plaintiff was struck on head by previously attached bracket which became dislodged and where two similar brackets had fallen the same day; court distinguished § 23-1.7(a)(1), which applies only where work site is “normally exposed” to falling objects); *Spiegler v Gerken Bldg. Corp.*, 57 AD3d 514, 868 NYS2d 712 (2d Dept 2008) (§ 23-1.8(c)(1) inapplicable where worker injured when 10-foot vertical mounting channel he was securing to ground fell on his head); *Modeste v Mega Contracting, Inc.*, 40 AD3d 255, 835

NYS2d 156 (1st Dept 2007) (disapproved on other grounds in *Penaranda v 4933 Realty, LLC*, 118 AD3d 596, 991 NYS2d 30 (1st Dept 2014)) (§ 23-1.8(c)(1) inapplicable where worker's injuries occurred when he was thrown from the roof of a "Bobcat" and not as a result of a falling object or other head bumping hazard); *Sikorski v Burroughs Drive Apartments, Inc.*, 306 AD2d 844, 762 NYS2d 718 (4th Dept 2003) (§ 23-1.8(c)(1) is sufficiently specific to support a cause of action under Labor Law § 241(6), but is not applicable where injured worker was not working below the area from which the injury-producing item fell); *Singh v 106-108 Bayard Street Corp.*, 300 AD2d 31, 750 NYS2d 496 (1st Dept 2002) (§ 23-1.8(c)(1) is sufficiently specific to support Labor Law § 241(6) claim); *Lysiak v Murray Realty Co.*, 227 AD2d 746, 642 NYS2d 350 (3d Dept 1996) (§ 23-1.8(c)(1) is not intended to afford protection against hazard of falling tree).

12 NYCRR 23-1.8(c)(3)—Protection in Construction, Demolition and Excavation Operations; Personal protective equipment; Protective apparel; Waterproof clothing—*Langer v MTA Capital Construction Company*, 184 AD3d 401, 125 NYS3d 694 (1st Dept 2020) (§ 23-1.8(c)(3)), which provides that every employee required to work in rain, snow or similar wetting conditions be provided with waterproof coat, pants and hat, sufficiently specific to support Labor Law § 241(6) cause of action, but inapplicable where sludgy, oily water poured onto plaintiff, causing him to lose his balance, since his injuries were not the result of improper clothing).

12 NYCRR 23-1.8(c)(4)—Protection in Construction, Demolition and Excavation Operations; Personal protective equipment; Protective apparel; Protection from corrosive substances—*Kammerer v Mercado*, 195 AD3d 1513, 145 NYS3d 888 (4th Dept 2021) (§ 23-1.8(c)(4)), which requires that every employee required to use or handle corrosive substances or chemicals shall be provided with and shall be required to wear appropriate protective apparel as well as approved eye protection, inapplicable where caustic substance leaked from clogged pipe plaintiff was attempting to fix, since plaintiff was not required to "use or handle" the substance); *Flores v Infrastructure Repair Service, LLC*, 115 AD3d 543, 982 NYS2d 103 (1st Dept 2014) (§ 23-1.8(c)(4) inapplicable where unrefuted expert evidence showed that hot rubberized asphalt is not corrosive substance); *Welsh v Cranesville Block Co. Inc.*, 258 AD2d 759, 685 NYS2d 825 (3d Dept 1999) (§ 23-1.8(c)(4) applied to plaintiff allegedly injured from the corrosive effects of wet concrete that he was required to kneel in while performing work); *Creamer v Amsterdam High School*, 241 AD2d 589, 659 NYS2d 560 (3d Dept 1997) (§ 23-1.8(c)(4) is sufficiently specific and applies to plaintiff injured while handling heated asphalt).

12 NYCRR 23-1.9(c)(3)—Protection in Construction, Demolition and Excavation Operations; Drinking water and sanitation; Toilet facilities; Accessibility of toilet facilities—*Fox v Hydro Development Group, Inc.*, 222 AD2d 1124, 635 NYS2d 897 (4th Dept 1995) (§ 23-1.9(c)(3), is not a safety regulation but rather is a health regulation, mandating that facilities be located reasonably close to the worksite; regardless, it is not applicable because plaintiff was injured while waiting for a portable toilet to be vacated).

12 NYCRR 23-1.10(a)—Protection in Construction, Demolition and Excavation Operations; General Provisions; Hand Tools; Unpowered hand tools—*Boots v Bette & Cring, LLC*, 124 AD3d 1119, 3 NYS3d 141 (3d Dept 2015) (§ 23-1.10[a], which provides that edged tools shall be kept sharp and maintained free from burrs and mushroomed heads, and prohibits the use of tools with split or loose handles, is sufficiently specific to serve as a predicate for Labor Law § 241[6] claim, but regulation is inapplicable to injury caused by dysfunctional locking mechanism of utility knife, as mechanism is not split or loose tool handle).

12 NYCRR § 23-1.10(b)—Protection in Construction, Demolition and Excavation Operations; Hand tools; Electrical and pneumatic hand tools—*Coleman v ISG Lackawanna Services, LLC*, 74 AD3d 1825, 902 NYS2d 480 (4th Dept 2010) (§ 23-1.10(b), which prescribes standards of use for electrical and pneumatic hand tools, inapplicable where plaintiff injured while using diesel-powered water blasting unit); *Szafranski v Niagara Frontier Transp. Authority*, 5 AD3d 1111, 773 NYS2d 332 (4th Dept 2004) (neither air compressor nor gauge on air compressor is hand tool within the meaning of § 23-1.10(b)).

12 NYCRR § 23-1.10(b)(1)—Protection in Construction, Demolition and Excavation Operations; Hand tools; Electrical and pneumatic hand tools; Power shut-off requirements—*Rivera v 15 Broad Street, LLC*, 76 AD3d 621, 906 NYS2d 333 (2d Dept 2010) (§ 23-1.10(b)(1), which sets forth safety standards for disconnecting and shutting off electric and pneumatic hand tools, inapplicable to injuries arising from use of core drilling machine or core borer); *Shields v General Elec. Co.*, 3 AD3d 715, 771 NYS2d 249 (3d Dept 2004) (§ 23-1.10(b)(1) is sufficiently specific to support Labor Law § 241(6) claim).

12 NYCRR 23-1.11—Protection in Construction, Demolition and Excavation Operations; Lumber and nail fastenings—*DePaul v N.Y. Brush LLC*, 114 AD3d 609, 981 NYS2d 75 (1st Dept 2014) (§ 23-1.11(a), which requires that lumber used in construction of equipment or temporary structures be sound and free of defects that may impair lumber's strength, potentially applicable where defendant failed to show that accident not caused by unsound or defective lumber).

12 NYCRR 23-1.12(c)—Protection in Construction, Demolition and Excavation Operations; General provisions; Guarding of power-driven machinery; Power-driven saws—*Cabrera v Revere Condominium*, 91 AD3d 695, 937 NYS2d 98 (2d Dept 2012) (§ 23-1.12(c), which prescribes required safety features for certain power-driven saws, inapplicable to grinder); *Conforti v Bovis Lend Lease LMB, Inc.*, 37 AD3d 235, 829 NYS2d 498 (1st Dept 2007) (same).

12 NYCRR 23-1.12(c)(1)—Protection in Construction, Demolition and Excavation Operations; General provisions; Guarding of power-driven machinery; Power-driven saws—*Kelmendi v 157 Hudson Street, LLC*, 137 AD3d 567, 27 NYS3d 532 (1st Dept 2016) (§ 23-1.12[c][1], which requires that portable power driven hand-operated saw not provided with saw tables have fixed guards above the base plate and removable self-adjusting guards below the base plate, is sufficiently specific to support Labor Law § 241[6] cause of action; defendant could not avoid liability by providing saw that did not have base plate to accommodate guard); *Kruk v New York*, 112 AD3d 518, 977 NYS2d 233 (1st Dept 2013) (§ 23-1.12(c)(1) does not require provision of saw table); *Opalinski v New York*, 110 AD3d 694, 972 NYS2d 320 (2d Dept 2013) (§ 23-1.12(c)(1) relates to power-driven saws, not grinders); *Cabrera v Revere Condominium*, 91 AD3d 695, 937 NYS2d 98 (2d Dept 2012) (same; distinguishing *St. Louis v North Elba*, 16 NY3d 411, 923 NYS2d 391, 947 NE2d 1169 (2011)); *Haider v Davis*, 35 AD3d 363, 827 NYS2d 179 (2d Dept 2006) (§ 23-1.12(c)(1) sufficiently specific to support Labor Law § 241(6) cause of action).

12 NYCRR 23-1.12(c)(2)—Protection in Construction, Demolition and Excavation Operations; General provisions; Guarding of power-driven machinery—Power-driven saws—*Cruz v 1142 Bedford Avenue, LLC*, 192 AD3d 859, 145 NYS3d 77 (2d Dept 2021) (§ 23-1.12[c][2], which requires that power-driven saws other than portable saws be equipped with guards that cover saw blade so as to prevent contact with teeth, applicable where plaintiff injured by malfunctioning table saw lacking protective guard); *Sheng Hai Tong v K and K 7619, Inc.*, 144 AD3d 887, 41 NYS3d 266 (2d Dept 2016) (§ 23-1.12[c][2] was applicable where plaintiff was injured while using portable saw as makeshift table saw since courts consider function of equipment, not merely its name); *Ortega-Estrada v 215-219 West 145th Street LLC*, 118 AD3d 614, 987 NYS2d 845 (1st Dept 2014) (§ 23-1.12(c)(2) applicable where plaintiff injured while using table saw not equipped with blade guard); *Alameda-Cabrera v Noble Elec. Contracting Co., Inc.*, 117 AD3d 484, 985 NYS2d 497 (1st Dept 2014) (§ 23-1.12(c)(2) potentially applicable to injuries occurring when, following temporary power outage, plaintiff's hand and/or wood he was holding moved and drew his hand under unguarded miter saw).

12 NYCRR 23-1.12(c)(3)—Protection in Construction, Demolition and Excavation Operations; General provisions; Guarding of power-driven machinery—Power-driven saws—Table circular saws—*Cruz v 1142 Bedford Avenue, LLC*, 192 AD3d 859, 145 NYS3d 77 (2d Dept 2021) (§ 23-1.12[c][3], which requires that table circular saw used for ripping be provided with spreader fastened so as to prevent material kickback, applicable where plaintiff injured by malfunctioning table saw lacking spreader); *Ortega-Estrada v 215-219 West 145th Street LLC*, 118 AD3d 614, 987 NYS2d 845 (1st Dept 2014) (§ 23-1.12(c)(3) applicable where plaintiff injured while using table saw not equipped with spreader).

12 NYCRR 23-1.13—Electrical Hazards—*Vannname v Rochester Gas & Elec., Inc.*, 111 AD3d 1331, 974 NYS2d 714 (4th Dept 2013) (§ 23-1.13, which provides specific guidelines to protect workers against electrocution, inapplicable where defendant subject to jurisdiction of Public Service Commission); *Greenough v Niagara Mohawk Power Corp.*, 13 AD3d 1160, 787 NYS2d 762 (4th Dept 2004) (same, citing Public Service Law § 5(1)(d)); *Rice v Cortland*, 262 AD2d 770, 691 NYS2d 616 (3d Dept 1999) (§ 23-1.13 is a sufficiently specific safety directive to support cause of action under Labor Law § 241(6)).

12 NYCRR 23-1.13(b)(3)—Protection in Construction, Demolition and Excavation Operations; Electrical Hazards; Investigation and warning—Section 23-1.13(b)(3) requires that, before work is begun, the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool or machine into physical or electrical contact therewith, and shall post and maintain proper warning signs where such a circuit exists and shall advise employees of the locations of such lines, the hazards involved and the protective measures to be taken, see *Navedo v VNO 225 West 58th Street LLC*, 203 AD3d 406, 164 NYS3d 564 (1st Dept 2022) (§ 23-1.13[b][3] applicable where plaintiff electrocuted even though he touched safety cable not designed to carry electric charge because the electrocution was caused by a wire designed to carry a charge); *DelRosario v United Nations Federal Credit Union*, 104 AD3d 515, 961 NYS2d 389 (1st Dept 2013) (§ 23-1.13[b][3] sufficiently specific to support Labor Law § 241[6] and applicable where plaintiff struck by live exposed electrical wire while standing on ladder).

12 NYCRR 23-1.13(b)(4)—Protection in Construction, Demolition and Excavation Operations; Electrical Hazards; Protection of employees—Section 23-1.13(b)(4) provides that employees shall not work in such proximity to any part of an

electric power circuit that he or she may contact such circuit in the course of his or her work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means. The section further provides that, in work areas where the exact locations of underground electric power lines are unknown, persons using jack hammers, bars or other hand tools which may contact such power lines shall be provided with insulated protective gloves, body aprons and footwear, see *Navedo v VNO 225 West 58th Streel LLC*, 203 AD3d 406, 164 NYS3d 564 (1st Dept 2022) (§ 23-1.13[b][4] applicable where plaintiff electrocuted even though he touched safety cable not designed to carry electric charge because the electrocution was caused by a wire designed to carry a charge); *Higgins v TST 375 Hudson, L.L.C.*, 179 AD3d 508, 119 NYS3d 80 (1st Dept 2020) (§ 23-1.13[b][4] applicable where plaintiff was shocked by when he came into contact with live junction box while installing duct work); *Wolodin v Lehr Construction Corp.*, 177 AD3d 496, 114 NYS3d 300 (1st Dept 2019) (§ 23-1.13[b][4] violated as matter of law where insulation used to guard circuit did not protect worker who was required to cut through energized wires); *O'Leary v S & A Elec. Contracting Corp.*, 149 AD3d 500, 53 NYS3d 617 (1st Dept 2017) (§ 23-1.13[b][4] applicable where plaintiff was shocked by temporary electrical wiring); *Addonisio v New York*, 112 AD3d 554, 978 NYS2d 131 (1st Dept 2013) (§ 23-1.13[b][4] potentially applicable where plaintiff electrocuted when he cut with power saw into electrical cable encased in concrete conduit while excavating roadway); *DelRosario v United Nations Federal Credit Union*, 104 AD3d 515, 961 NYS2d 389 (1st Dept 2013) (§ 23-1.13[b][4] sufficiently specific to support Labor Law § 241[6] and applicable where plaintiff struck by live exposed electrical wire while standing on ladder); *Adams v Owens-Corning Fiberglass Corp.*, 260 AD2d 877, 688 NYS2d 788 (3d Dept 1999) (questions of fact existed with regard to whether defendant violated § 23-1.13[b][4]).

12 NYCRR 23-1.13(b)(5)—Protection in Construction, Demolition and Excavation Operations; Electrical Hazards; Guarding of switches or other circuit interrupting devices—Section 23-1.13(b)(5) provides that where protection for employees consists of de-energizing circuits, employers shall cause open switches or other circuit interrupting devices to be guarded against inadvertent closing until such employees are no longer exposed, see *Adams v Owens-Corning Fiberglass Corp.*, 260 AD2d 877, 688 NYS2d 788 (3d Dept 1999) (where wires became electrified while plaintiff was working on them questions of fact existed with regard to whether defendant violated § 23-1.13[b][5]).

12 NYCRR 23-1.15—Protection in Construction, Demoli-

tion and Excavation Operations; Safety railing—Section 23-1.15 prescribes standards for safety railings when such railing is required under Industrial Code, see *Rooney v D.P. Consulting Corp.*, 204 AD3d 428, 166 NYS3d 155 (1st Dept 2022) (§ 23-1.15(a) potentially applicable where plaintiff tripped on wooden ramp lacking safety railing); *Ramirez v Metropolitan Transp. Authority*, 106 AD3d 799, 965 NYS2d 156 (2d Dept 2013) (§ 23-1.15 inapplicable to accident occurring when plank in elevated catwalk broke and no allegation that railing failed); *Forschner v Jucca Co.*, 63 AD3d 996, 883 NYS2d 63 (2d Dept 2009) (§ 23-1.15 inapplicable where plaintiff not provided with safety railing); *Holly v Chautauqua*, 63 AD3d 1558, 881 NYS2d 741 (4th Dept 2009), rev'd on other grounds, 13 NY3d 931, 895 NYS2d 308, 922 NE2d 897 (2010) (same); *Ferluckaj v Goldman Sachs & Co.*, 53 AD3d 422, 862 NYS2d 473 (1st Dept 2008), rev'd on other grounds, 12 NY3d 316, 880 NYS2d 879, 908 NE2d 869 (2009) (same); *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 852 NYS2d 138 (2d Dept 2008) (same); *Dooley v Peerless Importers, Inc.*, 42 AD3d 199, 837 NYS2d 720 (2d Dept 2007) (same); *Garlow v Chappaqua Cent. School Dist.*, 38 AD3d 712, 832 NYS2d 627 (2d Dept 2007) (same); *Dzieran v 1800 Boston Road, LLC*, 25 AD3d 336, 808 NYS2d 36 (1st Dept 2006) (same); *Partridge v Waterloo Cent. School Dist.*, 12 AD3d 1054, 784 NYS2d 767 (4th Dept 2004) (same); *Wells v British American Development Corp.*, 2 AD3d 1141, 770 NYS2d 161 (3d Dept 2003) (§ 23-1.15 may provide basis for cause of action under Labor Law § 241(6) when considered in conjunction with failure to comply with § 23-1.7(b)(1), a regulation mandating that hazardous openings be guarded by fastened covers or safety railings); *Mazzu v Benderson Development Co., Inc.*, 224 AD2d 1009, 637 NYS2d 540 (4th Dept 1996) (plaintiff and co-worker were carrying scaffold between building and empty swimming pool at building renovation project when plaintiff stepped on edge of pool, the tile cracked, and he fell to bottom of pool; § 23-1.15 is specific and, along with § 23-1.7(b)(1), which governs “hazardous openings” sufficient to make out a prima facie case under § 241(6)).

12 NYCRR 23-1.15(c)—Protection in Construction, Demolition and Excavation Operations; Safety railing; Toe-board requirement—*Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 891 NYS2d 46 (1st Dept 2009) (§ 23-1.15(c), which requires that safety railings be constructed with a one-inch by four-inch toeboard except when railing is installed at grade or ground level or is not adjacent to any opening, pit or other area which may be occupied by any person, inapplicable where there were no workers below elevated platform on which plaintiff worked); *Shaheen v Hueber-Breuer Const. Co., Inc.*, 4 AD3d 761, 772 NYS2d 156 (4th Dept 2004) (§ 23-1.15(c), is sufficiently specific to support Labor Law § 241(6) claim).

12 NYCRR 23-1.16—Protection in Construction, Demoli-

tion and Excavation Operations; Safety belts, harnesses, tail lines and lifelines—Section 23-1.16 prescribes standards for safety belts, harnesses, tail lines, and lifelines, see *Venegas v Shymer*, 201 AD3d 1001, 157 NYS3d 765 (2d Dept 2022) (§ 23-1.16 inapplicable where plaintiff was not provided with any safety devices); *Ramirez v Metropolitan Transp. Authority*, 106 AD3d 799, 965 NYS2d 156 (2d Dept 2013) (§ 23-1.16 inapplicable where such devices were offered but plaintiff was not wearing one when he fell); *Thompson v Sithe/Independence, LLC*, 107 AD3d 1385, 967 NYS2d 279 (4th Dept 2013) (§ 23-1.16 inapplicable where drop line for attachment of safety harness had been removed in area where plaintiff was working; Code provision does not specify when enumerated safety devices are required); *Forschner v Jucca Co.*, 63 AD3d 996, 883 NYS2d 63 (2d Dept 2009) (§ 23-1.16 inapplicable where plaintiff not provided with such safety equipment); *Ferluckaj v Goldman Sachs & Co.*, 53 AD3d 422, 862 NYS2d 473 (1st Dept 2008), rev'd on other grounds, 12 NY3d 316, 880 NYS2d 879, 908 NE2d 869 (2009) (same); *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 852 NYS2d 138 (2d Dept 2008) (same); *Garlow v Chappaqua Cent. School Dist.*, 38 AD3d 712, 832 NYS2d 627 (2d Dept 2007) (same); *Dzieran v 1800 Boston Road, LLC*, 25 AD3d 336, 808 NYS2d 36 (1st Dept 2006) (same); *Partridge v Waterloo Cent. School Dist.*, 12 AD3d 1054, 784 NYS2d 767 (4th Dept 2004) (§ 23-1.16 does not prescribe when safety belts and other enumerated devices are required and therefore is inapplicable where such devices have not been provided); *Farmer v Central Hudson Gas & Elec. Corp.*, 299 AD2d 856, 750 NYS2d 407 (4th Dept 2002) (§ 23-1.16 is sufficiently specific to support Labor Law § 241(6) claim); *Mills v Niagara Mohawk Power Corp.*, 262 AD2d 901, 692 NYS2d 493 (3d Dept 1999) (§ 23-1.16 was sufficient to sustain cause of action under Labor Law § 241(6)); *Bennion v Goodyear Tire & Rubber Co.*, 229 AD2d 1003, 645 NYS2d 195 (4th Dept 1996) (§ 23-1.16[b] and [c] not applicable because plaintiff's accident did not involve faulty safety belt or lack of safety belt).

12 NYCRR 23-1.16(b)—Protection in Construction, Demolition, and Excavation Operations; Safety belts, harnesses, tail lines and lifelines—*Guaman v 178 Court Street, LLC*, 200 AD3d 655, 159 NYS3d 454 (2d Dept 2021) (issue of fact as to whether § 23-1.16[b], which requires use of safety belts and harnesses and provides that such equipment must be [a] properly attached either directly to securely anchored tail line, securely anchored hanging lifeline or tail line attached to securely anchored hanging lifeline and [b] arranged so as to preclude fall greater than five feet, was violated and whether such violation proximately caused accident where plaintiff allegedly fell through uncovered stairwell opening); *Stigall v State*, 189 AD3d 469, 136 NYS3d 275 (1st Dept 2020) (§ 23-1.16[b] applicable where worker attached to safety lanyard fell

more than five feet before striking the deck below); *Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 44 NYS3d 388 (1st Dept 2017) (§ 23-1.16(b) sufficiently specific to support Labor Law § 241(6) cause of action); *Jerez v Tishman Const. Corp. of New York*, 118 AD3d 617, 989 NYS2d 465 (1st Dept 2014) (§ 23-1.16(b) sufficiently specific to support Labor Law § 241(6) cause of action and potentially applicable where none of conditions specified in regulation were satisfied).

12 NYCRR 23-1.16(c)—Protection in Construction, Demolition and Excavation Operations; Safety belts, harnesses, tail lines and lifelines; Instruction in use—*Schutt v Bookhagen*, 186 AD3d 1027, 130 NYS3d 153 (4th Dept 2020) (§ 23-1.16(c), which requires instructed prior to use of safety belts and harnesses, is sufficiently specific to support a Labor Law § 241(6) cause of action but inapplicable where plaintiff alleged that he was not provided with a harness).

12 NYCRR 23-1.16(d)—Protection in Construction, Demolition and Excavation Operations; Safety belts, harnesses, tail lines and lifelines—Tail lines—*Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 891 NYS2d 46 (1st Dept 2009) (§ 23-1.16(d), which requires that tail lines not exceed four feet, applicable where plaintiff testified that his tail line was approximately six feet long and claimed the excess length was a cause of his injury).

12 NYCRR 23-1.16(f)(1)—Protection in Construction, Demolition and Excavation Operations; Safety belts, harnesses, tail lines and lifelines; Inspection and maintenance—*Bisram v Long Island Jewish Hosp.*, 116 AD3d 475, 983 NYS2d 518 (1st Dept 2014) (§ 23-1.16(f)(1), which requires inspection of safety belts, harnesses, tail lines and lifelines by designated person prior to each use and forbids use of such equipment showing excessive wear, damage or deterioration that could affect equipment's strength, applicable where provided devices failed to protect plaintiff from injury).

12 NYCRR 23-1.17—Protection in Construction, Demolition and Excavation Operations; Life nets—Section 23-1.17 prescribes standards for life nets, see *Venegas v Shymer*, 201 AD3d 1001, 157 NYS3d 765 (2d Dept 2022) (§ 23-1.17 inapplicable where plaintiff was not provided with any safety devices); *Ramirez v Metropolitan Transp. Authority*, 106 AD3d 799, 965 NYS2d 156 (2d Dept 2013) (§ 23-1.17 inapplicable where plaintiff working on elevated catwalk fell only a few feet and, thus, absence or failure of life net could not be proximate cause of his injuries); *Forschner v Jucca Co.*, 63 AD3d 996, 883 NYS2d 63 (2d Dept 2009) (§ 23-1.17 inapplicable where plaintiff not provided with such equipment); *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 852 NYS2d 138 (2d Dept 2008)

(same); *Dzieran v 1800 Boston Road, LLC*, 25 AD3d 336, 808 NYS2d 36 (1st Dept 2006) (same); *Bennion v Goodyear Tire & Rubber Co.*, 229 AD2d 1003, 645 NYS2d 195 (4th Dept 1996) (§ 23-1.17 not applicable because plaintiff was not using life net at time he fell); *Lawyer v Rotterdam Ventures Inc.*, 204 AD2d 878, 612 NYS2d 682 (3d Dept 1994) (§ 23-1.17 was not applicable where plaintiff, while erecting sign on front of building, fell from ladder when it slipped and collapsed).

12 NYCRR 23-1.18(c)(1)—Protection in Construction, Demolition and Excavation Operations; Personal protective equipment; protective apparel; head protection—Section 23-1.18(c)(1) requires every person required to work or pass within any area where there is a danger of being struck by falling objects or materials or where the hazard of head bumping exists to be provided with and required to wear an approved safety hat, see *Rooney v D.P. Consulting Corp.*, 204 AD3d 428, 166 NYS3d 155 (1st Dept 2022) (§ 23-1.18[c][1] inapplicable where no building or other structure was to be constructed or demolished).

12 NYCRR 23-1.20—Protection in Construction and Excavation Operation; Chutes—*Parrales v Wonder Works Const. Corp.*, 55 AD3d 579, 864 NYS2d 325 (2d Dept 2008) (§ 23-1.20, which prescribes safety standards for chutes, applicable where worker removing debris from bottom of old elevator shaft being used as chute injured by piece of wood that fell from higher floor); *Curley v Gateway Communications Inc.*, 250 AD2d 888, 672 NYS2d 523 (3d Dept 1998) (“chute” contemplated by § 23-1.20 is in the nature of conduit used to remove materials and debris from elevated levels of structure down to truck and is inapplicable to planks wedged against truck for purpose of unloading pipe from truck).

12 NYCRR 23-1.20(a)—Protection in Construction and Excavation Operation; Chutes; Chute Enclosures—*Rivas-Pichardo v 292 Fifth Avenue Holdings, LLC*, 198 AD3d 826, 156 NYS3d 85 (2d Dept 2021) (§ 23-1.20[a], which provides that chutes used for removal of material and debris from elevated levels of structure shall be entirely enclosed on all sides, except for openings used for the receiving and discharging of material and debris, which openings must be covered when not in use, potentially applicable where plaintiff struck by bricks dumped down elevator shaft being used as debris chute).

12 NYCRR 23-1.21—Protection in Construction, Demolition and Excavation Operations; Ladders and ladderways—*Evans v Syracuse Model Neighborhood Corp.*, 53 AD3d 1135, 862 NYS2d 425 (4th Dept 2008) (§ 23-1.21, which governs ladders, inapplicable where worker fell from “ladder pick” that

functioned as “sidewalk go[ing] from ladder to ladder”); *Maldonado v Townsend Ave. Enterprises*, 294 AD2d 207, 741 NYS2d 696 (1st Dept 2002) (§ 23-1.21 inapplicable where accident did not involve use of ladder).

12 NYCRR 23-1.21(a)—Protection in Construction, Demolition and Excavations Operations; Ladders and ladderways; Metal and fiberglass ladders—*Sochan v Mueller*, 162 AD3d 1621, 78 NYS3d 608 (4th Dept 2018) (§ 23-1.21(a), which requires that all metal and fiberglass ladders that are ten feet or longer be approved before use, not sufficiently specific to support Labor Law § 241(6) cause of action); *Arigo v Spencer*, 39 AD3d 1143, 834 NYS2d 805 (4th Dept 2007) (violation of § 23-1.21(a) not proximate cause of accident, which resulted from either plaintiff’s loss of footing on ladder or the ladder’s “kick[ing] out”).

12 NYCRR 23-1.21(b)—Protection in Construction, Demolition and Excavation Operations; Ladders and ladderways; General requirements for ladders—Section 23-1.21(b) sets forth general requirements for ladders, see *Singh v 180 Varick, LLC*, 203 AD3d 1194, 163 NYS3d 455 (2d Dept 2022) (§ 23-1.21[b] inapplicable where plaintiff fell from ladder due to his own loss of balance).

12 NYCRR 23-1.21(b)(1)—Protection in Construction, Demolition and Excavation Operations; Ladders and ladderways; General requirements for ladders; Strength—*Przyborowski v A & M Cook, LLC*, 120 AD3d 651, 992 NYS2d 56 (2d Dept 2014) (§ 23-1.21[b][1], which requires that ladders be capable of sustaining at least four times the maximum load to be placed thereon without breakage, dislodgment or loosening of component parts, sufficiently specific to support Labor Law § 241(6) claim; regulation potentially applicable where plaintiff fell from unsecured closed A-frame ladder); *Campos v 68 East 86th Street Owners Corp.*, 117 AD3d 593, 988 NYS2d 1 (1st Dept 2014) (§ 23-1.21(b)(1) not supportive of Labor Law § 241(6) cause of action where plaintiff testified that he had used ladder without incident before and there was no evidence that ladder unable to sustain plaintiff’s weight); *Croussett v Chen*, 102 AD3d 448, 958 NYS2d 105 (1st Dept 2013) (§ 23-1.21(b)(1) inapplicable where no evidence that ladder incapable of supporting four times maximum load intended to be supported thereon); *Riccio v NHT Owners, LLC*, 51 AD3d 897, 858 NYS2d 363 (2d Dept 2008) (§ 23-1.21(b)(1) sufficiently specific to support Labor Law § 241(6) cause of action); *Amantia v Barden & Robeson Corp.*, 38 AD3d 1167, 833 NYS2d 784 (4th Dept 2007) (§ 23-1.21(b)(1) inapplicable where worker used form for pouring concrete to assist him to climb down from truck’s cargo floor; form not a “ladder” within meaning of rule and, in any event, there was no evidence that accident related

to form's strength); *Santamaria v 1125 Park Ave. Corp.*, 249 AD2d 16, 670 NYS2d 844 (1st Dept 1998) (§ 23-1.21(b)(1) provides basis for liability under Labor Law § 241(6) where ladder did not comply with minimum strength standard specified in regulation).

12 NYCRR 23-1.21(b)(3)—Protection in Construction, Demolition and Excavation Operations; Ladders and ladders; General requirements for ladders; Maintenance and replacement—*Juchniewicz v Merex Food Corp.*, 46 AD3d 623, 848 NYS2d 255 (2d Dept 2007) (§ 23-1.21(b)(3), which provides that ladders must be maintained in good condition and cannot be used if they have broken members or parts, insecure joints between members or parts, wooden rungs or steps worn down to less than $\frac{3}{4}$ of their original thickness or any other flaw or material defect that can cause failure, inapplicable where plaintiff testified that he lost balance because of steel object that interfered with his grasping rung).

12 NYCRR 23-1.21(b)(3)(i)—Protection in Construction, Demolition and Excavation Operations; Ladders and ladders; General requirements for ladders; Maintenance and replacement—*Przyborowski v A & M Cook, LLC*, 120 AD3d 651, 992 NYS2d 56 (2d Dept 2014) (§ 23-1.21[b][3][i], which forbids use of ladder with broken parts or members, sufficiently specific to support Labor Law § 241[6] claim).

12 NYCRR 23-1.21(b)(3)(ii)—Protection in Construction, Demolition and Excavation Operations; Ladders and ladders; General Requirements for ladders; Maintenance and replacement—*Croussett v Chen*, 102 AD3d 448, 958 NYS2d 105 (1st Dept 2013) (§ 23-1.21(b)(3)(ii), which forbids use of a ladder with insecure joints between its members or parts, sufficiently specific to support Labor Law § 241(6) cause of action but inapplicable where plaintiff testified that he opened and set up ladder without incident, that the aluminum side supports were in working order and that ladder had four rubber footings).

12 NYCRR 23-1.21(b)(3)(iv)—Protection in Construction, Demolition and Excavation Operations; Ladders and ladders; General requirements for ladders; Maintenance and replacement—*Zimmer v Town of Lancaster Indus. Development Agency*, 125 AD3d 1315, 3 NYS3d 815 (4th Dept 2015) (§ 23-1.21[b][3][iv], which forbids use of a ladder having any flaw or defect in material that could cause ladder to fail, inapplicable to icing condition in ladder's locking mechanism; icing of locks not flaw or defect of material in ladder); *Przyborowski v A & M Cook, LLC*, 120 AD3d 651, 992 NYS2d 56 (2d Dept 2014) (§ 23-1.21[b][3][iv], sufficiently specific to support Labor Law § 241[6] claim); *Campos v 68 East 86th*

Street Owners Corp., 117 AD3d 593, 988 NYS2d 1 (1st Dept 2014) (§ 23-1.21(b)(3)(iv) not supportive of Labor Law § 241(6) cause of action where plaintiff testified that he had used ladder without incident before and there was no evidence that ladder not in good condition); Croussett v Chen, 102 AD3d 448, 958 NYS2d 105 (1st Dept 2013) (§ 23-1.21(b)(3)(iv) sufficiently specific to support Labor Law § 241(6) cause of action, but inapplicable where plaintiff testified that he opened and set up ladder without incident, that the aluminum side supports in working order and that ladder had four rubber footings); Hossain v Kurzynowski, 92 AD3d 722, 939 NYS2d 89 (2d Dept 2012) (§ 23-1.21(b)(3)(iv) sufficiently specific to support Labor Law § 241(6) cause of action; regulation applicable where rubber had worn away from feet of ladder); Melchor v Singh, 90 AD3d 866, 935 NYS2d 106 (2d Dept 2011) (violation of regulation established by plaintiff's testimony that plastic at top of ladder "wasn't any good anymore" and that feet of ladder were old and "weren't any good"); Riccio v NHT Owners, LLC, 51 AD3d 897, 858 NYS2d 363 (2d Dept 2008) (§ 23-1.21(b)(3)(iv) sufficiently specific to support Labor Law § 241(6) cause of action); De Oliveira v Little John's Moving, Inc., 289 AD2d 108, 734 NYS2d 165 (1st Dept 2001) (§ 23-1.21(b)(3)(iv) provides basis for liability under Labor Law § 241(6)).

12 NYCRR 23-1.21(b)(4)(i)—Protection in Construction, Demolition and Excavation Operations; Ladders and ladders; General requirements for ladders; Installation and use—Artoglou v Gene Scappy Realty Corp., 57 AD3d 460, 869 NYS2d 172 (2d Dept 2008) (§ 23-1.21(b)(4)(i)), which requires that portable ladders regularly used as access between floors or levels be nailed or otherwise securely fastened, inapplicable where worker used ladder to gain access to roof to perform his work); Egan v Monadnock Const., Inc., 43 AD3d 692, 841 NYS2d 547 (1st Dept 2007) (§ 23-1.21(b)(4) inapplicable where worker used A-frame ladder as makeshift means of descending to basement); Arigo v Spencer, 39 AD3d 1143, 834 NYS2d 805 (4th Dept 2007) (§ 23-1.21(b)(4)(i) inapplicable where ladder was used to climb from porch roof to building's second-story roof); Amantia v Barden & Robeson Corp., 38 AD3d 1167, 833 NYS2d 784 (4th Dept 2007) (§ 23-1.21(b)(4)(i) inapplicable where form worker used to assist him to climb down from truck's cargo floor not used as regular means of access between floors or levels of a building); Kinsler v Lu-Four Associates, 215 AD2d 631, 628 NYS2d 303 (2d Dept 1995) (plaintiff who was injured when unsecured ladder slipped stated a cause of action under Labor Law § 241(6) based on a violation of § 23-1.21(b)(4)(i)).

12 NYCRR 23-1.21(b)(4)(ii)—Protection in Construction, Demolition and Excavation Operations; Ladders and ladders; General requirements for ladders; Installation

and use—Cordova v 653 Eleventh Avenue LLC., 190 AD3d 637, 140 NYS3d 230 (1st Dept 2021) (§ 23-1.21[b][4][ii], which requires that “[a]ll ladder footings shall be firm” and that “[s]lippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings,” inapplicable where photographs demonstrated that ladder was not placed on slippery surface, had appropriate rubber feet, and no unsecured objects were used as footings); Przyborowski v A & M Cook, LLC, 120 AD3d 651, 992 NYS2d 56 (2d Dept 2014) (§ 23-1.21[b][4][ii] sufficiently specific to support Labor Law § 241[6] claim); Campos v 68 East 86th Street Owners Corp., 117 AD3d 593, 988 NYS2d 1 (1st Dept 2014) (§ 23-1.21(b)(4)(ii) not supportive of Labor Law § 241(6) cause of action where plaintiff testified that he had used ladder without incident before and there was no evidence that ladder not in good condition, or that floor underneath it was slippery); Estrella v GIT Industries, Inc., 105 AD3d 555, 963 NYS2d 110 (1st Dept 2013) (§ 23-1.21(b)(4)(ii) potentially applicable where unsecured ladder on which plaintiff stood suddenly moved and defendant failed to show that ladder complied with firm-footing requirement); Croussett v Chen, 102 AD3d 448, 958 NYS2d 105 (1st Dept 2013) (§ 23-1.21(b)(4)(ii) sufficiently specific to support Labor Law § 241(6) cause of action but inapplicable where plaintiff testified that he opened and set up ladder without incident and that ladder had four rubber footings); Melchor v Singh, 90 AD3d 866, 935 NYS2d 106 (2d Dept 2011) (§ 23-1.21(b)(4)(ii) applicable where plaintiff fell because unsecured ladder, which had old and worn feet that compelled plaintiff to attempt to secure ladder by placing small blocks at its bottom, slipped out from under him); Kwang Ho Kim v D & W Shin Realty Corp., 47 AD3d 616, 852 NYS2d 138 (2d Dept 2008) (§ 23-1.21(b)(4)(ii) applicable where plaintiff fell because unsecured ladder slipped out from under him); Arigo v Spencer, 39 AD3d 1143, 834 NYS2d 805 (4th Dept 2007) (§ 23-1.21(b)(4)(ii) inapplicable where record established that ladder was not placed on slippery or unstable object); Sprague v Peckham Materials Corp., 240 AD2d 392, 658 NYS2d 97 (2d Dept 1997) (§ 23-1.21(b)(4)(ii) sufficiently specific to support Labor Law § 241(6) cause of action).

12 NYCRR 23-1.21(b)(4)(iii)—Protection in Construction, Demolition and Excavation Operations; Ladders and ladderways, General requirements for ladders; Installation and use—Kwang Ho Kim v D & W Shin Realty Corp., 47 AD3d 616, 852 NYS2d 138 (2d Dept 2008) (§ 23-1.21(b)(4)(iii) which requires that leaning ladders be rigid enough to prevent excessive sag under expected maximum loading conditions, inapplicable where plaintiff fell because unsecured ladder slipped out from under him).

12 NYCRR 23-1.21(b)(4)(iv)—Protection in Construction,

Demolition and Excavation Operations; Ladders and ladders; General Requirements for ladders; Installation and use—*Cordova v 653 Eleventh Avenue LLC.*, 190 AD3d 637, 140 NYS3d 230 (1st Dept 2021) (§ 23-1.21(b)(4) inapplicable where ladder was used to reach sidewalk bridge where plaintiff was working and work was not being performed “from a ladder”); *Grant v New York*, 109 AD3d 961, 972 NYS2d 86 (2d Dept 2013) (§ 23-1.21(b)(4)(iv) applicable where plaintiff fell from unsecured ladder); *Torres v Perry Street Development Corp.*, 104 AD3d 672, 960 NYS2d 450 (2d Dept 2013) (§ 23-1.21(b)(4)(iv) potentially applicable where plaintiff allegedly injured when ladder he walked past and worker standing on it fell on him; fact that plaintiff not on ladder at time of the accident does not preclude recovery under Rule); *Melchor v Singh*, 90 AD3d 866, 935 NYS2d 106 (2d Dept 2011) (§ 23-1.21(b)(4)(iv) applicable where plaintiff was working at a height at which certain protective measures were required but not provided); *Deshields v Carey*, 69 AD3d 1191, 897 NYS2d 254 (3d Dept 2010) (§ 23-1.21(b)(4)(iv) sufficiently specific to support Labor Law § 241(6) cause of action and applicable where plaintiff injured when closed A-frame ladder leaning against spherical boiler collapsed as he attempted to climb it); *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 852 NYS2d 138 (2d Dept 2008) (§ 23-1.21(b)(4)(iv) inapplicable where there was no claim that upper end of ladder slipped); *Arigo v Spencer*, 39 AD3d 1143, 834 NYS2d 805 (4th Dept 2007) (§ 23-1.21(b)(4)(iv), which applies only when work is performed from ladder, inapplicable where ladder used as means of access to building’s roof and not as platform for work); *Montalvo v J. Petrocelli Const., Inc.*, 8 AD3d 173, 780 NYS2d 558 (1st Dept 2004) (§ 23-1.21(b)(4)(iv) has concrete specifications sufficient to support Labor Law § 241(6) cause of action).

12 NYCRR 23-1.21(b)(4)(v)—Protection in Construction, Demolition and Excavation Operations; Ladders and ladder underways; General Requirements for ladders; Installation and use—*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 852 NYS2d 138 (2d Dept 2008) (§ 23-1.21(b)(4)(v), which requires that upper end of any ladder leaning against slippery surface be mechanically secured against side slip while work being performed from ladder, inapplicable where plaintiff fell because unsecured ladder slipped out from under him and there was no claim that upper end of ladder slipped); *Arigo v Spencer*, 39 AD3d 1143, 834 NYS2d 805 (4th Dept 2007) (§ 23-1.21(b)(4)(v), which applies only when work is performed from ladder, inapplicable where ladder used as means of access to building’s roof and not as platform for work); *Amantia v Barden & Robeson Corp.*, 38 AD3d 1167, 833 NYS2d 784 (4th Dept 2007) (§ 23-1.21(b)(4)(v) inapplicable where worker used form for pouring concrete to assist him to climb down from truck’s cargo floor; form not a “ladder” within mean-

ing of rule and, in any event, there was no evidence that form was leaned against slippery surface).

12 NYCRR 23-1.21(b)(9)—Protection in Construction, Demolition and Excavation Operations; Ladders and ladder underways; General requirements for ladders; Installation and use—*Riffo-Veloza v Scarsdale*, 68 AD3d 839, 891 NYS2d 418 (2d Dept 2009) (§ 23-1.21(b)(9), which provides that ladders shall not be placed in door openings unless the doors are securely fastened open, closed and locked or otherwise effectively guarded against swinging, applicable where worker fell from extension ladder leaning against or just above newly-installed garage door when garage door unexpectedly started to lift open).

12 NYCRR 23-1.21(c)—Protection in Construction; Ladders and ladderways; Single ladders—*Sochan v Mueller*, 162 AD3d 1621, 78 NYS3d 608 (4th Dept 2018) (§ 23-1.21(c), which pertains to single ladders, applicable where plaintiff used top half of extension ladder as single ladder).

12 NYCRR 23-1.21(c)(2)(ii)(a)—Protection in Construction; Ladders and ladderways; Single ladders; Cleat-type ladders, Construction—*Potter v NYC Partnership Housing Development Fund Co., Inc.*, 13 AD3d 83, 786 NYS2d 438 (1st Dept 2004) (violation of § 23-1.21(c)(2)(ii)(a), which requires that ladder rungs be between 12 and 14 inches apart, may be established prima facie by affidavit of expert who reviewed photographs of ladder).

12 NYCRR 23-1.21(d)—Protection in Construction; Ladders and ladderways; Extension ladders and sectional ladders—*Sochan v Mueller*, 162 AD3d 1621, 78 NYS3d 608 (4th Dept 2018) (§ 23-1.21(d), which pertains to extension ladders and sectional ladders, not applicable where plaintiff used top half of extension ladder as single ladder).

12 NYCRR 23-1.21(d)(2)—Protection in Construction, Demolition and Excavation Operations; Ladders and ladderways; Extension ladders and sectional ladders; Adjustment guides—*Zimmer v Town of Lancaster Indus. Development Agency*, 125 AD3d 1315, 3 NYS3d 815 (4th Dept 2015) (§ 23-1.21[d][2], which requires that adjustment guides on extension ladders be so attached to rails as to prevent upper sections from tipping or falling out while in use or during adjustment and further requires that, while extended, each upper section be locked in place by two automatic positive acting locks, potentially applicable where automatic positive acting locks, which were designed to prevent or halt the uncontrolled retraction of the upper extension, were iced-over at time of accident because ladder was stored outside night before); *Deshields*

v Carey, 69 AD3d 1191, 897 NYS2d 254 (3d Dept 2010) (§ 23-1.21(d)(2) potentially applicable where evidence insufficient to establish that supplied hooks were automatic and locked in place when ladder extended).

12 NYCRR 23-1.21(e)(2)—Protection in Construction, Demolition and Excavation Operations; Ladder and ladders; Stepladders; Bracing—*Przyborowski v A & M Cook, LLC*, 120 AD3d 651, 992 NYS2d 56 (2d Dept 2014) (§ 23-1.21[e][2], which requires that “[s]uch bracing as may be necessary for rigidity shall be provided for every stepladder,” sufficiently specific to support Labor Law § 241(6) claim); *Croussett v Chen*, 102 AD3d 448, 958 NYS2d 105 (1st Dept 2013) (§ 23-1.21(e)(2) not sufficiently specific to support Labor Law § 241(6) cause of action); *Fairchild v Servidone Const. Corp.*, 288 AD2d 665, 733 NYS2d 735 (3d Dept 2001) (abrogated by, *Misicki v Caradonna*, 12 NY3d 511, 882 NYS2d 375, 909 NE2d 1213 (2009)) (same).

12 NYCRR 23-1.21(e)(3)—Protection in Construction, Demolition and Excavation Operations; Ladders and ladders; Stepladders; Stepladder footing—Section 23-1.21(e)(3) requires that standing stepladders be used only on firm, level footings and that work performed from a step of a stepladder 10 feet or more above the footing either be steadied by a person standing at foot or secured against sway by mechanical means, see *McNamara v Gusmar Enterprises, LLC*, 204 AD3d 779, 167 NYS3d 123 (2d Dept 2022) (§ 23-1.21(e)(3) potentially applicable where plaintiff fell from A-frame ladder while making alterations to fire sprinkler system); *Schroeder v Kalenak Painting & Paperhanging, Inc.*, 27 AD3d 1097, 811 NYS2d 240 (4th Dept) (holding that § 23-1.21(e)(3) is sufficiently specific to support Labor Law § 241(6) cause of action, but rejecting plaintiff’s claim as speculative), *aff’d*, 7 NY3d 797, 821 NYS2d 804, 854 NE2d 1268 (2006); *Vega v Renaissance 632 Broadway, LLC*, 103 AD3d 883, 962 NYS2d 200 (2d Dept 2013) (§ 23-1.21(e)(3) inapplicable to accident involving ladder that was 6- to 8-feet high where plaintiff was standing less than 10 feet above footing); *Croussett v Chen*, 102 AD3d 448, 958 NYS2d 105 (1st Dept 2013) (§ 23-1.21(e)(3) sufficiently specific to support Labor Law § 241(6) cause of action but inapplicable where plaintiff testified that he opened and set up ladder without incident, that the aluminum side supports in working order and that ladder had four rubber footings); *Losurdo v Skyline Associates, L.P.*, 24 AD3d 1235, 807 NYS2d 249 (4th Dept 2005) (§ 23-1.21(e)(3) sufficiently specific to support Labor Law § 241(6) cause of action); *Enderlin v Hebert Indus. Insulation, Inc.*, 224 AD2d 1020, 638 NYS2d 262 (4th Dept 1996) (§ 23-1.21(e)(3), whose purpose is to protect workers from hazards arising from the movement of unsecured stepladders, is specific enough to support Labor Law § 241(6) cause of ac-

tion, but not applicable because there was no evidence stepladder moved before or after plaintiff was injured).

12 NYCRR 23-1.22—Protection in Construction, Demolition and Excavation Operations; Structural runways, ramps and platforms—Curley v Gateway Communications Inc., 250 AD2d 888, 672 NYS2d 523 (3d Dept 1998) (ramps, runways or platforms contemplated by § 23-1.22 are those used to transport vehicular and/or pedestrian traffic, not ones constructed to remove pipe from level of flatbed truck to ground); Bennion v Goodyear Tire & Rubber Co., 229 AD2d 1003, 645 NYS2d 195 (4th Dept 1996) (§ 23-1.22 not applicable because plaintiff's accident did not involve collapse of platform).

12 NYCRR 23-1.22(b)—Protection in Construction, Demolition and Excavation Operations; Structural runways, ramps and platforms—Davies v Simon Property Group, Inc., 174 AD3d 850, 107 NYS3d 341 (2d Dept 2019) (§ 23-1.22(b), which establishes standards for ramps used by motor trucks or heavier vehicles, wheelbarrows, power buggies, hand carts or hand trucks or by persons only, sufficiently specific to support Labor Law § 241(6) cause of action); Torkel v NYU Hospitals Center, 63 AD3d 587, 883 NYS2d 8 (1st Dept 2009) (§ 23-1.22(b) inapplicable where ramps in question used by workers to move wheeled dumpsters).

12 NYCRR 23-1.22(b)(1)—Protection in Construction, Demolition and Excavation Operations; Structural runways, ramps and platforms; construction and bracing—Seem v Premier Camp Company, LLC, 200 AD3d 921, 161 NYS3d 117 (2d Dept 2021) (§ 23-1.22(b)(1), which establishes standards for ramps used by motor trucks or heavier vehicles, may be sufficiently specific to support Labor Law § 241(6) cause of action in case where dump truck plaintiff was operating toppled over while in process of unloading 60,000 pounds of gravel).

12 NYCRR 23-1.22(b)(2)—Protection in Construction, Demolition and Excavation Operations; Runways and ramps—O'Hare v New York, 280 AD2d 458, 720 NYS2d 523 (2d Dept 2001) (§ 23-1.22(b)(2), which establishes standards for construction of runways and ramps to be used by individuals, sets forth specific standards of conduct).

12 NYCRR 23-1.22(b)(3)—Protection in Construction, Demolition and Excavation Operations; Runways and ramps—Sawczynszyn v New York University, 158 AD3d 510, 73 NYS3d 131 (1st Dept 2018) (§ 23-1.22(b)(3), which establishes standards for construction of ramps for wheelbarrows, power buggies, hand carts and hand trucks, sufficiently specific to support Labor Law § 241[6] cause of action and applicable

where plaintiff was injured while pulling four-wheeled plastic cart containing construction materials over temporary make-shift plywood ramp bridging loading dock and truck bed); *Arrasti v HRH Const. LLC*, 60 AD3d 582, 876 NYS2d 373 (1st Dept 2009) (§ 23-1.22(b)(3) sufficiently specific to support Labor Law § 241(6) cause of action and applicable where plaintiff claimed ramp from which he fell while wheeling loaded A-frame cart did not comply with prescribed standards).

12 NYCRR 23-1.22(b)(4)—Protection in Construction, Demolition and Excavation Operations; Runways and ramps—*Amantia v Barden & Robeson Corp.*, 38 AD3d 1167, 833 NYS2d 784 (4th Dept 2007) (§ 23-1.22(b)(4), which requires safety railings on runways and ramps located more than four feet above the ground, grade or floor, inapplicable where form worker used to assist him to climb down from truck's cargo floor not four feet from ground below).

12 NYCRR 23-1.22(c)—Protection in Construction, Demolition and Excavation Operations; Structural runways, ramps and platforms; Platforms—*Sotarriba v 346 West 17th Street LLC*, 179 AD3d 599, 118 NYS3d 90 (1st Dept 2020) (§ 23-1.22(c), which sets safety standards for platforms used to transport vehicular and pedestrian traffic, inapplicable where plaintiff fell through unguarded stairwell opening); *Mutadir v 80-90 Maiden Lane Del LLC*, 110 AD3d 641, 974 NYS2d 364 (1st Dept 2013) (§ 23-1.22(c) inapplicable where plaintiff fell from milk crates on which he was standing to install "slot boards" for shelves on interior walls); *Vislocky v New York*, 62 AD3d 785, 879 NYS2d 176 (2d Dept 2009) (§ 23-1.22(c) inapplicable to 20-foot-high concrete pedestal on which plaintiff stood as he applied jackhammer to rebars installed in center of pedestal); *Pilato v Nigel Enterprises, Inc.*, 48 AD3d 1133, 850 NYS2d 799 (4th Dept 2008) (§ 23-1.22(c) inapplicable where plaintiff claimed that he fell between ceiling joists); *Dzieran v 1800 Boston Road, LLC*, 25 AD3d 336, 808 NYS2d 36 (1st Dept 2006) (§ 23-1.22(c) applies only to platforms used to transport vehicular and pedestrian traffic and is therefore inapplicable to platform being constructed for storage purposes); *Olson v Pyramid Crossgates Co.*, 291 AD2d 706, 738 NYS2d 430 (3d Dept 2002) (§ 23-1.22(c) applicable only to platforms whose purpose is to facilitate work by supporting workers or their materials); *Curley v Gateway Communications Inc.*, 250 AD2d 888, 672 NYS2d 523 (3d Dept 1998) (same); *Bryant v General Elec. Co.*, 221 AD2d 687, 633 NYS2d 410 (3d Dept 1995) (§ 23-1.22(c) specifically addresses standards applicable to platforms used as a work area; questions of fact exist whether the pipe plaintiff straddled constituted a "platform").

12 NYCRR 23-1.22(c)(1)—Protection in Construction, Demolition and Excavation Operations; Structural run-

ways, ramps and platforms; Platform; Platforms used as working or unloading areas—Seem v Premier Camp Company, LLC, 200 AD3d 921, 161 NYS3d 117 (2d Dept 2021) (§ 23-1.22(c)(1), which prescribes standards for planking on platforms used as working areas or for unloading, may be sufficiently specific to support Labor Law § 241(6) cause of action in case where dump truck plaintiff was operating toppled over while in process of unloading 60,000 pounds of gravel); Ramirez v Metropolitan Transp. Authority, 106 AD3d 799, 965 NYS2d 156 (2d Dept 2013) (§ 23-1.22(c) potentially applicable to accident occurring when plank in catwalk used over elevated subway track broke).

12 NYCRR 23-1.23—Protection in Construction, Demolition and Excavation Operations; Earth ramps and runways—Doty v Eastman Kodak Co., 229 AD2d 961, 646 NYS2d 474 (4th Dept 1996) (§ 23-1.23 was not applicable because plaintiff did not slide down a ramp or runway, but rather an embankment); Smith v Monroe, 229 AD2d 984, 645 NYS2d 258 (4th Dept 1996) (question of fact whether § 23-1.23 applied where plaintiff was injured when he fell while walking down the side of anchor trench); Demartino v CBS Auto Body and Towing, Inc., 208 AD2d 886, 618 NYS2d 92 (2d Dept 1994) (§ 23-1.23 mandates compliance with concrete specifications).

12 NYCRR 23-1.24—Protection in Construction, Demolition and Excavation Operations; Work on roofs—Mergenhagen v Dish Network Service L.L.C., 64 AD3d 1170, 883 NYS2d 405 (4th Dept 2009) (§ 23-1.24, which requires, inter alia, roofing brackets where roof slope steeper than one in four inches, sufficiently specific and applicable where plaintiff allegedly slipped and fell from roof while installing satellite dish); Bennion v Goodyear Tire & Rubber Co., 229 AD2d 1003, 645 NYS2d 195 (4th Dept 1996) (§ 23-1.24 not applicable because plaintiff's accident did not involve fall from roof); Rudolph v Hofstra University, 225 AD2d 680, 640 NYS2d 126 (2d Dept 1996) (§ 23-1.24 sets forth specific standards of conduct).

12 NYCRR 23-1.24(a)—Protection in Construction, Demolition and Excavation Operations; Work on roofs; General requirements—Schutt v Bookhagen, 186 AD3d 1027, 130 NYS3d 153 (4th Dept 2020) (§ 23-1.24(a) requires plaintiff to submit competent proof establishing slope of roof); Amirr v Calcagno Const. Co., 257 AD2d 585, 684 NYS2d 280 (2d Dept 1999) (same).

12 NYCRR 23-1.24(a)(1)(i)—Protection in Construction, Demolition and Excavation Operations; Work on roofs; General requirements; Roofing brackets—Landon v Austin, 88 AD3d 1127, 931 NYS2d 424 (3d Dept 2011) (§ 23-1.24(a)(1)(i), which requires roofing brackets to be used when-

ever work is to be performed on any roof having a slope steeper than one in four inches unless crawling boards or approved safety belts are used in compliance with part 23, is sufficiently specific to serve as a predicate for a Labor Law § 241(6) action).

12 NYCRR 23-1.24(b)—Protection in Construction, Demolition and Excavation Operations; Work on roofs; High and steep roofs—*Schutt v Bookhagen*, 186 AD3d 1027, 130 NYS3d 153 (4th Dept 2020) (§ 23-1.24(b), which requires provision of scaffolds where work is being performed on roofs over 20 feet from ground having a slopes steeper than one inch in four inches, is sufficiently specific to support a Labor Law § 241(6) cause of action but requires plaintiff to submit competent proof establishing slope of roof from which he fell to obtain summary judgment); *Amirr v Calcagno Const. Co.*, 257 AD2d 585, 684 NYS2d 280 (2d Dept 1999) (same).

12 NYCRR 23-1.24(d)—Protection in Construction, Demolition and Excavation Operations; Work on roofs; Hot roofing material transporters, also known as hot luggers—*Castillo v Starrett City, Inc.*, 4 AD3d 320, 772 NYS2d 74 (2d Dept 2004) (§ 23-1.24(d), which requires that closed containers or devices used for molten roofing material be equipped with certain safety features to minimize hazards “caused by blowbacks of the molten roofing material,” does not prohibit use of open bucket of hot tar and is inapplicable to accident involving hot-tar container with no lid or cover); *Irwin v St. Joseph’s Intercommunity Hosp.*, 236 AD2d 123, 665 NYS2d 773 (4th Dept 1997); *Tallchief v Jemco Roofing*, 217 AD2d 915, 629 NYS2d 603 (4th Dept 1995) (issue of fact as to whether § 23-1.24(d) was violated where plaintiff was injured when end of flexible pipe came out of hot lugger and sprayed hot tar on plaintiff).

12 NYCRR § 23-1.25(a)(2)(i)—Welding and flame cutting operations; Compressed gas cylinders; Control valves and regulators—*Piazza v Frank L. Ciminelli Const. Co., Inc.*, 2 AD3d 1345, 770 NYS2d 504 (4th Dept 2003) (§ 12-1.25(a)(2)(i), which requires that the control valve of any compressed gas cylinder be located at the domed end of such cylinder and protected by a suitable cap or ring guard when not in use, is sufficiently specific to support a Labor Law § 241(6) cause of action).

12 NYCRR 23-1.25(d)—Protection in Construction, Demolition and Excavation Operations; Welding and flame cutting operations; Protection of persons—*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993) (§ 23-1.25(d) not sufficiently specific to support Labor Law § 241(6) cause of action to the extent it requires that all persons engaged in welding and flame-cutting be

provided with proper scaffolds where necessary); *Brady v New York*, 52 AD3d 331, 859 NYS2d 193 (1st Dept 2008) (§ 23-1.25(d) sufficiently specific to support Labor Law § 241(6) cause of action to the extent it requires that all persons engaged in welding and flame-cutting be provided with appropriate protective apparel, since the appropriateness of protective apparel may be determined with reference to task involved; provision sufficiently specific and applicable to the extent it requires approved eye protection suitable for the work involved where plaintiff was not provided with face shield); *Winkelman v Alcan Aluminum Corp.*, 256 AD2d 1126, 685 NYS2d 167 (4th Dept 1998) (§ 23-1.25(d) not sufficiently specific to the extent that it requires that all persons engaged in welding and flame-cutting be provided with appropriate protective apparel) (disapproved in *Brady v New York*, *supra*); see *Contrera v Gesher Realty Corp.*, 1 AD3d 111, 766 NYS2d 200 (1st Dept 2003) (§ 23-1.25(d) inapplicable to welder's work in replacing wooden staircase with iron one).

12 NYCRR 23-1.25(e)(3)—Protection in Construction, Demolition and Excavation Operations; Welding and flame cutting operations; Fire protection—*Winkelman v Alcan Aluminum Corp.*, 256 AD2d 1126, 685 NYS2d 167 (4th Dept 1998) (§ 23-1.25(e)(3), which requires that welders be provided with an approved fire extinguisher or fire pail filled with a fire extinguishing agent within their easy reach while welding in the vicinity of combustible materials, sets forth a concrete specification that may serve as a predicate for a Labor Law § 241(6) claim).

12 NYCRR 23-1.25(f)—Protection in Construction, Demolition and Excavation Operations, Explosion Hazard—*Dupre v Arant*, 151 AD3d 1675, 56 NYS3d 725 (4th Dept 2017) (§ 23-1.25(f), which requires certain safety measures be taken prior to any “welding or flame cutting” of tank or container that contained materials that may generate a flammable vapor upon application of heat, not applicable where explosion occurred while plaintiff was cutting tank with demolition saw).

12 NYCRR 23-1.26—Protection in Construction, Demolition and Excavation Operations; Personal Protective Equipment; Lead fumes and dust from structural steel—*Cerverizzo v New York*, 116 AD3d 469, 983 NYS2d 515 (1st Dept 2014) (§ 23-1.26, which prescribes safety measures, including provision of respirator, when cleaning or heating of structural steel or metal could expose workers to lead or other toxic fumes, inapplicable to plaintiff's bracket installation work performed in aeration tank).

12 NYCRR 23-1.27(d)—Protection in Construction, Demolition and Excavation Operations; Mechanical, hydraulic

and pneumatic jacks—*Smith v LeFrois Development, LLC*, 28 AD3d 1133, 817 NYS2d 456 (4th Dept 2006) (§ 23-1.27(d), which requires that objects or structures raised to desired height by means of jacks be immediately blocked or cribbed, inapplicable to where worker struck by steel pin that fell from steel beam which had been supported by column raised by forklift).

12 NYCRR 23-1.28(a)—Protection in Construction, Demolition and Excavation Operations; Hand-propelled vehicles; Maintenance—*Garcia v 95 Wall Associates, LLC*, 116 AD3d 413, 983 NYS2d 237 (1st Dept 2014) (first sentence of § 23-1.28(a), which requires that hand-propelled vehicles be maintained in good repair, not sufficiently specific to support Labor Law § 241(6) claim; however, second sentence of § 23-1.28(a), which forbids use of hand-propelled vehicles with damaged handles or loose parts, is sufficiently specific); see *Spencer v Term Fulton Realty Corp.*, 183 AD3d 441, 123 NYS3d 599 (1st Dept 2020) (§ 23-1.28(1) inapplicable where accident was caused by cart becoming stuck on debris on floor); *Brasch v Yonkers Const. Co.*, 298 AD2d 345, 751 NYS2d 200 (2d Dept 2002), recalled, vacated and superseded on reargument on other grounds, 306 AD2d 508, 762 NYS2d 626 (2d Dept 2003) (§ 23-1.28(a), which provides that hand-propelled vehicles having damaged handles or loose parts shall not be used, is sufficiently specific to support a Labor Law § 241(6) cause of action); *Gray v Balling Const. Co., Inc.*, 239 AD2d 913, 659 NYS2d 630 (4th Dept 1997) (same); but see *Wegner v State Street Bank & Trust Co. of Connecticut Nat. Ass'n*, 298 AD2d 211, 748 NYS2d 150 (1st Dept 2002) (§ 23-1.28(a) is general directive that cannot serve as predicate for liability under Labor Law § 241(6)).

12 NYCRR 23-1.28(b)—Protection in Construction, Demolition and Excavation Operations; Hand propelled vehicles; Wheels and handles—*Sancino v Metropolitan Transportation Authority*, 184 AD3d 534, 124 NYS3d 534 (1st Dept 2020) (§ 23-1.28(b), which requires that the “[w]heels of hand-propelled vehicles shall be maintained free-running and well secured to the frames of the vehicles,” potentially applicable where wheel of dumpster plaintiff was pushing allegedly broke, causing dumpster to topple and injure plaintiff’s toe); *Spencer v Term Fulton Realty Corp.*, 183 AD3d 441, 123 NYS3d 599 (1st Dept 2020) (§ 23-1.28(b) inapplicable where accident was caused by cart becoming stuck on debris on floor and not by any problem with its wheels); *Ahern v NYU Langone Medical Center*, 147 AD3d 537, 48 NYS3d 39 (1st Dept 2017) (triable issue of fact as to application of § 23-1.28[b]); *Garcia v 95 Wall Associates, LLC*, 116 AD3d 413, 983 NYS2d 237 (1st Dept 2014) (§ 23-1.28(b) sufficiently specific to support Labor Law § 241(6) cause of action, but inapplicable where accident not caused by defect in cart’s wheels); *Brasch v Yonkers Const.*

Co., 298 AD2d 345, 751 NYS2d 200 (2d Dept 2002), recalled, vacated and superseded on reargument on other grounds, 306 AD2d 508, 762 NYS2d 626 (2d Dept 2003) (§ 23-1.28(b) is sufficiently specific to support a Labor Law § 241(6) cause of action); *Freitas v New York City Transit Authority*, 249 AD2d 184, 672 NYS2d 101 (1st Dept 1998) (same); but see *Lazar v Ontario*, 221 AD2d 916, 634 NYS2d 595 (4th Dept 1995) (§ 23-1.28(b) is general directive that cannot serve as predicate for liability under Labor Law § 241(6)).

12 NYCRR 23-1.30—Protection in Construction, Demolition and Excavation Operations; Protection in Illumination—*Favaloro v Port Authority of New York & New Jersey*, 191 AD3d 524, 143 NYS3d 4 (1st Dept 2021) (summary judgment proper for violation of § 23-1.30, which requires illumination “sufficient for safe working conditions” that is “no less than 10 foot candles,” where plaintiff testified it was very dark and only lighting in work area was from floodlights 80 feet above ground); *Emery v Steinway, Inc.*, 178 AD3d 613, 116 NYS3d 227 (1st Dept 2019) (§ 23-1.30 is sufficiently specific to support Labor Law § 241(6) claim); *Hall v Queensbury Union Free School Dist.*, 147 AD3d 1249, 47 NYS3d 765 (3d Dept 2017) (question of fact as to whether defendant violated § 23-1.30 where plaintiff’s coworker claimed that light at bottom of stairwell was not working such that one could not tell when he or she had reached bottom of staircase); *Hernandez v Columbus Centre, LLC*, 50 AD3d 597, 857 NYS2d 84 (1st Dept 2008) (§ 23-1.30 may have been violated where plaintiff testified that illumination was “poor” and consisted only of street light 150 to 200 feet away); *Verel v Ferguson Elec. Const. Co., Inc.*, 41 AD3d 1154, 838 NYS2d 280 (4th Dept 2007) (despite affidavit that temporary light stringers provided at least 10 foot candles of illumination throughout project’s work area, plaintiff’s deposition testimony that area in which he worked was so dark that a person would not be able to read newspaper and that there was no artificial lighting in area where he worked sufficient to raise a question of fact as to whether § 23-1.30 was violated); *Giglio v St. Joseph Intercommunity Hosp.*, 309 AD2d 1266, 765 NYS2d 77 (4th Dept 2003) (§ 23-1.30 is sufficiently specific to support Labor Law § 241(6) claim); *Murphy v Columbia University*, 4 AD3d 200, 773 NYS2d 10 (1st Dept 2004) (§ 23-1.30 is sufficiently specific with regard to the obligation to keep work areas illuminated and free of debris); *Herman v St. John’s Episcopal Hosp.*, 242 AD2d 316, 678 NYS2d 635 (2d Dept 1997) (§ 23-1.30, although sufficiently specific, could not support plaintiff’s Labor Law § 241(6) claim because plaintiff did not sufficiently establish that lighting where he fell was poor); *Gawel v Consolidated Edison Co. of New York, Inc.*, 237 AD2d 138, 655 NYS2d 351 (1st Dept 1997) (§ 23-1.30 contains “concrete specifications” rendering § 241(6) claim viable); *Bennion v Goodyear Tire & Rubber Co.*, 229 AD2d 1003, 645

NYS2d 195 (4th Dept 1996) (§ 23-1.30 not applicable because plaintiff's accident did not involve insufficient lighting); *Duell v Eastman Kodak Co.*, 224 AD2d 997, 637 NYS2d 552 (4th Dept 1996) (question of fact existed whether lighting in area where plaintiff was working was sufficient to meet standard set forth in 12 NYCRR 23-1.30).

12 NYCRR 23-1.32—Protection in Construction, Demolition and Excavation Operations; Protection in Illumination—Imminent danger; notice, warning and avoidance—*Seem v Premier Camp Company, LLC*, 200 AD3d 921, 161 NYS3d 117 (2d Dept 2021) (d§ 23-1.32, which requires immediate compliance with Industrial Code Part 23 to end imminent dangers and posting of certain warning notices, may be sufficiently specific to support Labor Law § 241(6) cause of action in case where dump truck plaintiff was operating toppled over while in process of unloading 60,000 pounds of gravel).

12 NYCRR 23-1.33—Protection in Construction, Demolition and Excavation Operations; Protection of persons passing by construction, demolition or excavation operations—Section 23-1.33 sets forth standards for protection of persons such as pedestrians passing by structures in which construction, demolition or excavation work is being performed, see *Leighton v Chaber, LLC*, 204 AD3d 903, 164 NYS3d 849 (2d Dept 2022) (§ 23-1.33 not applicable to plaintiff, who was working at construction site when he was injured); *Ozzimo v H.E.S., Inc.*, 249 AD2d 912, 672 NYS2d 197 (4th Dept 1998) (§ 23-1.33 sets forth specific safety standards).

12 NYCRR 23-1.33(a)—Protection in Construction, Demolition and Excavation Operations; Protection of persons passing by construction, demolition or excavation operations; Protection required—*McMahon v Durst*, 224 AD2d 324, 638 NYS2d 48 (1st Dept 1996) (§ 23-1.33 does not mandate compliance with specifications).

12 NYCRR 23-1.33(d)—Protection in Construction, Demolition and Excavation Operations; Protection of persons passing by construction, demolition or excavation operations; Maintenance—*McGrath v Lake Tree Village Associates*, 216 AD2d 877, 629 NYS2d 358 (4th Dept 1995) (§ 23-1.33(d), which applies to defined walkways, was not applicable where plaintiff, who was carrying a 24-foot scaffold pick from a truck to the building was injured while walking over a 4 to 5 foot high pile of dirt).

12 NYCRR 23-2.1—Construction Operations; Maintenance and housekeeping—*Herman v St. John's Episcopal Hosp.*, 242 AD2d 316, 678 NYS2d 635 (2d Dept 1997) (§ 23-2.1,

which describes standards for storing material and equipment, requires compliance with concrete specifications); *White v Farash Corp.*, 224 AD2d 978, 637 NYS2d 558 (4th Dept 1996) (§ 23-2.1 sufficiently specific to support Labor Law § 241(6) cause of action and potentially applicable where plaintiff stepped onto piece of angle iron left by co-worker); but see *Venezia v State*, 57 AD3d 522, 868 NYS2d 710 (2d Dept 2008) (§ 23-2.1 not sufficiently specific to support Labor Law § 241(6) cause of action).

12 NYCRR 23-2.1(a)—Construction Operations; Maintenance and housekeeping; Storage of material or equipment—*Sancino v Metropolitan Transportation Authority*, 184 AD3d 534, 124 NYS3d 534 (1st Dept 2020) (§ 23-2.1(a), which requires, among other things, that building material be “stored in a safe and orderly manner,” and that “material piles” be “so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare,” not applicable when wheel of dumpster plaintiff was pushing allegedly broke, causing dumpster to topple and injure plaintiff’s toe, since accident did not occur due to methods of material storage); *Rodriguez v Dormitory Authority of State*, 104 AD3d 529, 962 NYS2d 102 (1st Dept 2013) (§ 23-2.1(a) inapplicable where accident occurred in open working area); *Aragona v State*, 74 AD3d 1260, 905 NYS2d 237 (2d Dept 2010) (§ 23-2.1(a) sufficiently specific to support Labor Law § 241(6) cause of action, but inapplicable where worker tripped on padeye welded to deck of work barge as he walked along corridor created by lumber and construction material); *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 841 NYS2d 249 (1st Dept 2007) (§ 23-2.1(a)(2), which provides that material and equipment may not exceed the weight bearing capacity of the floor, platform or scaffold in which it is stored and may not be placed or stored so close to any edge of a floor, platform or scaffold so as to endanger any person beneath the edge, applies only to material being stored); *Gonzalez v Glenwood Mason Supply Co., Inc.*, 41 AD3d 338, 839 NYS2d 74 (1st Dept 2007) (§ 23-2.1(a) inapplicable to areas underneath stationary hoists); *Mahoney v Madeira Associates*, 32 AD3d 1303, 822 NYS2d 190 (4th Dept 2006) (§ 23-2.1(a)(2) not applicable where sledgehammer that struck plaintiff fell from log purlin rather than floor, platform or scaffold); *McCombs v Cimato Enterprises, Inc.*, 20 AD3d 883, 798 NYS2d 818 (4th Dept 2005) (§ 23-2.1(a)(2) not applicable where plaintiff’s injury caused by material being unloaded from truck); *Rosado v Briarwoods Farm, Inc.*, 19 AD3d 396, 796 NYS2d 394 (2d Dept 2005) (§ 23-2.1(a) sufficiently specific to support Labor Law § 241(6) cause of action); *Castillo v Starrett City, Inc.*, 4 AD3d 320, 772 NYS2d 74 (2d Dept 2004) (§ 23-2.1(a) not applicable where material on which plaintiff tripped was in use and not stored, was single item and not “material pile” and roof where accident occurred was not “passageway, walkway, stairway or other

thoroughfare”); *Scannell v Mt. Sinai Medical Center*, 256 AD2d 214, 683 NYS2d 18 (1st Dept 1998) (§ 23-2.1(a) is a concrete specification that may support a Labor Law § 241(6) claim); *Cafarella v Harrison Radiator Div. of General Motors*, 237 AD2d 936, 654 NYS2d 910 (4th Dept 1997) (§ 23-2.1(a)(1), although sufficiently specific, does not apply because truck bed where plaintiff fell does not constitute passageway, walkway or other thoroughfare); *Lehner v Dormitory Authority of State*, 221 AD2d 958, 633 NYS2d 911 (4th Dept 1995) (§ 23-2.1(a) sufficiently specific to support plaintiff’s Labor Law § 241(6) cause of action).

12 NYCRR 23-2.1(a)(1)—Construction Operations; Maintenance and housekeeping; Storage of material or equipment—Section 23-2.1(a)(1) requires that building materials be stored in safe and orderly manner and that material piles be stable and located so as not to obstruct passageways, walkways, stairways or other thoroughfares, see *Nicholson v Sabey Data Center Properties, LLC*, 205 AD3d 620, 169 NYS3d 292 (1st Dept 2022) (§ 23-2.1[a][1] potentially applicable where pallet jack allegedly engaged suddenly and jumped back, propelling plaintiff backwards and causing him to trip on loose pipe; evidence of four or five loose pipes on floor that had been dislodged from stack); *Padilla v Touro College University System*, 204 AD3d 415, 166 NYS3d 152 (1st Dept 2022) (§ 23-2.1[a][1] potentially applicable where stacked sheetrock fell on plaintiff; issues of fact as to whether sheetrock stored in safe and orderly manner and whether accident occurred in passageway, walkway, or stairway); *Ormsbee v Time Warner Realty Inc.*, 203 AD3d 630, 166 NYS3d 130 (1st Dept 2022) (§ 23-2.1[a][1] inapplicable where gang box lid suddenly fell causing plaintiff’s injury, as accident occurred in open work area and not passageway); *Kuylen v KPP 107th Street, LLC*, 203 AD3d 465, 160 NYS3d 866 (1st Dept 2022) (§ 23-2.1[a][1] inapplicable where stack of sheetrock boards fell onto plaintiff in apartment and not in passageway, hallway, stairway, or other walkway); *Abreu v Frocione Properties, LLC*, 199 AD3d 1452, 154 NYS3d 620 (4th Dept 2021) (§ 23-2.1[a][1], which requires that building materials be stored in safe and orderly manner and that material piles be stable and located so as not to obstruct passageways, walkways, stairways or other thoroughfares, not applicable where segments of pallet rack system plaintiff was installing in warehouse were not in use and were not stored when they tipped over onto him); *Armental v 401 Park Avenue South Associates, LLC*, 182 AD3d 405, 121 NYS3d 259 (1st Dept 2020) (§ 23-2.1[a][1] potentially applicable where plaintiff allegedly tripped on pile of loose pipes obstructing doorway); *Prevost v One City Block LLC*, 155 AD3d 531, 65 NYS3d 172 (1st Dept 2017) (§ 23-2.1[a][1] potentially applicable where there was conflicting evidence as to whether plaintiff slipped and fell in “passageway” or open area); *Hebbard v United*

Health Services Hospitals, Inc., 135 AD3d 1150, 23 NYS3d 465 (3d Dept 2016) (§ 23-2.1[a][1] applicable where stack of scaffold frames resting against garage column tipped onto plaintiff); *Miles v Buffalo State Alumni Ass'n, Inc.*, 121 AD3d 1573, 993 NYS2d 852 (4th Dept 2014) (§ 23-2.1[a][1] inapplicable where drywall involved in accident was in use rather than in storage, and subject drywall did not constitute “material pile”); *Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 995 NYS2d 95 (2d Dept 2014) (§ 23-2.1[a][1] inapplicable where plaintiff struck by falling object; accident did not involve obstruction of passageway, walkway, stairway or other thoroughfare by material pile); *Gualpa v Leon D. DeMatteis Const. Corp.*, 121 AD3d 416, 997 NYS2d 1 (1st Dept 2014) (§ 23-2.1[a][1] inapplicable where injury occurred in open work area); *Desena v North Shore Hebrew Academy*, 119 AD3d 631, 989 NYS2d 505 (2d Dept 2014) (§ 23-2.1(a)(1) inapplicable where accident occurred in open area of worksite); *Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 964 NYS2d 144 (1st Dept 2013) (§ 23-2.1(a)(1) inapplicable where no allegation that accident occurred in one of enumerated areas); *Gualpa v Leon D. DeMatteis Const. Corp.*, 117 AD3d 614, 986 NYS2d 459 (1st Dept 2014) (§ 23-2.1(a)(1) inapplicable where accident occurred in open work area); *Cody v State*, 82 AD3d 925, 919 NYS2d 55 (2d Dept 2011) (§ 23-2.1(a)(1) inapplicable where accident occurred in open work area and material that caused plaintiff to fall was not being stored but rather was in use); *Barrios v Boston Properties LLC*, 55 AD3d 339, 866 NYS2d 99 (1st Dept 2008) (§ 23-2.1(a)(1) inapplicable where accident occurred on loading dock or work area); *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 836 NYS2d 130 (1st Dept 2007) (§ 23-2.1(1)(a) inapplicable where room measuring 18 feet by 20 feet not a passageway); see *Castillo v 3440 LLC*, 46 AD3d 382, 847 NYS2d 575 (1st Dept 2007) (material must be stored safely but need not involve passageway).

12 NYCRR 23-2.1(a)(2)—Construction Operations; Maintenance and housekeeping, Storage of material or equipment; Storage on floor or close to edge of floor, platform or scaffold—Section 23-2.1(a)(2) provides that “material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold” and “shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge,” see *Chuqui v Amna, LLC*, 203 AD3d 1018, 166 NYS3d 192 (2d Dept 2022) (§ 23-2.1[a][2] inapplicable where pieces of sheet metal on cart plaintiff was helping to move fell on him); *Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 995 NYS2d 95 (2d Dept 2014) (§ 23-2.1[a][2] potentially applicable where plaintiff struck by object that fell from upper floor of building under construction); *Desena v North Shore Hebrew Academy*, 119

AD3d 631, 989 NYS2d 505 (2d Dept 2014) (§ 23-2.1[a][2] inapplicable to injuries caused by heavy block falling onto plaintiff's foot from unsecured pile of blocks on pallet located in open area at worksite); *Fontaine v Juniper Associates*, 67 AD3d 608, 888 NYS2d 409 (1st Dept 2009) (§ 23-2.1[a][2] potentially applicable where lumber stacked inches from edge of flatbed truck fell on plaintiff).

12 NYCRR 23-2.1(b)—Construction Operations; Maintenance and housekeeping; Disposal of debris—There is a conflict in the Appellate Divisions as to whether § 23-2.1(b), which requires debris to be handled so as not to endanger any person in the area of disposal, is sufficiently specific to support a Labor Law § 241(6) cause of action. The Fourth Department holds that it is sufficiently specific, *St. John v Westwood-Squibb Pharmaceuticals, Inc.*, 138 AD3d 1501, 31 NYS3d 720 (4th Dept 2016); *Mitchell v NRG Energy, Inc.*, 125 AD3d 1542, 4 NYS3d 445 (4th Dept 2015); *Coleman v ISG Lackawanna Services, LLC*, 74 AD3d 1825, 902 NYS2d 480 (4th Dept 2010); see *Scally v Regional Indus. Partnership*, 9 AD3d 865, 780 NYS2d 457 (4th Dept 2004) (noting that regulation sufficiently specific but holding it inapplicable where worker injured after climbing on top of roof air conditioning unit to clear debris). The First and Second Departments have consistently held that § 23-2.1(b) will not support a cause of action under Labor Law § 241(6), *Armental v 401 Park Avenue South Associates, LLC*, 182 AD3d 405, 121 NYS3d 259 (1st Dept 2020); *Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 995 NYS2d 95 (2d Dept 2014); *La Veglia v St. Francis Hosp.*, 78 AD3d 1123, 912 NYS2d 611 (2d Dept 2010); *Parrales v Wonder Works Const. Corp.*, 55 AD3d 579, 864 NYS2d 325 (2d Dept 2008); *Madir v 21-23 Maiden Lane Realty, LLC*, 9 AD3d 450, 780 NYS2d 369 (2d Dept 2004); *Salinas v Barney Skanska Const. Co.*, 2 AD3d 619, 769 NYS2d 559 (2d Dept 2003); *Quinlan v New York*, 293 AD2d 262, 739 NYS2d 706 (1st Dept 2002); *Fowler v CCS Queens Corp.*, 279 AD2d 505, 719 NYS2d 270 (2d Dept 2001); *Mendoza v Marche Libre Associates*, 256 AD2d 133, 681 NYS2d 517 (1st Dept 1998).

12 NYCRR 23-2.2(a)—Construction Operations; Concrete work; General requirements—*Morris v Pavarini Const.*, 22 NY3d 668, 985 NYS2d 202, 8 NE3d 317 (2014) (provisions of § 23-2.2(a) requiring that forms be “braced or tied together so as to maintain position and shape” may apply to forms that are not complete and may apply to wall component); *Morris v Pavarini Const.*, 9 NY3d 47, 842 NYS2d 759, 874 NE2d 723 (2007) (provisions of § 23-2.2(a) requiring forms in concrete work to be “structurally safe” and “properly braced” not sufficiently specific to support Labor Law § 241(6) cause of action; however, provisions of rule requiring that forms be “braced or tied together so as to maintain position and shape” are sufficiently specific; expert evidence needed to determine whether

rule applicable to forms not yet completed); *Ross v DD 11th Ave., LLC*, 109 AD3d 604, 971 NYS2d 304 (2d Dept 2013) (§ 23-2.2(a) is sufficiently specific to support liability under Labor Law § 241(6); absent expert opinion addressing applicability of § 23-2.2(a) to wooden forms being stripped from concrete column, defendants moving to dismiss Labor Law § 241(6) claim failed to establish entitlement to relief); *Giordano v Forest City Ratner Companies*, 43 AD3d 1106, 842 NYS2d 552 (2d Dept 2007) (absent expert opinion addressing applicability of § 23-2.2(a) to forms not yet completed, defendant not entitled to summary judgment dismissing Labor Law § 241(6) cause of action based on rule); *Corsaro v Mt. Calvary Cemetery*, 227 AD2d 957, 643 NYS2d 853 (4th Dept 1996) (§ 23-2.2(a) is sufficiently specific to support liability under Labor Law § 241(6)).

12 NYCRR 23-2.2(b)—Construction Operations; Concrete work; Inspection—*Cody v State*, 82 AD3d 925, 919 NYS2d 55 (2d Dept 2011) (§ 23-2.2(b), which requires persons to be designated to continuously inspect the stability of all forms, shores and reshores including all braces and other supports during the placing of concrete, and that any unsafe condition be remedied immediately, inapplicable where plaintiff's injuries caused by plaintiff's act of stepping on piece of lumber, not by an unstable form, shore, or brace); *Gielow v Rosa Coplon Home*, 251 AD2d 970, 674 NYS2d 551 (4th Dept 1998) (§ 23-2.2(b) is not applicable where plaintiff's injury was not caused by unstable form, shore or bracing during placing of concrete).

12 NYCRR 23-2.3(a)(1)—Construction Operations; Structural steel assembly; Placing of structural members—*Smith v LeFrois Development, LLC*, 28 AD3d 1133, 817 NYS2d 456 (4th Dept 2006) (§ 23-2.3(a)(1), which provides that during final placing of structural steel members load shall not be released from hoist ropes until securely fastened in place, inapplicable where worker struck by drift pin after column supporting steel beam was raised by forklift); *Hasty v Solvay Mill Ltd. Partnership*, 306 AD2d 892, 760 NYS2d 795 (4th Dept 2003) (§ 23-2.3(a)(1) does not require that hoisting ropes be used for placing structural steel members and applies only when hoisting ropes have actually been used for that purpose); *Fair v 431 Fifth Ave. Associates*, 249 AD2d 262, 670 NYS2d 359 (2d Dept 1998) (holding that plaintiff may assert claim under Labor Law § 241(6) by proving violation of § 23-2.3(a)(1)).

12 NYCRR 23-2.3(c)—Construction Operations; Structural steel assembly; Hoisting steel panels and structural steel members—*Lombardi v New York*, 175 AD3d 1521, 109 NYS3d 373 (2d Dept 2019) (§ 23-2.3(c), which requires use of tag lines “while steel panels or structural steel members are being hoisted to prevent uncontrolled movement,” inapplicable where metal plate used to cover excavated trench in roadway

struck plaintiff as it was being removed); *Tomala-Campoverde v Trumbull Equities, LLC*, 186 AD3d 522, 129 NYS3d 157 (2d Dept 2020) (§ 23-2.3(c), which requires use of tag lines “while steel panels or structural steel members are being hoisted to prevent uncontrolled movement,” potentially applicable where there was conflicting evidence in record as to whether tag lines were being used to stabilize steel beam that injured plaintiff); *Cruz v Neil Hospitality, LLC*, 50 AD3d 619, 855 NYS2d 219 (2d Dept 2008) (§ 23-2.3(c), inapplicable where plaintiff and coworkers were pushing steel beam over another beam on 15-foot dirt mound and beam being pushed slid down onto plaintiff).

12 NYCRR 23-2.4—Construction Operations; Flooring requirements in building construction—*Giordano v Forest City Ratner Companies*, 43 AD3d 1106, 842 NYS2d 552 (2d Dept 2007) (§ 23-2.4(a) and (b), which govern the installation of permanent and temporary flooring in skeleton steel construction in tiered buildings, inapplicable to project utilizing poured concrete construction); *Bennion v Goodyear Tire & Rubber Co.*, 229 AD2d 1003, 645 NYS2d 195 (4th Dept 1996) (§ 23-2.4 was not applicable because plaintiff was not engaged in construction of skeleton steel building).

12 NYCRR 23-2.4(b)(1)—Construction Operations; Flooring requirements in building construction—Temporary flooring—skeleton steel construction in tiered buildings—*O’Connor v Lincoln Metrocenter Partners, L.P.*, 266 AD2d 60, 698 NYS2d 632 (1st Dept 1999) (§ 23-2.4(b)(1), requiring all hazardous openings to be covered and temporary flooring to be secured against movement, provides a basis for liability under Labor Law § 241(6)).

12 NYCRR 23-2.4(c)—Construction Operations; Flooring requirements in building construction; Flooring—other construction—*Giordano v Forest City Ratner Companies*, 43 AD3d 1106, 842 NYS2d 552 (2d Dept 2007) (§ 23-2.4(c), which establishes standards for single wood flooring, double wood flooring and bar joist construction, inapplicable to projects utilizing poured concrete construction).

12 NYCRR 23-2.5(a)—Construction Operations; Protection of persons in shafts; General—*Rivas-Pichardo v 292 Fifth Avenue Holdings, LLC*, 198 AD3d 826, 156 NYS3d 85 (2d Dept 2021) (§ 23-2.5[a], which prescribes safety standards for shafts other than elevator shafts, potentially applicable where plaintiff struck by bricks dumped down elevator shaft being used as debris chute); *Parrales v Wonder Works Const. Corp.*, 55 AD3d 579, 864 NYS2d 325 (2d Dept 2008) (§ 23-2.5(a) applicable where worker removing debris from bottom of old elevator shaft being used as chute injured by piece of wood that fell from higher floor).

12 NYCRR 23-2.5(a)(1)—Construction Operations; Protection of persons in shafts; General; Protection from falling material—Section 23-2.5(a)(1) requires, where persons are working in shafts, a tight covering of planking at a point in the shaft not more than two stories or 30 feet, whichever is less, above the level where persons are working, see *Peters v Structure Tone, Inc.*, 204 AD3d 522, 166 NYS3d 632 (1st Dept 2022) (issue of fact as to whether planking two stories or 30 feet above plaintiff would have protected him from falling debris).

12 NYCRR 23-2.5(b)(1)—Construction Operations; Protection of persons in shafts; Protection of persons in elevator shafts; Requirement of platform above work level—*Moldaver v Pref 34 East 51st Street, LLC*, 194 AD3d 419, 143 NYS3d 214 (1st Dept 2021) (§ 23-2.5[b][1]), which requires, where persons are working in an elevator shaft, that a tight platform consisting of planks at least two inches thick full size, exterior grade plywood at least three-quarters inch thick or material of equivalent strength shall be installed not more than two stories or 30 feet, whichever is less, above the level at which any work is being performed, not applicable where such platform would not have prevented counterweight that plaintiff was installing from crushing his fingers).

12 NYCRR 23-2.5(b)(3)—Construction Operations; Protection of persons in shafts; Protection of persons in elevator shafts—*Moldaver v Pref 34 East 51st Street, LLC*, 194 AD3d 419, 143 NYS3d 214 (1st Dept 2021) (§ 23-2.5[b][3]), which requires that a solid or wire mesh partition be provided where necessary to prevent persons installing, repairing or replacing an elevator from contacting adjacent operable elevators or counterweights, not applicable where counterweight that plaintiff was installing was not operable and such partition would have prevented plaintiff from carrying out his task); *Brownrigg v New York City Housing Authority*, 119 AD3d 504, 990 NYS2d 34 (2d Dept 2014) (§ 23-2.5[b][3] applicable where plaintiff struck in eye by falling tool that co-worker accidentally knocked off top of elevator cab situated in adjacent shaft above where plaintiff was working); *Franco v Jay Cee of New York Corp.*, 36 AD3d 445, 827 NYS2d 143 (1st Dept 2007) (§ 23-2.5(b)(3) does not mandate that partition be placed in any particular location).

12 NYCRR 23-2.5(b)(4)—Construction Operations; Protections of persons in shafts; Protection of persons in elevator shafts—*Nevins v Essex Owners Corp.*, 276 AD2d 315, 714 NYS2d 38 (1st Dept 2000) (elevator, sent into descent by plaintiff, not a “falling object” under § 23-2.5(b)(4)).

12 NYCRR 23-2.6—Construction Operations; Catch

platforms required—*Maldonado v Townsend Ave. Enterprises*, 294 AD2d 207, 741 NYS2d 696 (1st Dept 2002) (§ 23-2.6, which pertains to the construction of exterior masonry walls, inapplicable to facts of case).

12 NYCRR 23-2.8—Construction Operations—Painting—*Cerverizzo v New York*, 116 AD3d 469, 983 NYS2d 515 (1st Dept 2014) (§ 23-2.8, which prescribes safety measures for workers painting in confined spaces, inapplicable to plaintiff's bracket installation work).

12 NYCRR 23-2.8(a)—Construction Operations—Painting—Confined space definition—*Pittman v S.P. Lenox Realty, LLC*, 119 AD3d 846, 989 NYS2d 359 (2d Dept 2014) (§ 23-2.8(a), which defines "confined space" as "a room, a portion of a room or an enclosure having no means of natural ventilation other than one entrance opening and which room, portion of a room or enclosure is of such dimensions that a painter is required to work inside such room, portion of a room or enclosure" and further states that "such confined space may be a tank, an elevator car, a compartment, a closet, the upper area of a high ceiling room or a similarly enclosed space," inapplicable to apartment in which plaintiff was refinishing floors).

12 NYCRR 23-3.1—Demolition Operations; Special approval required—*Jackson v Williamsville Cent. School Dist.*, 229 AD2d 985, 645 NYS2d 202 (4th Dept 1996) (§ 23-3.1 cannot support Labor Law § 241(6) action).

12 NYCRR § 23-3.2(a)(2)—Demolition Operations; General requirements; Preparations for the demolition of any building or other structures; Shutting off, capping or sealing of gas, electric, water, steam and other supply lines—*Pino v Robert Martin Co.*, 22 AD3d 549, 802 NYS2d 501 (2d Dept 2005) (tacitly holding that § 23-3.2(a)(2), which requires that gas, electric, water, steam and other supply lines be shut off, capped or sealed before demolition work begins, sufficiently specific to support § 241(6) claim).

12 NYCRR 23-3.2(a)(3)—Demolition Operations; General requirements; Preparations for the demolition of any building or other structures; protection of gas, electric, water, steam and other operative supply lines—*Balladares v Southgate Owners Corp.*, 40 AD3d 667, 835 NYS2d 693 (2d Dept 2007) (§ 23-3.2(a)(3), which requires that gas, electric, water, steam and other operative supply lines be protected or moved before demolition work begins so as to prevent damage, inapplicable where worker injured by falling into a hole as result of basement floor collapse during demolition of brick wall with jackhammer).

12 NYCRR 23-3.2(b)—Demolition Operations; General

requirements; Protection of adjacent structures—*Perillo v Lehigh Const. Group, Inc.*, 17 AD3d 1136, 795 NYS2d 808 (4th Dept 2005) (§ 23-3.2(b) pertains solely to protection of stability of adjacent structures, and does not pertain to protection of stability of walls within building or structure being demolished).

12 NYCRR 23-3.3—Demolition Operations; Demolition by Hand—*Cardenas v One State Street, LLC*, 68 AD3d 436, 890 NYS2d 41 (1st Dept 2009) (“demolition” work to which § 23-3.3 is applicable is defined in 12 NYCRR 23-1.4(b)(16) as “work incidental to or associated with the total or partial razing of a building or other structure including the removal or dismantling of machinery or other equipment”; this definition requires that work involve changes to structural integrity of building, as opposed to mere renovation of its interior); *Baranello v Rudin Management Co.*, 13 AD3d 245, 785 NYS2d 918 (1st Dept 2004) (removal of portion of wall not “demolition” as defined in § 23-1.4(b)(16)); *Quinlan v New York*, 293 AD2d 262, 739 NYS2d 706 (1st Dept 2002) (neither creation of hole in wall nor attempt to repair hole “demolition work” for purposes of applying § 23-3.3); *Terry v Mutual Life Ins. Co. of New York*, 265 AD2d 929, 695 NYS2d 808 (4th Dept 1999) (§ 23-3.3 sets forth concrete specifications).

12 NYCRR 23-3.3(b)—Demolition Operations; Demolition by Hand; Demolition of walls and partitions—*Balladares v Southgate Owners Corp.*, 40 AD3d 667, 835 NYS2d 693 (2d Dept 2007) (§ 23-3.2(b), which requires that adjacent structures be examined and protected where necessary before demolition begins, inapplicable where worker injured as result of basement floor collapse during demolition of brick wall with jackhammer); *Bald v Westfield Academy*, 298 AD2d 881, 747 NYS2d 623 (4th Dept 2002) (§ 23-3.3(b)(3) is sufficiently specific to support Labor Law § 241(6) cause of action).

12 NYCRR 23-3.3(b)(2)—Demolition Operations; Demolition by Hand; Demolition of walls and partitions—*Kaminski v 53rd Street and Madison Tower Development, LLC*, 70 AD3d 530, 895 NYS2d 76 (1st Dept 2010) (§ 23-3.3(b)(2), which provides that masonry shall not be permitted to fall in such masses as to endanger the structural stability of any floor or structural support that such masonry may strike in falling, potentially applicable where there was evidence from which it could be inferred that masonry from collapsed eighth-floor wall damaged floor and staircase, endangering their stability).

12 NYCRR 23-3.3(b)(3)—Demolition Operations; Demolition by Hand; Demolition of walls and partitions—*Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1, 935 NYS2d 551, 959 NE2d 488 (2011) (§ 23-3.3(b)(3),

which provides that walls, chimneys and other parts of buildings and structures “shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration,” does not require that “fall” or “collapse,” as distinguished from “weaken[ing],” be caused specifically by “wind pressure” or “vibration”; rule potentially applicable where unsecured standing pipes on same level as plaintiff fell when hit by debris from demolition); *Garcia v Market Associates*, 123 AD3d 661, 998 NYS2d 193 (2d Dept 2014) (§ 23-3.3[b](3) inapplicable where hazard arose from plaintiff’s actual performance of demolition work itself, rather than structural instability caused by progress of demolition); *Card v Cornell University*, 117 AD3d 1225, 985 NYS2d 740 (3d Dept 2014) (§ 23-3.3(b)(3) potentially applicable where concrete half wall fell and landed on plaintiff’s foot during its demolition allegedly due to structural instability resulting from removal of horizontal rebar, part of wall’s concrete base and shallowness of vertical rebar); *Maldonado v AMMM Properties Co.*, 107 AD3d 954, 968 NYS2d 163 (2d Dept 2013) (§ 23-3.3(b)(3) inapplicable where hazard arose from plaintiff’s performance of demolition work rather than from structural instability caused by demolition); *Vega v Renaissance 632 Broadway, LLC*, 103 AD3d 883, 962 NYS2d 200 (2d Dept 2013) (§ 23-3.3(b)(3) inapplicable where hazard was from plaintiff’s performance of demolition work rather than structural instability caused by demolition); *Garcia v 225 East 57th Street Owners, Inc.*, 96 AD3d 88, 942 NYS2d 533 (1st Dept 2012) (§ 23-3.3(b)(3) not applicable where hazard arose from actual performance of plaintiff’s work, and not from structural instability caused by progress of other demolition work); *Perillo v Lehigh Const. Group, Inc.*, 17 AD3d 1136, 795 NYS2d 808 (4th Dept 2005) (§ 23-3.3(b)(3) sufficiently specific to support § 241(6) claim).

12 NYCRR 23-3.3(c)—Demolition Operations; Demolition by hand; Inspection—*Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1, 935 NYS2d 551, 959 NE2d 488 (2011) (§ 23-3.3(c), which requires continuing inspections during “hand demolition” work to detect hazards from weakened or deteriorated walls or floors or loosened material, applicable where unsecured standing pipes on same level as plaintiff fell when hit by debris from demolition); *Santana v MMF 1212 Assoc L.L.C.*, 190 AD3d 505, 135 NYS3d 825 (1st Dept 2021) (§ 23-3.3[c] potentially applicable where portion of ceiling allegedly fell on worker performing demolition work in apartment bathroom); *Nicola v United Veterans Mutual Housing No. 2, Corporation*, 178 AD3d 937, 116 NYS3d 296 (2d Dept 2019) (§ 23-3.3(c) inapplicable where plaintiff was injured while drilling hole to install piping since such conduct did not constitute demolition); *Garcia v Market Associates*, 123 AD3d 661, 998 NYS2d 193 (2d Dept 2014) (§ 23-3.3[c] inapplicable where hazard arose from plaintiff’s actual performance of de-

molition work itself, rather than structural instability caused by progress of demolition); *Card v Cornell University*, 117 AD3d 1225, 985 NYS2d 740 (3d Dept 2014) (§ 23-3.3(c) potentially applicable where concrete half wall fell and landed on plaintiff's foot during its demolition allegedly due to structural instability resulting from removal of horizontal rebar, part of wall's concrete base and shallowness of vertical rebar); *Maldonado v AMMM Properties Co.*, 107 AD3d 954, 968 NYS2d 163 (2d Dept 2013) (§ 23-3.3(c) inapplicable where hazard arose from plaintiff's performance of demolition work rather than from structural instability caused by demolition); *Vega v Renaissance 632 Broadway, LLC*, 103 AD3d 883, 962 NYS2d 200 (2d Dept 2013) (§ 23-3.3(c) inapplicable where hazard was from plaintiff's performance of demolition work rather than structural instability caused by demolition); *Bolster v Eastern Bldg. and Restoration, Inc.*, 96 AD3d 1123, 946 NYS2d 298 (3d Dept 2012) (§ 23-3.3(c) inapplicable where accident resulted not from structural instability but from planned performance of removal of fixture from wall, lowering it to particular height and purposely dropping it to floor); *Garcia v 225 East 57th Street Owners, Inc.*, 96 AD3d 88, 942 NYS2d 533 (1st Dept 2012) (§ 23-3.3(c) not applicable where hazard arose from actual performance of plaintiff's work, and not from structural instability caused by progress of other demolition work); *Vasquez v Urbahn Associates Inc.*, 79 AD3d 493, 918 NYS2d 1 (1st Dept 2010) (defendant liable on Labor Law § 241(6) claim predicated on § 23-3.3(c) where plaintiff establishes that defendant failed to conduct inspections required by regulation); *Cardenas v One State Street, LLC*, 68 AD3d 436, 890 NYS2d 41 (1st Dept 2009) (§ 23-3.3(c) sufficiently specific to support Labor Law § 241(6) cause of action and potentially applicable where work involved prying 80-pound electrical panel from wall; regulation's reference to "loosened material" could be construed to encompass electrical panel being removed); *Campoverde v Bruckner Plaza Associates, L.P.*, 50 AD3d 836, 855 NYS2d 268 (2d Dept 2008) (§ 23-3.3(c), inapplicable where plaintiff injured by performance of demolition work itself and not any structural instability caused by such work); *Balladares v Southgate Owners Corp.*, 40 AD3d 667, 835 NYS2d 693 (2d Dept 2007) (§ 23-3.3(c) applicable where worker injured as result of basement floor collapse during demolition of brick wall with jackhammer); *Perillo v Lehigh Const. Group, Inc.*, 17 AD3d 1136, 795 NYS2d 808 (4th Dept 2005) (§ 23-3.3(c) sufficiently specific to support § 241(6) claim); *Salinas v Barney Skanska Const. Co.*, 2 AD3d 619, 769 NYS2d 559 (2d Dept 2003) (§ 23-3.3(c) was intended to provide a safeguard against hazards created by the progress of the demolition work); *Ofri v Waldbaum, Inc.*, 285 AD2d 536, 728 NYS2d 74 (2d Dept 2001) (§ 23-3.3(c) not applicable where plaintiff's injuries were not caused by hazard created by demolition work); *Randazzo v Consolidated Edison Co. of New York*, 271 AD2d 667, 706 NYS2d 467 (2d Dept 2000) (although § 23-

3.3(c) contains concrete specifications, it is inapplicable to plaintiff who was injured when plywood planks were blown onto him by strong gust of wind); *Gawel v Consolidated Edison Co. of New York, Inc.*, 237 AD2d 138, 655 NYS2d 351 (1st Dept 1997) (§ 23-3.3(c) contains “concrete specifications” rendering § 241(6) claim viable).

12 NYCRR 23-3.3(e)—Demolition Operations; Demolition by hand; Methods of operation—*Rivas-Pichardo v 292 Fifth Avenue Holdings, LLC*, 198 AD3d 826, 156 NYS3d 85 (2d Dept 2021) (§ 23-3.3(e), which prescribes the manner in which debris, bricks and other material must be removed from hand demolition sites, potentially applicable where plaintiff struck by bricks dumped down elevator shaft being used as debris chute); *Campoverde v Bruckner Plaza Associates, L.P.*, 50 AD3d 836, 855 NYS2d 268 (2d Dept 2008) (§ 23-3.3(e) inapplicable to removal of material from its original place in wall or ceiling); *Freitas v New York City Transit Authority*, 249 AD2d 184, 672 NYS2d 101 (1st Dept 1998) (§ 23-3.3(e) applies to debris being removed from height to ground and does not apply where debris on ground was being collected in wheeled dumpster at ground level).

12 NYCRR 23-3.3(f)—Demolition Operations; Demolition by hand; Access to floors—*Luebke v MBI Group*, 122 AD3d 514, 997 NYS2d 379 (1st Dept 2014) (§ 23-3.3[f], which requires that workers be provided with safe access to and egress from every building or other structure in course of demolition, applicable where plaintiff, who was involved in gut renovation project, injured when he attempted to exit building through glass door that fell on him because pins had come loose).

12 NYCRR 23-3.3(g)—Demolition Operations; Demolition by hand; Protection in other areas—*Salinas v Barney Skanska Const. Co.*, 2 AD3d 619, 769 NYS2d 559 (2d Dept 2003) (§ 23-3.3(g), which requires certain safety precautions to be taken in areas subject to falling debris, is inapplicable where plaintiff was working in area not subject to falling debris from another area); *Murtha v Integral Const. Corp.*, 253 AD2d 637, 677 NYS2d 338 (1st Dept 1998) (§ 23-3.3(g), which requires certain safety precautions to be taken in areas subject to falling debris, contains specific positive commands sufficient to satisfy § 241(6)).

12 NYCRR 23-3.3(h)—Demolition Operations; Demolition by hand; Demolition of structural steel by hand—*Bolster v Eastern Bldg. and Restoration, Inc.*, 96 AD3d 1123, 946 NYS2d 298 (3d Dept 2012) (§ 23-3.3(h), which prescribes manner in which steel construction must be demolished when the demolishment is by hand, inapplicable where fixture moved from wall to floor in immediate vicinity); *Charney v Lechase*

Const., 90 AD3d 1477, 935 NYS2d 392 (4th Dept 2011) (§ 23-3.3(h) is sufficiently specific to support a Labor Law § 241(6) action).

12 NYCRR 23-3.3(j)—Demolition Operations; Demolition by hand; Floor openings—*Alonzo v Safe Harbors of the Hudson Housing Development Fund Co., Inc.*, 104 AD3d 446, 961 NYS2d 91 (1st Dept 2013) (§ 23-3.3(j)(2)(i), which requires that “[e]very opening used for the removal of debris or materials . . . be provided with an enclosure,” applicable where hole into which plaintiff fell was used for that purpose; rule applicable even if construction project had not reached actual demolition phase).

12 NYCRR 23-3.3(k)—Demolition Operations; Demolition by hand; Storage of materials—*Sande v Trinity Centre LLC*, 188 AD3d 505, 135 NYS3d 389 (1st Dept 2020) (§ 23-3.3(k), which regulates the storage of materials and debris during hand demolition, inapplicable where there was no evidence that demolition was in progress, that pile of debris plaintiff tripped over resulted from demolition, or that the pile consisted of materials being stored).

12 NYCRR 23-3.3(k)(1)(ii)—Demolition Operations; Demolition by hand; Storage of materials; General—*Randazzo v Consolidated Edison Co. of New York*, 271 AD2d 667, 706 NYS2d 467 (2d Dept 2000) (although § 23-3.3(k)(1)(ii) contains concrete specifications, it is inapplicable to plaintiff who was injured when plywood planks were blown onto him by strong gust of wind).

12 NYCRR 23-3.3(l)—Demolition Operations; Demolition by hand; Safe footing—*Cueva v 373 Wythe Realty, Inc.*, 111 AD3d 876, 976 NYS2d 516 (2d Dept 2013) (§ 23-3.3(l), which requires that building-demolition worksites above first floor or ground level have safe footing consisting of sound flooring, applicable where section of roof across which plaintiff walked collapsed); *Harris v Rochester Gas & Elec. Corp.*, 11 AD3d 1032, 783 NYS2d 733 (4th Dept 2004) (§ 23-3.3(l), which requires that building-demolition worksites above first floor or ground level have safe footing free of accumulated debris, prohibits situations in which worker has to use pile of debris or materials as substitute for scaffold or other sound flooring; regulation inapplicable where plaintiff was standing on solid surface and there was some loose debris around him as an “unavoidable and inherent” product of demolition work).

12 NYCRR 23-3.4(b)—Demolition Operations; Mechanical methods of demolition; Structural stability—*Garcia v Market Associates*, 123 AD3d 661, 998 NYS2d 193 (2d Dept 2014) (§ 23-3.4[b], which provides that walls and other building

parts must not be left unguarded during mechanical demolition to avoid falling, inapplicable where hazard arose from plaintiff's actual performance of demolition work itself, rather than structural instability caused by progress of demolition); *Card v Cornell University*, 117 AD3d 1225, 985 NYS2d 740 (3d Dept 2014) (§ 23-3.4(b) inapplicable to hazards that result directly from demolition work); *Terry v Mutual Life Ins. Co. of New York*, 265 AD2d 929, 695 NYS2d 808 (4th Dept 1999) (§ 23-3.4(b) sets forth concrete specifications).

12 NYCRR 23-3.4(c)—Demolition Operations, Mechanical methods of demolition; Zone of demolition—*Garcia v Market Associates*, 123 AD3d 661, 998 NYS2d 193 (2d Dept 2014) (§ 23-3.4[c], which specifies various zones of demolition, regulates persons allowed to enter such zones, and requires certain controls to be located safe distance from point of demolition, inapplicable where hazard arose from plaintiff's actual performance of demolition work itself, rather than structural instability caused by progress of demolition).

12 NYCRR subpart 23-4—Excavation Operations—*Rogers v Niagara*, 209 AD2d 1034, 619 NYS2d 472 (4th Dept 1994) (sections of 12 NYCRR subpart 23-4 “set forth ‘concrete specifications’ concerning excavation operations” and are applicable where wall of trench caved in on plaintiff).

12 NYCRR 23-4.1—Excavation Operations—General Requirements—*Reyes v Astoria 31st Street Developers, LLC*, 190 AD3d 872, 139 NYS3d 352 (2d Dept 2021) (§ 23-4.1(a), which requires adequate underpinning, sheet piling, bracing or equivalent means be utilized whenever excavation other than hard rock excavation is performed in vicinity of buildings, structures or utilities, inapplicable where plaintiff fell to bottom of nine-foot hill after unsuccessfully attempting to help coworkers manually pass long piece of rebar across excavation site); *Balladares v Southgate Owners Corp.*, 40 AD3d 667, 835 NYS2d 693 (2d Dept 2007) (§ 23-4.1 inapplicable where worker injured as result of basement floor collapse during demolition of brick wall with jackhammer); *Zirkel v Frontier Communications of America, Inc.*, 29 AD3d 1188, 815 NYS2d 324 (3d Dept 2006) (§ 23-4.1, which requires that adequate underpinning, sheet piling, bracing or equivalent means be utilized whenever excavation other than hard rock excavation is performed in vicinity of buildings, structures or utilities inapplicable where worker engaged in removing old utility poles was struck by falling pole but there was no evidence that minimal excavation required for installation of new pole caused instability in ground supporting old pole); *Scarso v M.G. General Const. Corp.*, 16 AD3d 660, 792 NYS2d 546 (2d Dept 2005) (§ 23-4.1 is aimed primarily at protecting against collapse of structures associated with loss of stability due to excavation and is inap-

plicable where worker fell into excavation after losing balance); *Sainato v Albany*, 285 AD2d 708, 727 NYS2d 741 (3d Dept 2001) (§ 23-4.1 sufficiently specific to support cause of action under Labor Law § 241(6) and potentially applies where light pole broke off from foundation after adjacent sidewalk had been removed).

12 NYCRR 23-4.1(b)—Excavation Operations; General Requirements; Prohibited Entry—*Reyes v Astoria 31st Street Developers, LLC*, 190 AD3d 872, 139 NYS3d 352 (2d Dept 2021) (§ 23-4.1(b), which provides that no person shall be permitted to enter any trench or similar excavation where he or she may be exposed to side or bank failure or cave-in unless proper safeguards for his or her protection have been provided, is not sufficiently specific and cannot serve as predicate for Labor Law § 241(6) liability); *Smith v Robert Marini Builder, Inc.*, 83 AD3d 1188, 921 NYS2d 371 (3d Dept 2011) (same).

12 NYCRR 23-4.2—Excavation Operations; Trench and area type excavations—*Wells v British American Development Corp.*, 2 AD3d 1141, 770 NYS2d 161 (3d Dept 2003) (§ 23-4.2, which involves shoring and stabilization of trenches, was applicable where plaintiff working inside excavation claimed that he fell when ground under ledge he was standing on collapsed underneath him); *Adamczyk v Hillview Estates Development Corp.*, 226 AD2d 1049, 641 NYS2d 925 (4th Dept 1996) (§ 23-4.2, although a specific regulation, was inapplicable where plaintiff, who was standing in trench, injured back when he caught sewer pipe that co-worker attempted to hand him from above); *Fischer v State*, 291 AD2d 815, 737 NYS2d 204 (4th Dept 2002) (§ 23-4.2 is sufficiently specific and may be applicable to injury caused by piece of concrete falling into excavation).

12 NYCRR 23-4.2(a)—Excavation Operations; Trench and area type excavations—*Smith v Robert Marini Builder, Inc.*, 83 AD3d 1188, 921 NYS2d 371 (3d Dept 2011) (§ 23-4.2(a), which requires sheeting and shoring to be in contact with sides or banks of trench five feet or more in depth, violated where trench box and steel sheets installed in manner that sheets were not in contact with sides of trench below position of trench box); *Monsegur v Modern Comfort Technology*, 289 AD2d 307, 734 NYS2d 866 (2d Dept 2001) (Supreme Court providently exercised its discretion in finding that expert testimony was necessary to establish composition of soil for purposes of determining which § 23-4.2(a) specifications applied).

12 NYCRR 23-4.2(g)—Excavation Operations; Trench and area type excavations—*McCombs v Cimato Enterprises, Inc.*, 20 AD3d 883, 798 NYS2d 818 (4th Dept 2005) (§ 23-4.2(g) not applicable where material that struck plaintiff did not fall as a

result of the failure to clear slope); *Friot v Wal-Mart Stores Inc.*, 240 AD2d 890, 659 NYS2d 126 (3d Dept 1997) (§ 23-4.2(g), providing protection to workers in excavation trenches, does not apply to ground level accident); *McGrath v Lake Tree Village Associates*, 216 AD2d 877, 629 NYS2d 358 (4th Dept 1995) (§ 23-4.2(g) was not applicable where plaintiff, who was carrying a 24-foot scaffold pick from a truck to building, was injured while walking over 4 to 5 feet pile of dirt).

12 NYSCRR 23-4.2(h)—Excavation Operations; Trench and area type excavations—*Gurewitz v New York*, 175 AD3d 658 (2d Dept 2019) (§ 23-4.2[h]), which requires open excavations adjacent to sidewalks, streets, highways or other areas lawfully frequented be effectively guarded by fences, barricades or by coverings, not applicable where perimeter fence blew over and struck plaintiffs); *Wrobel v Pendleton*, 120 AD3d 963, 991 NYS2d 218 (4th Dept 2014) (§ 23-4.2[h] sufficiently specific to support Labor Law § 241[6] claim, but is inapplicable to an employee at work site); *Sparendam v Lehr Const. Corp.*, 24 AD3d 388, 807 NYS2d 335 (1st Dept 2005) (§ 23-4.2(h) inapplicable where work site had kerf cuts but there was not yet any excavation); *Scarso v M.G. General Const. Corp.*, 16 AD3d 660, 792 NYS2d 546 (2d Dept 2005) (§ 23-4.2(h), which requires that open excavations adjacent to sidewalks, streets, highways or other areas lawfully frequented, be effectively guarded, is sufficiently specific to support Labor Law § 241(6) cause of action and is applicable where worker fell into excavation 4 to 5 feet away from company truck).

12 NYCRR 23-4.2(i)—Excavation Operations; Trench and area type excavations—*Vanderwall v 1255 Portland Ave. LLC*, 128 AD3d 1446, 8 NYS3d 760 (4th Dept 2015) (§ 23-4.2[k], which provides that persons shall not be permitted to work in area where they may be struck or endangered by excavation equipment or dislodged material, not sufficiently specific to serve as predicate for Labor Law § 241[6] claim); *Smith v Monroe*, 229 AD2d 984, 645 NYS2d 258 (4th Dept 1996) (§ 23-4.2(i) was not applicable since the accident did not occur in unattended open excavation where no work was being performed).

12 NYCRR 23-4.2(k)—Excavation Operations; Trench and area type excavations—*Malvestuto v Lancaster*, 201 AD3d 1339, 163 NYS3d 340 (4th Dept 2022) (§ 23-4.2[k], which provides that persons shall not be permitted to work in an area where they may be struck or endangered by excavation equipment or dislodged material, not sufficiently specific to serve as predicate for Labor Law § 241(6) cause of action); *Mohamed v Watervliet*, 106 AD3d 1244, 965 NYS2d 637 (3d Dept 2013) (same); *Kropp v Shandaken*, 91 AD3d 1087, 937 NYS2d 345 (3d Dept 2012) (same); *Sparendam v Lehr Const. Corp.*, 24 AD3d 388, 807 NYS2d 335 (1st Dept 2005) (same); *Friot v Wal-Mart*

Stores Inc., 240 AD2d 890, 659 NYS2d 126 (3d Dept 1997) (same); *Webber v Dunkirk*, 226 AD2d 1050, 641 NYS2d 927 (4th Dept 1996) (same); but see *Zaino v Rogers*, 153 AD3d 763, 59 NYS3d 770 (2d Dept 2017) (§ 23-4.2(k) sufficiently specific to serve as predicate for Labor Law § 241(6) cause of action); *Cunha v Crossroads II*, 131 AD3d 440, 15 NYS3d 153 (2d Dept 2015) (§ 23-4.2[k] is sufficiently specific to serve as predicate for Labor Law § 241[6] claim; regulation does not require excavation work to be underway at time of accident, and there is no exception under it for when plaintiff was part of same work crew as operator of excavator); *Ferreira v New York*, 85 AD3d 1103, 927 NYS2d 100 (2d Dept 2011) (§ 23-4.2(k) is sufficiently specific to serve as predicate for Labor Law § 241(6) claim).

12 NYCRR 23-4.3—Excavation Operations; Access to excavations—*Bockmier v Niagara Recycling, Inc.*, 265 AD2d 897, 696 NYS2d 605 (4th Dept 1999) (§ 23-4.3, which requires that ladder be provided in any excavation more than three feet deep, applies to accident occurring when plaintiff stepped or jumped three to four feet from top of berm to flattened area in 15-foot excavation and tumbled to bottom of excavation); *Gielow v Rosa Coplon Home*, 251 AD2d 970, 674 NYS2d 551 (4th Dept 1998) (§ 23-4.3 does not apply where plaintiff was provided with ladder for access into excavation and was not entering into or exiting from excavation when accident occurred); *Doty v Eastman Kodak Co.*, 229 AD2d 961, 646 NYS2d 474 (4th Dept 1996) (§ 23-1.23 not applicable because accident did not occur on ladder, stairway or ramp providing access to an excavation); *Smith v Monroe*, 229 AD2d 984, 645 NYS2d 258 (4th Dept 1996) (question of fact whether § 23-4.3 applied where plaintiff fell while walking down the side of an anchor trench); *Adamczyk v Hillview Estates Development Corp.*, 226 AD2d 1049, 641 NYS2d 925 (4th Dept 1996) (§ 23-4.3, although a specific regulation, was inapplicable where plaintiff, who was standing in a trench, injured back when he caught sewer pipe that co-worker attempted to hand him from above); *Allen v Hodorowski and DeSantis Bldg. Contractors Inc.*, 220 AD2d 959, 632 NYS2d 707 (3d Dept 1995) (§ 23-4.3 sets forth concrete specification).

12 NYCRR 23-4.4—Excavation operations; Sheeting, shoring and bracing—*Wells v British American Development Corp.*, 2 AD3d 1141, 770 NYS2d 161 (3d Dept 2003) (§ 23-4.4, which prescribes standards for sheeting, shoring and bracing excavations that do not have sloping sides, held applicable where plaintiff working inside excavation claimed that he fell when ground under ledge he was standing on collapsed underneath him); *Adamczyk v Hillview Estates Development Corp.*, 226 AD2d 1049, 641 NYS2d 925 (4th Dept 1996) (§ 23-4.4, although specific, was inapplicable where plaintiff, who was standing in trench, injured back when he caught sewer pipe that co-worker attempted to hand him from above); *Fischer*

v State, 291 AD2d 815, 737 NYS2d 204 (4th Dept 2002) (§ 23-4.4 is sufficiently specific and may be applicable to injury caused by piece of concrete falling into excavation).

12 NYCRR 23-4.5—Excavation operations; Use of Tables III and IV; Minimum sizes of stringers and braces—Wells v British American Development Corp., 2 AD3d 1141, 770 NYS2d 161 (3d Dept 2003) (§ 23-4.5, which prescribes minimum sizes for stringers and timbers used in shoring and bracing excavations, held applicable where plaintiff working inside excavation claimed that he fell when ground under ledge he was standing on collapsed underneath him); Adamczyk v Hillview Estates Development Corp., 226 AD2d 1049, 641 NYS2d 925 (4th Dept 1996) (§ 23-4.5, although specific, was inapplicable where plaintiff, who was standing in trench, injured back when he caught sewer pipe that co-worker attempted to hand him from above).

12 NYCRR 23-5—Scaffolding—Bennion v Goodyear Tire & Rubber Co., 229 AD2d 1003, 645 NYS2d 195 (4th Dept 1996) (part 23-5 not applicable because plaintiff was not using a scaffold at the time he fell).

12 NYCRR 23-5.1—Scaffolding; General provisions for all scaffolds—Tomyuk v Junefield Ass'n, 57 AD3d 518, 868 NYS2d 731 (2d Dept 2008) (§ 23-5.1, which establishes standards for scaffolds, sufficiently specific to support Labor Law § 246(1) cause of action and applicable where worker fell off wooden scaffold while working on one-family house); Pilato v Nigel Enterprises, Inc., 48 AD3d 1133, 850 NYS2d 799 (4th Dept 2008) (§ 23-5.1 inapplicable where plaintiff allegedly fell between ceiling joists); Basile v ICF Kaiser Engineers Corp., 227 AD2d 959, 643 NYS2d 854 (4th Dept 1996) (§ 23-5.1 not applicable where plaintiff slipped and fell on stack of pipes).

12 NYCRR 23-5.1(b)—Scaffolding; General provisions for all scaffolds; scaffold footing or anchorage—Calderon v Walgreen Co., 72 AD3d 1532, 900 NYS2d 533 (4th Dept 2010) (§ 23-5.1(b), sufficiently specific to support Labor Law § 241(6) cause of action and potentially applicable where scaffold being dismantled tipped backward, causing plaintiff to fall to ground); Abreo v URS Greiner Woodward Clyde, 60 AD3d 878, 875 NYS2d 577 (2d Dept 2009) (§ 23-5.1(b), sufficiently specific to support Labor Law § 241(6) cause of action and potentially applicable where worker standing on stack of bricks piled onto scaffold fell to scaffold planking); O'Connor v Spencer (1997) Inv. Ltd. Partnership, 2 AD3d 513, 769 NYS2d 276 (2d Dept 2003) (§ 23-5.1(b) sufficiently specific to support a Labor Law § 241(6) claim); but see Kosovrasti v Epic (217) LLC, 96 AD3d 695, 948 NYS2d 260 (1st Dept 2012) (same).

12 NYCRR 23-5.1(c)—Scaffolding; General provisions for

all scaffolds; scaffold structure—*Klimowicz v Powell Cove Associates, LLC*, 111 AD3d 605, 975 NYS2d 419 (2d Dept 2013) (§ 23-5.1(c), which prescribes standards for scaffold structures, sufficiently specific to support Labor Law § 241(6) cause of action and potentially applicable where plaintiff fell through opening created by missing planks in elevated scaffold); *Ramirez v Metropolitan Transp. Authority*, 106 AD3d 799, 965 NYS2d 156 (2d Dept 2013) (§ 23-5.1(c), which prescribes load-bearing and bracing standards for scaffold structures, potentially applicable to accident occurring when plank in catwalk over elevated subway track broke); *Mutadir v 80-90 Maiden Lane Del LLC*, 110 AD3d 641, 974 NYS2d 364 (1st Dept 2013) (§ 23-5.1(c) not sufficiently specific to support Labor Law § 241(6) claim and inapplicable where plaintiff was standing on milk crates rather than scaffold at time of accident); *Susko v 337 Greenwich LLC*, 103 AD3d 434, 961 NYS2d 35 (1st Dept 2013) (§ 23-5.1(c) not sufficiently specific to support Labor Law § 241(6) claim); *Abreo v URS Greiner Woodward Clyde*, 60 AD3d 878, 875 NYS2d 577 (2d Dept 2009) (§ 23-5.1(c) sufficiently specific to support Labor Law § 241(6) cause of action and potentially applicable where worker standing on stack of bricks piled onto scaffold fell to scaffold planking); but see *Greaves v Obayashi Corp.*, 55 AD3d 409, 866 NYS2d 47 (1st Dept 2008) (same).

12 NYCRR 23-5.1(c)(1)—Scaffolding; General provisions for all scaffolds; Scaffold structure—The First Department had held that § 23-5.1(c)(1), which prescribes the weight bearing capacity of scaffolds, is not sufficiently specific to support a Labor Law § 241(6) cause of action, *Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 891 NYS2d 46 (1st Dept 2009). The Second Department has reached the opposite conclusion, *O'Connor v Spencer* (1997) Inv. Ltd. Partnership, 2 AD3d 513, 769 NYS2d 276 (2d Dept 2003); see *Debenedetto v Chetrit*, 190 AD3d 933, 140 NYS3d 569 (2d Dept 2021) (scaffold plaintiff was standing on collapsed for no apparent reason); *Treu v Cappelletti*, 71 AD3d 994, 897 NYS2d 199 (2d Dept 2010) (§ 23-5.1(c)(1) potentially applicable where question of fact existed as to whether makeshift scaffold was constructed so as to bear four times maximum weight to be carried).

12 NYCRR 23-5.1(c)(2)—Scaffolding; General provisions for all scaffolds; Scaffold structure—*Martin v Niagara Falls Bridge Commission*, 162 AD3d 1604, 78 NYS3d 584 (4th Dept 2018) (§ 23-5.1(c)(2), which requires that all scaffolds be provided with adequate horizontal and diagonal bracing to prevent lateral movement, not applicable where scaffold in process of being dismantled); *Treu v Cappelletti*, 71 AD3d 994, 897 NYS2d 199 (2d Dept 2010) (§ 23-5.1(c)(2) potentially applicable where question of fact existed as to whether makeshift scaffold conformed to rule's mandate); *O'Connor v Spencer* (1997) Inv.

Ltd. Partnership, 2 AD3d 513, 769 NYS2d 276 (2d Dept 2003) (12 NYCRR 23-5.1(c)(2) sufficiently specific to support Labor Law § 241(6)).

12 NYCRR 23-5.1(d)-Scaffolding; General provisions for all scaffolds; Scaffold structure; Scaffold loading—Mutadir v 80-90 Maiden Lane Del LLC, 110 AD3d 641, 974 NYS2d 364 (1st Dept 2013) (§ 23-5.1(d), which sets forth standards for maximum weight to be loaded on scaffolds, inapplicable where plaintiff was standing on milk crates rather than scaffold at time of accident).

12 NYCRR 23-5.1(e)-Scaffolding; General provisions for all scaffolds; Scaffold Planking—Videan v NRG Energy, Inc., 149 AD3d 1533, 53 NYS3d 436 (4th Dept 2017) (alleged violation of § 23-5.1(e), which requires, among other things, that scaffold planks be of a specified width and “laid tight,” inapplicable where scaffold’s inadequate height, rather than defects in planking, proximately caused accident); Susko v 337 Greenwich LLC, 103 AD3d 434, 961 NYS2d 35 (1st Dept 2013) (§ 23-5.1(e) sufficiently specific to support Labor Law § 241(6) cause of action and potentially applicable where defendant failed to demonstrate that scaffold had conforming planks); see Harkin v Nassau, 121 AD3d 942, 996 NYS2d 289 (2d Dept 2014) (§ 23-5.1[e] sufficiently specific to support Labor Law § 241[6] claim).

12 NYCRR 23-5.1(e)(1)—Scaffolding; General provisions for all scaffolds; Scaffold planking—Klimowicz v Powell Cove Associates, LLC, 111 AD3d 605, 975 NYS2d 419 (2d Dept 2013) (§ 23-5.1(e)(1), which prescribes standards for scaffold planking, sufficiently specific to support Labor Law § 241(6) cause of action and potentially applicable where plaintiff fell through opening created by missing planks in elevated scaffold); Harris v Hueber-Breuer Const. Co., Inc., 67 AD3d 1351, 890 NYS2d 235 (4th Dept 2009) (§ 23-5.1(e)(1) potentially applicable where plaintiff injured while attempting to descend multi-level scaffold with allegedly inadequate planking).

12 NYCRR 23-5.1(e)(5)—Scaffolding; General provisions for all scaffolds; Scaffold planking; Minimum Width—Section § 23-5.1(e)(5) provides that, except in certain circumstances, the minimum width of every planked scaffold platform shall be 18 inches, Payne v NSH Community Services, Inc., 203 AD3d 546, 165 NYS3d 494 (1st Dept 2022) (§ 23-5.1[e][5] not applicable where plaintiff tripped while crossing rebar mat, as such mat was not scaffold, nor would walkway across mat constitute scaffold); Debenedetto v Chetrit, 190 AD3d 933, 140 NYS3d 569 (2d Dept 2021) (§ 23-5.1(e)(5) sufficiently specific to support Labor Law § 241(6) cause of action and potentially applicable where planked scaffold on metal brackets affixed to outside of house collapsed for no apparent reason).

12 NYCRR 23-5.1(f)—Scaffolding; General provisions for all scaffolds; Scaffold maintenance and repair—*Debennedetto v Chetrit*, 190 AD3d 933, 140 NYS3d 569 (2d Dept 2021) (§ 23-5.1(f), which requires that scaffolds be kept in good repair and that defects and noncomplying conditions be fixed before further use, sets forth general rather than specific safety standard and is therefore insufficient to support Labor Law § 241(6) cause of action); *Klimowicz v Powell Cove Associates, LLC*, 111 AD3d 605, 975 NYS2d 419 (2d Dept 2013) (same); *Holly v Chautauqua*, 63 AD3d 1558, 881 NYS2d 741 (4th Dept 2009), rev'd on other grounds, 13 NY3d 931, 895 NYS2d 308, 922 NE2d 897 (2010) (same); *Allan v DHL Exp. (USA), Inc.*, 99 AD3d 828, 952 NYS2d 275 (2d Dept 2012) (same); *Moutray v Baron*, 244 AD2d 618, 663 NYS2d 926 (3d Dept 1997) (§ 23-5.1(f) is not a sufficiently specific regulation because it is a subpart of general provisions for all scaffolds).

12 NYCRR 23-5.1(h)—Scaffolding; General provisions for all scaffolds; Scaffold erection and removal—*Corona v HHSC 13th St. Dev. Corp.*, 197 AD3d 1025, 153 NYS3d 448 (1st Dept 2021) (§ 23-5.1(h), which requires erection and removal of scaffolds by designated person, not applicable because putative absence of designated person was not proximate cause of accident); *Holly v Chautauqua*, 63 AD3d 1558, 881 NYS2d 741 (4th Dept 2009), rev'd on other grounds, 13 NY3d 931, 895 NYS2d 308, 922 NE2d 897 (2010) (whether or not it is sufficiently specific inapplicable where accident unrelated to defective scaffold's erection or removal); *Debennedetto v Chetrit*, 190 AD3d 933, 140 NYS3d 569 (2d Dept 2021) (§ 23-5.1(h) potentially applicable where where planked scaffold on metal brackets affixed to outside of house collapsed for no apparent reason); *Allan v DHL Exp. (USA), Inc.*, 99 AD3d 828, 952 NYS2d 275 (2d Dept 2012) (§ 23-5.1(h) inapplicable where scaffold not being erected or removed at time of accident); *Abreo v URS Greiner Woodward Clyde*, 60 AD3d 878, 875 NYS2d 577 (2d Dept 2009) (§ 23-5.1(h), which requires that scaffolds be erected and removed by designated persons, sufficiently specific to support Labor Law § 241(6) cause of action and potentially applicable where worker standing on stack of bricks piled onto scaffold fell to scaffold planking); *Lavore v Kir Munsey Park 020, LLC*, 40 AD3d 711, 835 NYS2d 708 (2d Dept 2007) (§ 23-5(h) inapplicable where worker's use of truck as functional equivalent of scaffold had ceased and scaffolding material removed before accident occurred).

12 NYCRR § 23-5.1(i)—Scaffolding; General provisions for all scaffolds; Overhead protection—*Zervos v New York*, 8 AD3d 477, 779 NYS2d 106 (2d Dept 2004) (§ 23-5.1(i), which prescribes the size, length, width and lay-out of planks used to protect workers exposed to danger from overhead falling objects, is sufficiently specific to support Labor Law § 241(6) cause of action).

12 NYCRR 23-5.1(j)—General provisions for all scaffolds; Safety railings—*Debenedetto v Chetrit*, 190 AD3d 933, 140 NYS3d 569 (2d Dept 2021) (§ 23-5.1(j), which specifies railing requirements for scaffold platforms, potentially applicable where planked scaffold on metal brackets affixed to outside of house collapsed for no apparent reason); *Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 891 NYS2d 46 (1st Dept 2009) (§ 23-5.1(j) potentially applicable where plaintiff fell from elevated platform); *Holly v Chautauqua*, 63 AD3d 1558, 881 NYS2d 741 (4th Dept 2009), *rev'd on other grounds*, 13 NY3d 931, 895 NYS2d 308, 922 NE2d 897 (2010) (§ 23-5.1(j), which requires that safety railings be provided for open sides of scaffolds located more than 7 feet from ground and which prescribes standards for such railings, inapplicable where scaffold was 6 feet from ground and had no safety railings); *Crespo v Triad, Inc.*, 294 AD2d 145, 742 NYS2d 25 (1st Dept 2002) (plaintiff denied summary judgment on issue of liability under § 241(6) because of factual issues as to whether scaffold from which he fell was at least seven feet high).

12 NYCRR 23-5.2—Scaffolding; Approval required—*Devoy v New York*, 192 AD3d 665, 144 NYS3d 68 (2d Dept 2021) (defendants failed to establish § 23-5.2, which provides that the use of any scaffold of a type not named, specified or described in Part 23 of the Industrial Code is prohibited without special approval, was inapplicable where plaintiff was injured while working on a mobile, elevated platform in train tunnel intended to allow him to avoid being struck by passing trains); *Maldonado v Townsend Ave. Enterprises*, 294 AD2d 207, 741 NYS2d 696 (1st Dept 2002) (§ 23-5.2 is inapplicable where accident did not involve use of scaffold).

12 NYCRR 23-5.3(c)—General Provisions for Metal Scaffolds; Strength and factor safety—*Debenedetto v Chetrit*, 190 AD3d 933, 140 NYS3d 569 (2d Dept 2021) (§ 23-5.3(c), which provides that the total of live and dead loads imposed on any scaffold assembly shall not exceed one-quarter of the ultimate strength of the members as determined by actual test, potentially applicable where planked scaffold on metal brackets affixed to outside of house collapsed for no apparent reason).

12 NYCRR 23-5.3(d)(2)—General Provisions for Metal Scaffolds; Minimum uniform live loads; Metal scaffolds designed and constructed for particular types of work—*Debenedetto v Chetrit*, 190 AD3d 933, 140 NYS3d 569 (2d Dept 2021) (§ 23-5.3(d)(2), which provides that metal scaffolds shall support uniformly distributed live loads in accordance with various specified types of work (i.e., masonry, stone setting, carpentry, etc.), potentially applicable where planked scaffold on metal brackets affixed to outside of house collapsed for no apparent reason during carpentry work).

12 NYCRR 23-5.3(d)(3)—General Provisions for Metal Scaffolds; Minimum uniform live loads; Dead loads—*Debenedetto v Chetrit*, 190 AD3d 933, 140 NYS3d 569 (2d Dept 2021) (§ 23-5.3(d)(3), which requires that, in addition to live loads, metal scaffolds shall be designed and constructed to support dead loads, such as platforms, frames, safety railings and other members, potentially applicable where planked scaffold on metal brackets affixed to outside of house collapsed for no apparent reason).

12 NYCRR 23-5.3(e)—General Provisions for Metal Scaffolds; Safety railings—*Debenedetto v Chetrit*, 190 AD3d 933, 140 NYS3d 569 (2d Dept 2021) (§ 23-5.3(e), which requires safety railings on scaffolds constructed pursuant to Subpart 5.3 of the Industrial Code, potentially applicable where planked scaffold on metal brackets affixed to outside of house collapsed for no apparent reason); *Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 891 NYS2d 46 (1st Dept 2009) (§ 23-5.3(e) potentially applicable where plaintiff fell from elevated platform).

12 NYCRR 23-5.3(f)—General Provisions for Metal Scaffolds; Access—*Klimowicz v Powell Cove Associates, LLC*, 111 AD3d 605, 975 NYS2d 419 (2d Dept 2013) (§ 23-5.3(f), which requires provision of ladders, stairs or ramps for access to and egress from platform levels of metal scaffolds located more than two feet above or below grade, floor or other equivalent level, sufficiently specific to support Labor Law § 241(6) cause of action and potentially applicable where plaintiff fell through opening created by missing planks in elevated scaffold); *Harris v Hueber-Breuer Const. Co., Inc.*, 67 AD3d 1351, 890 NYS2d 235 (4th Dept 2009) (§ 23-5.3(f) potentially applicable where plaintiff injured while attempting to descend multi-level scaffold with allegedly inadequate planking).

12 NYCRR 23-5.3(g)—Scaffolding; General provisions for metal scaffolds; Footings—*Calderon v Walgreen Co.*, 72 AD3d 1532, 900 NYS2d 533 (4th Dept 2010) (§ 23-5.3(g), which prescribes standards for footing of metal scaffolds, sufficiently specific to support Labor Law § 241(6) cause of action and potentially applicable where scaffold being dismantled tipped backward, causing plaintiff to fall to ground); *Abreo v URS Greiner Woodward Clyde*, 60 AD3d 878, 875 NYS2d 577 (2d Dept 2009) (§ 23-5.3(g), sufficiently specific to support Labor Law § 241(6) cause of action and potentially applicable where worker standing on stack of bricks piled onto scaffold fell to scaffold planking).

12 NYCRR 23-5.3(h)—Scaffolding; General provisions for metal scaffolds; Tie-ins—*Abreo v URS Greiner Woodward Clyde*, 60 AD3d 878, 875 NYS2d 577 (2d Dept 2009) (§ 23-5.3(g), which requires that metal scaffolds be securely tied into the

building or other structure and at intervals of no more than 30 feet horizontally and 26 feet vertically, sufficiently specific to support Labor Law § 241(6) cause of action and potentially applicable where worker standing on stack of bricks piled onto scaffold fell to scaffold planking).

12 NYCRR 23-5.4—Scaffolding; Tubular welded frame scaffolds—*Holly v Chautauqua*, 63 AD3d 1558, 881 NYS2d 741 (4th Dept 2009), rev'd on other grounds, 13 NY3d 931, 895 NYS2d 308, 922 NE2d 897 (2010) (§ 23-5.4, which prescribes standards for tubular welded frame scaffolds and for safety railing posts installed on such scaffolds, inapplicable where no safety railings provided).

12 NYCRR 23-5.6—Scaffolding; Pole scaffolds—*Maldonado v Townsend Ave. Enterprises*, 294 AD2d 207, 741 NYS2d 696 (1st Dept 2002) (§ 23-5.6 is inapplicable where accident did not involve use of scaffold).

12 NYCRR 23-5.7—Scaffolding; Outrigger scaffolds—*Maldonado v Townsend Ave. Enterprises*, 294 AD2d 207, 741 NYS2d 696 (1st Dept 2002) (§ 23-5.7 is inapplicable where accident did not involve use of scaffold).

12 NYCRR 23-5.8—Scaffolding; All suspended scaffolds—*Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 891 NYS2d 46 (1st Dept 2009) (although § 23-5.8, which prescribes standards for suspended scaffolds, does not mention safety railings, requirements for safety railings in §§ 23-5.1 and 23-5.3 are applicable to suspended scaffolds); *Avila v Ashton Management Co.*, 24 AD3d 273, 807 NYS2d 24 (1st Dept 2005) (§ 23-5.8, which regulates the construction and operation of scaffolds, applicable where no evidence that defendant provided required tie-ins).

12 NYCRR 23-5.13—Scaffolding; Carpenters' portable scaffolds—*Maldonado v Townsend Ave. Enterprises*, 294 AD2d 207, 741 NYS2d 696 (1st Dept 2002) (§ 23-5.13 is inapplicable where accident did not involve use of scaffold).

12 NYCRR 23-5.13(d)—Scaffolding; Carpenters' portable scaffolds; Safety railing—*Debennedetto v Chetrit*, 190 AD3d 933, 140 NYS3d 569 (2d Dept 2021) (§ 23-5.13(d), which requires safety railing where any carpenters' portable bracket scaffold is elevated more than seven feet above the ground, grade, floor or equivalent surface, potentially applicable where planked scaffold on metal brackets affixed to outside of house collapsed for no apparent reason).

12 NYCRR 23-5.16—Scaffolding; Trestle and extension trestle ladder scaffolds—*Maldonado v Townsend Ave. Enterprises*, 294 AD2d 207, 741 NYS2d 696 (1st Dept 2002) (§ 23-5.16 is inapplicable where accident did not involve use of scaffold).

12 NYCRR 23-5.17—Scaffolding; Ladder jack scaffolds—Maldonado v Townsend Ave. Enterprises, 294 AD2d 207, 741 NYS2d 696 (1st Dept 2002) (§ 23-5.17 is inapplicable where accident did not involve use of scaffold).

12 NYCRR 23-5.18—Manually-propelled mobile scaffolds—Robertson v Little Rapids Corp., 277 AD2d 560, 715 NYS2d 482 (3d Dept 2000) (abrogated on other grounds by, Goad v Southern Elec. Intern., Inc., 304 AD2d 887, 758 NYS2d 184 (3d Dept 2003)) (§ 23-5.18, relating to mobile scaffolds, is sufficiently specific to support Labor Law § 241(6) claim and applies to platform that was originally designed, manufactured and used as mobile scaffold).

12 NYCRR 23-5.18(b)—Manually-propelled Mobile Scaffolds; Safety railings—Ritzer v 6 East 43rd Street Corp., 57 AD3d 412, 871 NYS2d 26 (1st Dept 2008) (§ 23-5.18(b), which requires that manually-propelled mobile scaffolds be provided with safety railings constructed and installed in compliance with Industrial Code, sufficiently specific to support Labor Law § 241(6) cause of action and applicable where plaintiff fell from scaffold that had no safety railing).

12 NYCRR 23-5.18(e)—Manually-propelled Mobile Scaffolds; Safety railings—Ritzer v 6 East 43rd Street Corp., 57 AD3d 412, 871 NYS2d 26 (1st Dept 2008) (§ 23-5.18(e), which requires that manually-propelled mobile scaffolds be provided with casters with positive locking devices designed to support four times expected maximum load, sufficiently specific to support Labor Law § 241(6) cause of action and applicable where scaffold from which plaintiff fell had only two locking devices for its four wheels).

12 NYCRR 23-5.22(f)—Protection in Construction, Demolition and Excavation; Operations; Scaffolding; Stilts; Protection from Hazards—Gonzalez v Magestic Fine Custom Home, 115 AD3d 798, 982 NYS2d 344 (2d Dept 2014) (§ 23-5.22(f), which provides that stilts may only be used on floor surfaces “kept free from obstructions, materials, debris, accumulations of dirt or slippery substances,” potentially applicable where issue of fact as to whether electrical cable or wire that became entangled in plaintiff’s stilts, was integral part of work).

12 NYCRR 23-6—Material hoisting—Toefer v Long Island R.R., 4 NY3d 399, 795 NYS2d 511, 828 NE2d 614 (2005) (Industrial Code subpart 23-6 does not impose any requirement that hoists or cranes be used under particular circumstances; rather, it provides detailed rules to be followed when hoists or cranes are used); Dominguez v Mirman, Markovits & Landau, P.C., 180 AD3d 646, 119 NYS3d 136 (2d Dept 2020) (require-

ments of Industrial Code subpart 23-6 inapplicable to excavator being used for material hoisting); *Ciccone v Kendal On Hudson*, 72 AD3d 723, 898 NYS2d 645 (2d Dept 2010) (requirements of Industrial Code subpart 23-6 inapplicable to truck equipped with boom and fork being used to hoist bundles of panels); *Locicero v Princeton Restoration, Inc.*, 25 AD3d 664, 811 NYS2d 673 (2d Dept 2006) (mobile crane attached to back of truck specifically exempt from subpart 23-6 under provisions of § 23-6.1(a)); *Salinas v Barney Skanska Const. Co.*, 2 AD3d 619, 769 NYS2d 559 (2d Dept 2003) (subpart 23-6 inapplicable where no hoisting equipment was used); *Hasty v Solvay Mill Ltd. Partnership*, 306 AD2d 892, 760 NYS2d 795 (4th Dept 2003) (same); *McGrath v Lake Tree Village Associates*, 216 AD2d 877, 629 NYS2d 358 (4th Dept 1995) (subpart 23-6 refers to hoisting materials and equipment, which were not used by plaintiff who was carrying scaffold pick when he walked on 4 to 5 foot high pile of dirt); *Narrow v Crane-Hogan Structural Systems Inc.*, 202 AD2d 841, 609 NYS2d 372 (3d Dept 1994) (subpart 23-6 relates to general safety standards); *Soles v Eastman Kodak Co.*, 162 Misc2d 406, 616 NYS2d 871 (Sup 1994), *aff'd*, 216 AD2d 973, 629 NYS2d 610 (4th Dept 1995) (12 NYCRR 23-6.1, 23-6.2 and 23-6.3 address material hoists and are not applicable because block and tackle that was used at the time of the accident was not “material hoist” and, further, accident was not caused by failure of the block and tackle to meet the concrete specifications set out in those sections).

12 NYCRR 23-6.1—Material Hoisting; General requirements—*Balladares v Southgate Owners Corp.*, 40 AD3d 667, 835 NYS2d 693 (2d Dept 2007) (§ 23-6.1, which prescribes safety standards for material hoisting equipment other than cranes, derricks, aerial baskets, excavating machines used for material hoisting and fork lift trucks, inapplicable where worker injured as result of basement floor collapse during demolition of brick wall with jackhammer); *Smith v Homart Development Co.*, 237 AD2d 77, 666 NYS2d 218 (3d Dept 1997) (§ 23-6.1 inapplicable where plaintiff was not using material hoisting equipment at time of accident; section implies more than just rope connected through actual item being lifted and refers to items or loads that swing or turn freely).

12 NYCRR 23-6.1(a)—Material Hoisting; General requirements; Application of Subpart—*Rought v Price Chopper Operating Co., Inc.*, 73 AD3d 1414, 901 NYS2d 418 (3d Dept 2010) (§ 23-6.1(a), which states that requirements of Subpart shall apply to all material hoisting equipment except cranes, derricks, aerial baskets, excavating machines used for material hoisting and fork lift trucks, does not exempt cases in which forklift being used at job site as substitute power source for hoisting rather than for its intended use); *Schwab v A.J. Martini Inc.*, 288 AD2d 654, 732 NYS2d 474 (3d Dept 2001)

(§ 23-6.1(a) is not concrete specification); *Cardenas v American Ref-Fuel Co. of Hempstead*, 244 AD2d 377, 664 NYS2d 453 (2d Dept 1997) (§ 23-6.1(a) cannot support Labor Law § 241(6) cause of action because it does not set forth safety standard); *Sharrow v Dick Corp.*, 233 AD2d 858, 649 NYS2d 281 (4th Dept 1996) (same).

12 NYCRR 23-6.1(b)—Material Hoisting; General requirements; Maintenance—*Barrick v Palmark, Inc.*, 9 AD3d 414, 780 NYS2d 631 (2d Dept 2004) (§ 23-6.1(b), which requires that material hoisting equipment be maintained in good repair, did not contain concrete and specific standard relevant to Labor Law § 241(c) claim arising from worker's having been injured when wire sling he was using to loosen bolt snapped and struck him); *Schwab v A.J. Martini Inc.*, 288 AD2d 654, 732 NYS2d 474 (3d Dept 2001) (§ 23-6.1(b) relates merely to general safety standards and is not sufficient to impose liability under Labor Law § 241(6)); *Cardenas v American Ref-Fuel Co. of Hempstead*, 244 AD2d 377, 664 NYS2d 453 (2d Dept 1997) (even assuming that § 23-6.1(b) is sufficiently specific, it does not apply here because there is no evidence that lug in question was material hoist within meaning of section); *Sharrow v Dick Corp.*, 233 AD2d 858, 649 NYS2d 281 (4th Dept 1996) (even assuming that § 23-6.1(b) is sufficiently specific, it does not apply where there is no evidence that hoist over which plaintiff tripped was defective or improperly maintained).

12 NYCRR 23-6.1(c)—Material Hoisting; General requirements; Operation—Section 23-6.1(c) provides that (1) only trained, designated persons shall operate hoisting equipment and such equipment shall be operated in a safe manner at all times and (2) operators of material hoisting equipment shall remain at the controls while any load is suspended, see *Lopez v Halletts Astoria LLC*, 205 AD3d 573, 169 NYS3d 282 (1st Dept 2022) (§ 23-6.1[c][1] is “unquestionably general” and therefore may not support a Labor Law § 241[6] claim); *Gualpa v Canarsie Plaza, LLC*, 144 AD3d 1088, 42 NYS3d 293 (2d Dept 2016) (§ 23-6.1[c] inapplicable to forklifts, which are expressly exempted from that safety provision); *Martinez v 342 Property LLC*, 128 AD3d 408, 8 NYS3d 309 (1st Dept 2015) (§ 23-6.1[c] inapplicable where accident does not arise out of operation or loading of hoisting equipment); *Sharrow v Dick Corp.*, 233 AD2d 858, 649 NYS2d 281 (4th Dept 1996) (§ 23-6.1(c)(1) is unquestionably general insofar as it mandates that hoisting equipment be operated in a “safe manner at all times”; in any event regulation does not apply because plaintiff was not injured while operating hoist).

12 NYCRR 23-6.1(d)—Material Hoisting; General requirements; Loading—*Gualpa v Canarsie Plaza, LLC*, 144 AD3d 1088, 42 NYS3d 293 (2d Dept 2016) (§ 23-6.1[d], which provides

that material hoisting equipment shall not be loaded in excess of the live load for which it was designed and requires that loads be properly trimmed, securely slung and balanced, inapplicable to forklifts, which are expressly exempted from that safety provision); *Martinez v 342 Property LLC*, 128 AD3d 408, 8 NYS3d 309 (1st Dept 2015) (§ 23-6.1[d] inapplicable where accident does not arise out of operation or loading of hoisting equipment); *Kretowski v Braender Condominium*, 57 AD3d 950, 871 NYS2d 304 (2d Dept 2008) (§ 23-6.1(d) sufficiently specific to support Labor Law § 241(6) cause of action and potentially applicable where worker injured by brick that fell from pallet being hoisted to building roof); *Barrios v Boston Properties LLC*, 55 AD3d 339, 866 NYS2d 99 (1st Dept 2008) (§ 23-6.1(d) inapplicable to accident involving freight elevator, which is not a “material hoist”); *Hayden v 845 UN Ltd. Partnership*, 304 AD2d 499, 758 NYS2d 647 (1st Dept 2003) (§ 23-6.1(d) sufficiently specific to support Labor Law § 241(6) cause of action and applies to accident occurring when worker was “hoisting” by pulling on a rope tied to a cable in order to draw an elevator cable up to a “cat-head”).

12 NYCRR 23-6.1(g)—Material Hoisting; General requirements; Protection of moving parts—Section 23-6.1(g) provides that gears, belts, sprockets, drums, sheaves and points of contact between moving parts of power-driven hoist equipment, when not guarded by location, shall be guarded in compliance with this Industrial Code Parts 19 and 23, see *Lopez v Halletts Astoria LLC*, 205 AD3d 573, 169 NYS3d 282 (1st Dept 2022) (issue of fact whether violation of § 23-6.1[g] proximate cause of plaintiff’s injury).

12 NYCRR 23-6.1(h)—Material Hoisting; General requirements; Tag line—*Naughton v New York*, 94 AD3d 1, 940 NYS2d 21 (1st Dept 2012) (§ 23-6.1(h), which provides that loads that have a tendency to swing or turn freely during hoisting must be controlled by tag lines, is sufficiently specific to support a Labor Law § 241(6) action); *Morrison v New York*, 5 AD3d 642, 774 NYS2d 763 (2d Dept 2004) (§ 23-6.1(h) is not sufficiently specific); *Smith v Homart Development Co.*, 237 AD2d 77, 666 NYS2d 218 (3d Dept 1997) (§ 23-6.1(h) is not sufficiently specific).

12 NYCRR 23-6.1(j)(1)—Material Hoisting; General requirements; Hoisting machine; Hoist brakes—*Strangio v Severson Environmental Services, Inc.*, 74 AD3d 1892, 905 NYS2d 729 (4th Dept 2010), *aff’d* as modified on other grounds, 15 NY3d 914, 913 NYS2d 639, 939 NE2d 805 (2010) (§ 23-6.1(j) inapplicable where plaintiff was struck in face by handle of hand-operated hoisting machine when scaffold he was raising unexpectedly fell); *Toefer v Long Island Rail Road*, 308 AD2d 579, 764 NYS2d 865 (2d Dept 2003), *aff’d*, 4 NY3d 399, 795

NYS2d 511, 828 NE2d 614 (2005) (§ 23-6.1(j), which provides concrete safety specifications for hoists, was not applicable where plaintiff was injured when wooden lever used to push steel beams off side of truck he was unloading sprung up and hit his head); *Aloi v Structure-Tone, Inc.*, 2 AD3d 375, 767 NYS2d 832 (2d Dept 2003) (§ 23-6.1(j), which specifies required features of “hoisting machine[s],” not applicable where worker was using rope rather than mechanical hoisting device to lower bucket of steel bolts); *Mattison v Wilmot*, 228 AD2d 991, 645 NYS2d 122 (3d Dept 1996) (plaintiffs sufficiently alleged that defendants violated § 23-6.1(j)(1), concrete specification requiring manual hoists to be supplied with effective pawl and ratchet).

12 NYCRR 23-6.2(a)—Material Hoisting; Rigging, rope and chains for material hoists; Hoisting rope—*Rought v Price Chopper Operating Co., Inc.*, 73 AD3d 1414, 901 NYS2d 418 (3d Dept 2010) (§ 23-6.2(a), which sets forth standards for hoisting ropes, sufficiently specific to support Labor Law § 241(6) cause of action and potentially applicable where plaintiff struck by heavy wire when rope pulling wire up into conduit broke; § 23-6.1(a)’s exception for forklifts used for material hoisting inapplicable where forklift being used at job site as substitute power source for hoisting rather than for its intended use); *Hayden v 845 UN Ltd. Partnership*, 304 AD2d 499, 758 NYS2d 647 (1st Dept 2003) (§ 23-6.1(d) is sufficiently specific to support Labor Law § 241(6) cause of action and applies to accident occurring when worker was “hoisting” by pulling on a rope tied to a cable in order to draw an elevator cable up to a “cat-head”).

12 NYCRR 23-6.2(c)—Material Hoisting; Rigging, rope and chains for material hoists; Fittings—*Guerra v Port Authority of New York and New Jersey*, 35 AD3d 810, 828 NYS2d 440 (2d Dept 2006) (§ 23-6.2(c), which requires that pulley blocks and similar devices be securely fastened or used with safety hooks, sufficiently concrete to support Labor Law § 241(6) cause of action); *Augello v 20166 Tenants Corp.*, 251 AD2d 44, 673 NYS2d 664 (1st Dept 1998) (same).

12 NYCRR 23-6.2(d)—Material Hoisting; Rigging, rope and chains for material hoists; Use of chains—*Lombardi v New York*, 175 AD3d 1521, 109 NYS3d 373 (2d Dept 2019) (§ 23-6.2(d)(3), which prohibits use of “as slings in hoisting operations except for the raising or lowering of wooden piles, large timbers, large pieces of masonry or large stones,” inapplicable where metal plate used to cover excavated trench in roadway struck plaintiff as it was being removed); *Guerra v Port Authority of New York and New Jersey*, 35 AD3d 810, 828 NYS2d 440 (2d Dept 2006) (§ 23-6.2(d)(3), which prohibits use of defective chains, inapplicable to defective hooks being used

with chain); *Puckett v Erie*, 262 AD2d 964, 693 NYS2d 780 (4th Dept 1999) (§ 23-6.2(d) is sufficiently concrete to support Labor Law § 241(6) cause of action).

12 NYCRR § 23-6.3(a)—Material Platform or Bucket Hoists; Design requirements—*Kretowski v Braender Condominium*, 57 AD3d 950, 871 NYS2d 304 (2d Dept 2008) (§ 23-6.3(a), which requires that material platforms and bucket hoists erected after June 1, 1972 be designed by a licensed professional engineer and that the plans and specifications be kept on the job site, sufficiently specific to support Labor Law § 241(6) cause of action, but violation not established where plaintiff failed to show that pallet from which brick fell not designed by professional engineer); *Aloi v Structure-Tone, Inc.*, 2 AD3d 375, 767 NYS2d 832 (2d Dept 2003) (§ 23-6.3(a) not applicable where worker was using rope rather than mechanical hosting device to lower bucket of steel bolts).

12 NYCRR 23-6.3(e)—Material Platform or Bucket Hoists; Entrances to hoistways—*Barrios v Boston Properties LLC*, 55 AD3d 339, 866 NYS2d 99 (1st Dept 2008) (§ 23-6.3(e)(3), which requires that car platforms be provided with securely fastened blocks and cleats to prevent the rolling of wheeled vehicles and shifting of other equipment, inapplicable to accident involving freight elevator, which is not a “material hoist”).

12 NYCRR § 23-6.3(j)—Material Platform or Bucket Hoists; Thoroughfare—*Aloi v Structure-Tone, Inc.*, 2 AD3d 375, 767 NYS2d 832 (2d Dept 2003) (§ 23-6.3(a), which provides that hoistways for material hoists shall not be located either partially or wholly over sidewalks, passageways or other areas to which persons have access unless a broken-rope safety device capable of stopping and holding the platform or bucket with its rated load is provided, not applicable where worker was using rope rather than mechanical hosting device to lower bucket of steel bolts).

12 NYCRR 23-8—Mobile Cranes and Derricks—*Toefer v Long Island R.R.*, 4 NY3d 399, 795 NYS2d 511, 828 NE2d 614 (2005) (§ 23-8 does not impose any requirement that hoists or cranes be used under particular circumstances; rather, it provides detailed rules to be followed when hoists or cranes are used); *Gonzalez v Glenwood Mason Supply Co., Inc.*, 41 AD3d 338, 839 NYS2d 74 (1st Dept 2007) (§ 23-8 inapplicable to stationary hoists); *Hasty v Solvay Mill Ltd. Partnership*, 306 AD2d 892, 760 NYS2d 795 (4th Dept 2003) (§ 23-8 does not apply where no hoisting devices were used).

12 NYCRR 23-8.1(a)—Mobile Cranes, Tower Cranes and Derricks; General provisions; Stability and strength—*Goss v State University Const. Fund*, 261 AD2d 860, 690

NYS2d 811 (4th Dept 1999) (§ 23-8.1(a) is general safety standard); *Thompson v Ludovico*, 246 AD2d 642, 668 NYS2d 238 (2d Dept 1998) (same) (abrogated on other grounds by, *Misicki v Caradonna*, 12 NY3d 511, 882 NYS2d 375, 909 NE2d 1213 (2009)).

12 NYCRR 23-8.1(e)(3)—Mobile Cranes, Tower Cranes and Derricks; General provisions; Load Handling; Slings—*Hayek v Metropolitan Transportation Authority*, 195 AD3d 568, 146 NYS3d 479 (1st Dept 2021) (§ 23-8.1(e)(3), which requires that, where slings are used to hoist material of long length, spreader bars shall be used to space and keep sling legs in proper balance, sufficiently specific to support Labor Law § 241(6) cause of action and applicable where plaintiff was struck by improperly hoisted and inadequately secured load of rebar weighing between 2,000 and 3,000 pounds).

12 NYCRR 23-8.1(e)(4)—Mobile Cranes, Tower Cranes and Derricks; General provisions; Load Handling; Boxes—*Hayek v Metropolitan Transportation Authority*, 195 AD3d 568, 146 NYS3d 479 (1st Dept 2021) (§ 23-8.1(e)(4), which requires that certain materials be hoisted in boxes, such as reinforcing rods, conduit, and lumber of uneven lengths, sufficiently specific to support Labor Law § 241(6) cause of action and applicable where plaintiff was struck by improperly hoisted and inadequately secured load of L-shaped rebar weighing between 2,000 and 3,000 pounds).

12 NYCRR 23-8.1(f)—Mobile Cranes, Tower Cranes and Derricks; General provisions; Hoisting the load—*Cammon v New York*, 21 AD3d 196, 799 NYS2d 455 (1st Dept 2005) (§ 23-8.1(f)(1)(iv) sets forth a specific standard of conduct); *Lysiak v Murray Realty Co.*, 227 AD2d 746, 642 NYS2d 350 (3d Dept 1996) (§ 23-8.1(f), which involves “hoisting,” was found not applicable where tree being dragged by bulldozer during tree removal operation was unexpectedly propelled upward, striking plaintiff).

12 NYCRR 23-8.1(f)(1)—Mobile Cranes, Tower Cranes and Derricks; General Provisions; Hoisting the load; Inspection for specific unsafe conditions—*McCoy v Metropolitan Transp. Authority*, 38 AD3d 308, 832 NYS2d 26 (1st Dept 2007) (§ 23-8.1(f)(1), which requires inspection for specified unsafe conditions before hoisting with mobile crane, tower crane or derrick, applicable where injury occurred when beam, which had already been hoisted off the ground, was being propelled forward; when heavy object being moved from one spot to another, regulation not limited to part of operation in which object is being lifted vertically).

12 NYCRR 23-8.1(f)(1)(iv)—Mobile Cranes, Tower Cranes

and Derricks; General Provisions; Hoisting the load; Inspection for specific unsafe conditions; Securing and balancing of load—Hayek v Metropolitan Transportation Authority, 195 AD3d 568, 146 NYS3d 479 (1st Dept 2021) (§ 23-8.1(f)(1)(iv), which requires inspection to determine load is well secured and properly balanced in sling or lifting device before it is lifted more than a few inches with mobile crane, sufficiently specific to support Labor Law § 241(6) cause of action and applicable where plaintiff was struck by improperly hoisted and inadequately secured load of L-shaped rebar weighing between 2,000 and 3,000 pounds); Wein v East Side 11th & 28th, LLC, 186 AD3d 1579, 132 NYS3d 19 (2d Dept 2020) (§ 23-8.1(f)(1)(iv) could not serve as a basis for Labor Law § 241(6) cause of action not applicable where plaintiff and coworkers properly inspected load prior to hoisting).

12 NYCRR 23-8.1(f)(2)—Mobile Cranes, Tower Cranes and Derricks; General provisions; Hoisting the load; Conditions during hoisting operation—Conditions—Hayek v Metropolitan Transportation Authority, 195 AD3d 568, 146 NYS3d 479 (1st Dept 2021) (§ 23-8.1(f)(2), which specifies that moving loads shall be hoisted so as to prevent sudden accelerations or decelerations, and that loads shall not contact any obstructions, sufficiently specific to support Labor Law § 241(6) cause of action and applicable where plaintiff was struck by improperly hoisted and inadequately secured load of L-shaped rebar weighing between 2,000 and 3,000 pounds); Long v Tishman/Harris, 50 AD3d 356, 855 NYS2d 102 (1st Dept 2008) (§ 23-8.1(f)(2), which describes required conditions for hoisting operations and, under (ii), provides that load “shall not contact any obstruction,” inapplicable where crane operator moved crane forward causing hoisted girder to swing uncontrollably and strike safety railing on adjacent building; plaintiff grabbed girder in effort to prevent its dangerous swing; “obstruction” means something that hinders passage); McCoy v Metropolitan Transp. Authority, 38 AD3d 308, 832 NYS2d 26 (1st Dept 2007) (§ 23-8.1(f)(2), which prescribes conditions to be observed during hoisting operation, applicable where injury occurred when beam, which had already been hoisted off the ground, was being propelled forward; regulation not limited to part of operation in which object is being lifted vertically); Roosa v Cornell Real Property Servicing, Inc., 38 AD3d 1352, 831 NYS2d 784 (4th Dept 2007) (§ 23-8.1(f)(2) inapplicable where worker struck by tree branch, since there was no evidence that accident caused by crane or that crane came in contact with trees).

12 NYCRR 23-8.1(f)(2)(i)—Mobile Cranes, Tower Cranes and Derricks; General Provisions; Hoisting the load; Conditions of operation; Sudden acceleration or deceleration—Wein v East Side 11th & 28th, LLC, 186 AD3d 1579, 132 NYS3d 19 (2d Dept 2020) (§ 23-8.1(f)(2)(i), which provides that

during a hoisting operation from a mobile crane, there shall be no sudden acceleration or deceleration of the moving load unless required by emergency conditions, applicable and violated where hoisted load suddenly swung to side and pinned plaintiff against object).

12 NYCRR 23-8.1(f)(5)—Mobile Cranes, Tower Cranes and Derricks; Hoisting the load; General Provisions; Hoisting the load—*Catarino v State*, 55 AD3d 467, 866 NYS2d 161 (1st Dept 2008) (§ 23-8.1(f)(5), which provides that mobile cranes, tower cranes and derricks shall not hoist, lower, swing or travel while any person is located on the load or hook, not limited to situations where person is on load while load is being moved but also prohibits using crane while person is on load).

12 NYCRR 23-8.1(f)(6)—Mobile Cranes, Tower Cranes and Derricks; General Provisions; Hoisting the load—*Locicero v Princeton Restoration, Inc.*, 25 AD3d 664, 811 NYS2d 673 (2d Dept 2006) (§ 23-8.1(f)(6), which prohibits hoisting or carrying load over and above any person, is sufficiently specific to support Labor Law § 241(6) cause of action and is applicable where plaintiff was injured by bundle of wire mesh rebar being lifted over his head by crane on back of his truck).

12 NYCRR 23-8.1(f)(7)—Mobile Cranes, Tower Cranes and Derricks; General Provisions; Hoisting the load—*Locicero v Princeton Restoration, Inc.*, 25 AD3d 664, 811 NYS2d 673 (2d Dept 2006) (§ 23-8.1(f)(7), which provides that operator of mobile crane, tower crane or derrick shall not leave position at controls while load is being suspended and further provides that no person shall be permitted to pass under stationary suspended load, inapplicable where plaintiff-operator did not leave his position at controls of mobile crane).

12 NYCRR 23-8.1(i)—Mobile Cranes, Tower Cranes and Derricks; General Provisions; Guarding moving parts—*Penta v Related Companies, L.P.*, 286 AD2d 674, 730 NYS2d 140 (2d Dept 2001) (§ 23-8.1(i) cannot be reasonably interpreted to include hook on crane as among the “moving parts” covered under the regulation).

12 NYCRR 23-8.1(m)—Mobile Cranes, Tower Cranes and Derricks; General Provisions; Operation near power lines—*Murray v Lancaster Motorsports, Inc.*, 27 AD3d 1193, 812 NYS2d 726 (4th Dept 2006) (§ 23-8.1(m), which requires that mobile cranes, tower cranes and derricks near or around power lines or power facilities be operated only in accordance with the provisions of Subpart 23-1, creates general safety standard and is not sufficiently specific to support Labor Law § 241(6) cause of action).

12 NYCRR 23-8.2—Mobile Cranes, Tower Cranes and Derricks; General Provisions; Special Provisions for Mobile Cranes—*McCoy v Metropolitan Transp. Authority*, 75 AD3d 428, 904 NYS2d 50 (1st Dept 2010) (§ 23-8.2, which contains specific safety prescriptions for mobile cranes, applicable where accident caused by Gradall, which is capable of functioning both as forklift and mobile crane depending on type of attachment used and was functioning as a mobile crane at time of accident); *Roosa v Cornell Real Property Servicing, Inc.*, 38 AD3d 1352, 831 NYS2d 784 (4th Dept 2007) (§ 23-8.2, inapplicable where worker struck by tree branch and there was no evidence that accident caused by crane or that crane came in contact with trees).

12 NYCRR 23-8.2(b)(1)—Mobile Cranes, Tower Cranes and Derricks; Special provisions for mobile cranes; Footings and outriggers; Footings—*Tillman v Triou's Custom Homes, Inc.*, 253 AD2d 254, 687 NYS2d 506 (4th Dept 1999) (§ 23-8.2(b)(1) is sufficiently specific to support § 241(6) claim).

12 NYCRR 23-8.2(b)(2)—Mobile Cranes, Tower Cranes and Derricks; Special provisions for mobile cranes; Footings and outriggers; Outriggers—*Tillman v Triou's Custom Homes, Inc.*, 253 AD2d 254, 687 NYS2d 506 (4th Dept 1999) (§ 23-8.2(b)(2) is sufficiently specific to support § 241(6) claim).

12 NYCRR 23-8.2(b)(2)(iii)—Mobile Cranes, Tower Cranes and Derricks; Special provisions for mobile cranes; Footings and outriggers; Outriggers—*Mitchell v Triborough Bridge and Tunnel Authority*, 220 AD2d 727, 633 NYS2d 318 (2d Dept 1995) (§ 23-8.2(b)(2)(iii), which requires each outrigger on mobile crane to be visible from its actuating location, sets forth concrete specifications).

12 NYCRR 23-8.2(c)(3)—Mobile Cranes, Tower Cranes and Derricks; Special provisions for mobile cranes; Hoisting the load—*Toefer v Long Island Rail Road*, 308 AD2d 579, 764 NYS2d 865 (2d Dept 2003), *aff'd*, 4 NY3d 399, 795 NYS2d 511, 828 NE2d 614 (2005) (§ 23-8.2(c)(3), which requires restraint line when swinging of any load being hoisted by mobile crane may create hazard, not applicable where plaintiff, who was unloading steel beams from flatbed of truck, was injured when wooden level used to push beams off side of truck sprung up and hit his head); *Wein v East Side 11th & 28th, LLC*, 186 AD3d 1579, 132 NYS3d 19 (2d Dept 2020) (§ 23-8.2(c)(3) not violated where tag lines were used and no evidence that lack of tag line proximately caused load to suddenly swing and injure plaintiff); *McCoy v Metropolitan Transp. Authority*, 38 AD3d 308, 832 NYS2d 26 (1st Dept 2007) (§ 23-8.2(c)(3)(1) applicable where injury occurred when beam, which had already been hoisted off the ground, was being propelled

forward; when heavy object being moved from one spot to another, regulation not limited to part of operation in which object is being lifted vertically); *Locicero v Princeton Restoration, Inc.*, 25 AD3d 664, 811 NYS2d 673 (2d Dept 2006) (§ 23-8.2(c)(3) potentially applicable where plaintiff was injured by bundle of wire mesh rebar being lifted over his head by crane on back of his truck and defendant failed to establish that injuries were not caused by rotation or swinging of load); *Smith v Hovnanian Co. Inc.*, 218 AD2d 68, 633 NYS2d 888 (3d Dept 1995) (§ 23-8.2(c)(3) is sufficient to sustain Labor Law § 241(6) claim and is applicable where plaintiff's head became pinned between piece of sheetrock and wall during unloading operation).

12 NYCRR 23-8.2(d)(3)—Mobile Cranes, Tower Cranes and Derricks; Special provisions for mobile cranes; Mobile crane travel—*James v Alpha Painting & Const. Co., Inc.*, 152 AD3d 447, 59 NYS3d 21 (1st Dept 2017) (§ 23-8.2(d)(3), which provides that a mobile crane shall not travel with the boom so high that it may bounce back over the cab, applicable where elevated boom struck overhead sign, even though it did not in fact bounce back over the cab); *Braun v Fischbach and Moore, Inc.*, 280 AD2d 506, 721 NYS2d 79 (2d Dept 2001) (question of fact as to whether defendant violated section 23-8.2(d)(3)).

12 NYCRR 23-8.2(e)—Mobile Cranes, Tower Cranes and Derricks; Special provisions for mobile cranes; Counterweights for mobile cranes—*Tillman v Triou's Custom Homes, Inc.*, 253 AD2d 254, 687 NYS2d 506 (4th Dept 1999) (§ 23-8.2(e) is sufficiently specific to support § 241(6) claim).

12 NYCRR 23-8.2(f)(2)—Mobile Cranes, Tower Cranes and Derricks; Special provisions for mobile cranes; Mobile crane construction; Braking mechanism—*Thompson v Ludovico*, 246 AD2d 642, 668 NYS2d 238 (2d Dept 1998) (same) (abrogated on other grounds by, *Misicki v Caradonna*, 12 NY3d 511, 882 NYS2d 375, 909 NE2d 1213 (2009)) (§ 23-8.2(f)(2)(i) is merely general safety standard).

12 NYCRR 23-8.2(g)(1)(ii)—Mobile Cranes, Tower Cranes and Derricks; Special provisions for mobile cranes; Mobile crane capacity charts; Load rating for cranes—*Long v Tishman/Harris*, 50 AD3d 356, 855 NYS2d 102 (1st Dept 2008) (§ 23-8.2(g)(1)(i), which requires consideration of factors affecting crane stability such as freely suspended loads, track, wind or ground conditions, condition and inflation of tires, boom lengths and proper operating speeds, inapplicable where hoisted girder's dangerous swinging caused by crane operator's rolling crane forward with girder still hoisted).

12 NYCRR § 23-9.1-Protection in Construction, Demoli-

tion and Excavation Operations; Power-operated equipment; Application of Subpart—*Nicola v United Veterans Mutual Housing No. 2, Corporation*, 178 AD3d 937, 116 NYS3d 296 (2d Dept 2019) (hammer drill not “heavy equipment or machinery” within the meaning of § 23-9.1, which provides that subpart 23-9 applies to power-operated heavy equipment or machinery used in construction but not to material or personnel hoists or cranes and derricks); *Shields v First Ave. Builders LLC*, 118 AD3d 588, 988 NYS2d 607 (1st Dept 2014) (concrete pump is “power-operated equipment” within § 23-9.1).

12 NYCRR 23-9.2(a)—Power Operated Equipment; General requirements; Maintenance—*Misicki v Caradonna*, 12 NY3d 511, 882 NYS2d 375, 909 NE2d 1213 (2009) (portions of § 23-9.2(a)(1) which require that power-operated equipment be maintained in good repair and inspected with sufficient frequency to ensure good repair not sufficiently specific to support cause of action under Labor Law § 241(6); portion of rule which requires correction of structural defects or unsafe conditions in power-operated equipment upon discovery is sufficiently specific to support a cause of action under Labor Law § 241(6) and is potentially applicable where power tool was missing side handle, defect rendered tool unsafe and plaintiff allegedly told supervisor about defect); *Nicholson v Sabey Data Center Properties, LLC*, 205 AD3d 620, 169 NYS3d 292 (1st Dept 2022) (§ 23-9.2(a) potentially applicable where pallet jack allegedly engaged suddenly and jumped back, propelling plaintiff backwards and causing him to trip on loose pipe; plaintiff claimed he gave employer actual notice that pallet jack had not been working); *Viruet v Purvis Holdings LLC*, 198 AD3d 587, 156 NYS3d 25 (1st Dept 2021) (§ 23-9.2(a) applicable where visibly defective grinder lacking blade, safety guard, side handle, and cut-off switch spontaneously cut off and then turned back on without plaintiff engaging the power switch; “upon discovery” language in § 23-9.2(a) imposes affirmative duty to conduct necessary inspections to ensure compliance with safety regulations); *Shaw v Scepter, Inc.*, 187 AD3d 1662, 133 NYS3d 709 (4th Dept 2020) (§ 23-9.2(a) potentially applicable where man lift plaintiff was operating toppled from back of flatbed truck upon discovery or actual notice); *Golec v Dock Street Construction, LLC*, 186 AD3d 463, 129 NYS3d 160 (2d Dept 2020) (§ 23-9.2(a), which requires that any servicing or repairing of power-operated equipment be performed only while such equipment is at rest, sufficiently specific to support a cause of action under Labor Law § 241(6), and potentially applicable where plaintiff was allegedly injured while removing residual concrete from hopper of concrete pumper truck when engine was running at time of accident); *Salerno v Diocese of Buffalo*, 161 AD3d 1522, 76 NYS3d 347 (4th Dept 2018) (§ 23-9.2(a) potentially applicable where issues of fact as to whether defendants had actual notice of structural defect or unsafe

condition regarding safety bar that lowers onto operator's lap on Bobcat skid-loader); *Mitchell v NRG Energy, Inc.*, 125 AD3d 1542, 4 NYS3d 445 (4th Dept 2015) (portion of § 23-9.2[a] requiring correction of structural defects or unsafe conditions in power-operated equipment upon discovery is sufficiently specific to support § 241[6] claim; defendant's knowledge that defect or condition was dangerous is not precursor to liability); *Brown v New York Presbyterian Healthcare System, Inc.*, 123 AD3d 612, 999 NYS2d 66 (1st Dept 2014) (flatbed trailer attached to truck not "power operated equipment" within meaning of § 23-9.2[a]); *Shields v First Ave. Builders LLC*, 118 AD3d 588, 988 NYS2d 607 (1st Dept 2014) (portion of § 23-9.2(a) that requires correction of structural defects and unsafe conditions in power-operated equipment "[u]pon discovery," inapplicable where defendant and third-party defendant had no prior actual notice of unsafe condition; however, portion of rule requiring that servicing or repairing of such equipment be performed only while equipment at rest applicable where accident occurred while plaintiff cleaning concrete pump with engine running); *Alameda-Cabrera v Noble Elec. Contracting Co., Inc.*, 117 AD3d 484, 985 NYS2d 497 (1st Dept 2014) (§ 23-9.2(a) potentially applicable to injuries occurring when, following temporary power outage, plaintiff's hand and/or wood he was holding moved and drew his hand under miter saw that lacked protective guard and vise grip); *Cabrera v Revere Condominium*, 91 AD3d 695, 937 NYS2d 98 (2d Dept 2012) (hand-held grinder not "heavy machinery" as regulated by § 23-9); *Ramos v Patchogue-Medford School Dist.*, 73 AD3d 1010, 906 NYS2d 45 (2d Dept 2010) (no liability under portion of § 23-9.2(a) that requires correction upon discovery of structural defects and unsafe conditions in power-operated equipment where defendants demonstrated lack of notice of any structural defect or unsafe condition); *Hricus v Aurora Contractors, Inc.*, 63 AD3d 1004, 883 NYS2d 61 (2d Dept 2009) (§ 23-9.2(a) sufficiently specific to support Labor Law § 241(6) cause of action); see *Zaino v Rogers*, 153 AD3d 763, 59 NYS3d 770 (2d Dept 2017) (§ 23-9.2[a] not applicable in light of more specific provision applicable to particular equipment involved in accident).

12 NYCRR 23-9.2(b)—Power Operated Equipment; General requirements; Operation—*Webber v Dunkirk*, 226 AD2d 1050, 641 NYS2d 927 (4th Dept 1996) (§ 23-9.2(b) is not specific).

12 NYCRR 23-9.2(b)(1)—Power Operated Equipment, General requirements; Operation—*Berg v Albany Ladder Co., Inc.*, 40 AD3d 1282, 836 NYS2d 720 (3d Dept 2007), *aff'd*, 10 NY3d 902, 861 NYS2d 607, 891 NE2d 723 (2008) (§ 23-9.2(b)(1), which requires that power-operated equipment be operated only by trained, designated personnel and in a "safe manner," represents restatement of common-law rule and is

not sufficiently specific to support § 241(6) cause of action); *Guallpa v Canarsie Plaza, LLC*, 144 AD3d 1088, 42 NYS3d 293 (2d Dept 2016); *Penaranda v 4933 Realty, LLC*, 115 AD3d 482, 981 NYS2d 690 (1st Dept 2014) (same); *Hricus v Aurora Contractors, Inc.*, 63 AD3d 1004, 883 NYS2d 61 (2d Dept 2009) (same).

12 NYCRR 23-9.2(b)(2)—Power Operated Equipment; General requirements; Operation—*Mohamed v Watervliet*, 106 AD3d 1244, 965 NYS2d 637 (3d Dept 2013) (question of fact whether backhoe that caused plaintiff's injury was handling a "load" within meaning of § 23-9.2(b)(2), which provides that "[o]perators of power-operated material handling equipment shall remain at the controls while any load is being handled"); *Padilla v Frances Schervier Housing Development Fund Corp.*, 303 AD2d 194, 758 NYS2d 3 (1st Dept 2003) (§ 23-9.4(b)(2) is sufficiently specific to support a § 241(6) cause of action).

12 NYCRR 23-9.2(c)—Power Operated Equipment; General requirements; Loading—*Penaranda v 4933 Realty, LLC*, 115 AD3d 482, 981 NYS2d 690 (1st Dept 2014) (§ 23-9.2(c), which provides that power-operated material-handling equipment should not be loaded in excess of the manufacturer's design live load rating and that all loads must be properly trimmed to prevent dislodgement of any part of such loads during transit, insufficient to support Labor Law § 241(6) claim); *Modeste v Mega Contracting, Inc.*, 40 AD3d 255, 835 NYS2d 156 (1st Dept 2007) (disapproved on other grounds in *Penaranda v 4933 Realty, LLC*, 118 AD3d 596, 991 NYS2d 30 (1st Dept 2014)) (same); *Armer v General Elec. Co.*, 241 AD2d 581, 659 NYS2d 916 (3d Dept 1997) (§ 23-9.2(c) merely sets forth general safety standards).

12 NYCRR 23-9.2(g)—Power Operated Equipment; General requirements; Equipment at rest—*Mohamed v Watervliet*, 106 AD3d 1244, 965 NYS2d 637 (3d Dept 2013) (question of fact whether backhoe that caused plaintiff's injury was handling a load "at rest" within meaning of § 23-9.2(g), which provides that "operators of material handling equipment shall not leave such equipment while loads, buckets or blades are suspended" and that "[a]ny such load, bucket or blade shall be brought to rest on blocks, . . . lowered to the ground, grade or equivalent surface or . . . brought to the lowest end of travel of the equipment"); *Padilla v Frances Schervier Housing Development Fund Corp.*, 303 AD2d 194, 758 NYS2d 3 (1st Dept 2003) (§ 23-9.2(g) is sufficiently specific to support § 241(6) cause of action).

12 NYCRR 23-9.4—Power Operated Equipment—Power shovels and backhoes used for material handling—*St.*

Louis v North Elba, 16 NY3d 411, 923 NYS2d 391, 947 NE2d 1169 (2011) (§ 23-9.4, which sets standards for the use of “backhoes” and “power shovels,” applicable where front-end loader being used as “excavating machine” as defined in 12 NYCRR 23-1.4(b)(18) to hoist material; applicability of rule depends on manner in which equipment used rather than equipment’s name or label); *Dominguez v Mirman, Markovits & Landau, P.C.*, 180 AD3d 646, 119 NYS3d 136 (2d Dept 2020) (§ 23-9.4 inapplicable where plaintiff was struck by excavator bucket and not by beam being hoisted); *Copp v Elmira*, 31 AD3d 899, 819 NYS2d 167 (3d Dept 2006) (§ 23-9.4, applicable where plaintiff struck by pipe that fell while being lifted by payloader, since payloader was being used to accomplish same task as power shovel).

12 NYCRR 23-9.4(a)—Power Operated Equipment; Power shovels and backhoes used for material handling; Attachment of load—*Robinson v Nassau*, 84 AD3d 919, 923 NYS2d 135 (2d Dept 2011) (§ 23-9.4(a) too general to serve as predicate regulation); *Brechue v Wheatfield*, 241 AD2d 935, 661 NYS2d 334 (4th Dept 1997) (§ 23-9.4(a) is too general to support § 241(6) cause of action).

12 NYCRR 23-9.4(b)(2)—Power Operated Equipment; Power shovels and backhoes used for material handling; Inspection—*Phillips v New York*, 228 AD2d 570, 644 NYS2d 764 (2d Dept 1996) (abrogated on other grounds by, *Misicki v Caradonna*, 12 NY3d 511, 882 NYS2d 375, 909 NE2d 1213 (2009)) (§ 23-9.4(b)(2) not applicable where plaintiff was not injured while repairing one of the pieces of power equipment enumerated in that provision but while repairing a “loader” at a landfill); but see *St. Louis v North Elba*, 70 AD3d 1250, 894 NYS2d 587 (3d Dept 2010), *aff’d*, 16 NY3d 411, 923 NYS2d 391, 947 NE2d 1169 (2011) (declining to follow *Phillips v New York*, *supra* (2d Dept), to extent it holds § 23-9.4 inapplicable based solely on equipment’s name or label).

12 NYCRR 23-9.4(c)—Power Operated Equipment; Power shovels and backhoes used for material handling; Footing—*Malvestuto v Lancaster*, 201 AD3d 1339, 163 NYS3d 340 (4th Dept 2022) (§ 23-9.4[c], which requires firm, level and stable footing for power shovels and backhoes, potentially applicable where bucket of excavator situated on edge of trench above plaintiff struck his leg).

12 NYCRR 23-9.4(e)(1)—Power Operated Equipment; Power shovels and backhoes used for material handling; Attachment of load—*Padilla v Frances Schervier Housing Development Fund Corp.*, 303 AD2d 194, 758 NYS2d 3 (1st Dept 2003) (§ 23-9.4(e)(1), which requires that any load handled by power equipment be suspended from the bucket by wire

rope having a safety factor of four, is sufficiently specific to support a § 241(6) cause of action); *Brechue v Wheatfield*, 241 AD2d 935, 661 NYS2d 334 (4th Dept 1997) (§ 23-9.4(e)(1) is sufficiently specific to support § 241(6) cause of action, but is inapplicable to circumstances of case).

12 NYCRR 23-9.4(e)(2)—Power Operated Equipment; Power shovels and backhoes used for material handling; Attachment of load—*Padilla v Frances Schervier Housing Development Fund Corp.*, 303 AD2d 194, 758 NYS2d 3 (1st Dept 2003) (§ 23-9.4(e)(2), which requires that any load handled by power equipment be suspended from the bucket by wire rope connected by means of either a closed shackle or a safety hook capable of holding at least four times the intended load, is sufficiently specific to support a § 241(6) cause of action and is arguably violated when load is suspended from cable in a way that permits the load to shift).

12 NYCRR 23-9.4(h)(4)—Power Operated Equipment; Power shovels and backhoes used for material handling; General operation—*Cunha v Crossroads II*, 131 AD3d 440, 15 NYS3d 153 (2d Dept 2015) (§ 23-9.4[h][4], which provides that unauthorized persons should not be permitted in the cab or immediately adjacent to load-lifting equipment in operation, potentially applicable to plaintiff who was signaling to operator of loader when he was struck by excavator; plaintiff alleged that, although he was authorized to be at work site generally, he was not assigned task relating to loader, and no showing that his supervisor had authorized or directed him to give signals); *Ferreira v New York*, 85 AD3d 1103, 927 NYS2d 100 (2d Dept 2011) (§ 23-9.4(h)(4) inapplicable where injured individual member of work crew, not an “unauthorized person” who would not be permitted to stand adjacent to equipment); *Carroll v Erie*, 48 AD3d 1076, 850 NYS2d 738 (4th Dept 2008) (same).

12 NYCRR 23-9.4(h)(5)—Power Operated Equipment; Power Shovels and backhoes used for materials handling; General operation—*Cunha v Crossroads II*, 131 AD3d 440, 15 NYS3d 153 (2d Dept 2015) (§ 23-9.4[h][5], which provides that, “[w]here power shovels and backhoes are used for material handling, . . . [c]arrying or swinging suspended loads over areas where persons are working or passing is prohibited,” inapplicable where excavator that stuck plaintiff was not carrying or swinging suspended load over area where persons were working or passing at time of accident); *Leszczynski v Neversink*, 107 AD3d 1183, 968 NYS2d 204 (3d Dept 2013) (§ 23-9.4(h)(5) sufficiently specific to support Labor Law § 241(6) cause of action and applicable where elevated buckets carrying stones were used in area where plaintiff was working); *Mohamed v Watervliet*, 106 AD3d 1244, 965 NYS2d 637 (3d Dept 2013) (§ 23-9.4(h)(5) inapplicable where load that

caused plaintiff's injury not being carried or swung over plaintiff's head at time of accident).

12 NYCRR 23-9.5—Power Operated Equipment; Excavating machines—*Lysiak v Murray Realty Co.*, 227 AD2d 746, 642 NYS2d 350 (3d Dept 1996) (§ 23-9.5, which involves “excavation” was not applicable where tree being dragged by bulldozer during tree removal operation was unexpectedly propelled upward, striking plaintiff).

12 NYCRR 23-9.5(a)—Power Operated Equipment; Excavating machines; Footing—*Malvestuto v Lancaster*, 201 AD3d 1339, 163 NYS3d 340 (4th Dept 2022) (§ 23-9.5[a], which provides that excavating machines shall not be used where unstable conditions or slopes of ground or grade may cause such machines to tilt dangerously, potentially applicable where bucket of excavator situated on edge of trench above plaintiff struck his leg).

12 NYCRR 23-9.5(b)—Power Operated Equipment; Excavating machines; Protection of operator—*Malloy v Madison Forty-Five Co.*, 13 AD3d 55, 786 NYS2d 433 (1st Dept 2004) (§ 23-9.5(b), which requires that operators of excavating machines who may be exposed to overhead hazards be provided with “cab[s] or equivalent cover affording protection against such hazard[s],” is not limited to machines actually performing excavation work).

12 NYCRR 23-9.5(c)—Power Operated Equipment; Excavating machines; Operations—*Cunha v Crossroads II*, 131 AD3d 440, 15 NYS3d 153 (2d Dept 2015) (§ 23-9.5[c], which provides, among other things, that “[e]xcavating machines shall be operated only by designated persons” and that “[n]o person other than the pitman and excavating crew shall be permitted to stand within range of the back of a power shovel or within range of the swing of the dipper bucket while the shovel is in operation,” is sufficiently specific to serve as predicate for Labor Law § 241[6] claim); *Vanderwall v 1255 Portland Ave. LLC*, 128 AD3d 1446, 8 NYS3d 760 (4th Dept 2015) (§ 23-9.5[c] applicable where plaintiff was operating jackhammer independently from supervisor’s operation of excavator of which plaintiff was unaware); *Mohamed v Watervliet*, 106 AD3d 1244, 965 NYS2d 637 (3d Dept 2013) (question of fact whether backhoe that caused plaintiff’s injury was “in use” within meaning of § 23-9.5(c), which provides, among other things, that “[w]hen an excavating machine is not in use, the blade or dipper bucket shall rest on the ground or grade”); *Benevento v Buffalo*, 74 AD3d 1738, 902 NYS2d 864 (4th Dept 2010) (§ 23-9.5(c) arguably applicable where backhoe operator continued to operate and move bucket through excavation site after plaintiff, who was going to sweep dirt into hole, signaled that he should

stop); *Webber v Dunkirk*, 226 AD2d 1050, 641 NYS2d 927 (4th Dept 1996) (§ 23-9.5(c) is sufficiently specific).

12 NYCRR 23-9.5(f)—Power Operated Equipment; Excavation Machines—Stopping or parking excavating machines—*Mohamed v Watervliet*, 106 AD3d 1244, 965 NYS2d 637 (3d Dept 2013) (question of fact whether backhoe that caused plaintiff's injury was stopped or parked within meaning of § 23-9.5(f), which provides that "[t]he operator of any excavating machine shall not leave the controls of such machine until he has lowered the bucket or blade into firm contact with the ground or grade surface").

12 NYCRR 23-9.5(g)—Power Operated Equipment; Excavating machines; Crawlers—*Zaino v Rogers*, 153 AD3d 763, 59 NYS3d 770 (2d Dept 2017) (§ 23-9.5[g], which requires excavating machines "except for crawler mounted equipment" to sound warning signal up backing up, not applicable where accident involved crawler-mounted excavator; opinion of plaintiff's expert that back-up alarm was standard equipment on crawler-mounted excavators insufficient to raise triable issue of fact); *Millard v Ogdensburg*, 300 AD2d 1088, 751 NYS2d 901 (4th Dept 2002) (based on evidence taken at special hearing, court holds that § 23-9.5(g) exempts equipment mounted on crawlers instead of wheels).

12 NYCRR 23-9.6(b)(1), (2)—Power Operated Equipment; Aerial baskets; Equipment inspection—*Moore v Metro North Commuter R.R.*, 233 AD2d 192, 650 NYS2d 5 (1st Dept 1996) (plaintiff stated valid claim under Labor Law § 241(6) based on evidence that up switch of aerial basket was obstructed by cable tray plaintiff was installing, and was unguarded, and based on evidence that ground controls would not override basket controls).

12 NYCRR 23-9.6(c)(1)—Power Operated Equipment; Aerial baskets; Driving or moving of aerial basket truck—*Wilke v Communications Const. Group, Inc.*, 274 AD2d 473, 711 NYS2d 784 (2d Dept 2000) (§ 23-9.6(c)(1) sets forth only non-specific standards of "general regulatory criteria" and cannot serve as a predicate for violation of Labor Law § 241(6)).

12 NYCRR 23-9.6(e)—Power Operated Equipment; Aerial baskets; Aerial basket operation—*Kaleta v New York State Elec. & Gas Corp.*, 41 AD3d 1257, 837 NYS2d 824 (4th Dept 2007) (§ 23-9.6(e), which lists standards for operation of aerial baskets, arguably applicable where worker stepped out of lowered aerial bucket).

12 NYCRR 23-9.7—Power Operated Equipment; Motor trucks—*Modeste v Mega Contracting, Inc.*, 40 AD3d 255, 835

NYS2d 156 (1st Dept 2007) (disapproved on other grounds in *Penaranda v 4933 Realty, LLC*, 118 AD3d 596, 991 NYS2d 30 (1st Dept 2014)) (§ 23-9.7, which contains provisions pertaining to motor trucks, inapplicable to fork lifts; accident involved Bobcat, a type of forklift, not within regulation).

12 NYCRR 23-9.7(a)-Power Operated Equipment; Motor trucks-Brake maintenance—*Duffina v Essex*, 111 AD3d 1035, 974 NYS2d 645 (3d Dept 2013) (§ 23-9.7(a), which requires that brakes of motor trucks be so maintained that truck with full load may be securely held on any grade that may be encountered in normal use on job, applies not only to brakes' ability to hold vehicle in place but also to brakes' ability to bring moving vehicle to a stop); *Bloomfield v General Elec. Co.*, 198 AD2d 655, 603 NYS2d 606 (3d Dept 1993) (§ 23-9.7(a) applicable to claim that sudden stop of truck, on which plaintiff was passenger, was attributable to improper inspection or maintenance of truck's braking system).

12 NYCRR 23-9.7(b)(1)-Power Operated Equipment; Motor trucks-Blocks—*Duffina v Essex*, 111 AD3d 1035, 974 NYS2d 645 (3d Dept 2013) (§ 23-9.7(b), which requires that wheel blocks be used for "any truck ascending any ramp with slope steeper than one in 10 to prevent the truck from sliding in case of stall," inapplicable where brakes on plaintiff's loaded dump truck allegedly failed as he crested hill leading to paving operation).

12 NYCRR 23-9.7(c)—Power Operated Equipment; Motor trucks; Loading—*Eddy v John Hummel Custom Builders, Inc.*, 147 AD3d 16, 43 NYS3d 507 (2d Dept 2016) (§ 23-9.7[c], which requires, in pertinent part, that trucks "shall not be loaded beyond their rated capacities," inapplicable where plaintiff's act of riding on bed of truck was sole proximate cause of accident); *Mitchell v NRG Energy, Inc.*, 125 AD3d 1542, 4 NYS3d 445 (4th Dept 2015) (§ 23-9.7[c] inapplicable where truck not overloaded); *Duffina v Essex*, 111 AD3d 1035, 974 NYS2d 645 (3d Dept 2013) (§ 23-9.7(c) inapplicable to accident allegedly resulting from brake failure as loaded truck crested hill on its way to worksite; no evidence that vehicle loaded beyond its rated capacity); *Borowicz v International Paper Co.*, 245 AD2d 682, 664 NYS2d 893 (3d Dept 1997) (§ 23-9.7(c) is sufficiently specific to support Labor Law § 241(6) cause of action and is applicable to plaintiff's claim that scissor lift was being used as truck when accident occurred).

12 NYCRR § 23-9.7(d)—Power Operated Equipment; Motor trucks; Backing—*Erickson v Cross Ready Mix, Inc.*, 75 AD3d 524, 906 NYS2d 54 (2d Dept 2010) (§ 23-9.7(d), which provides that trucks shall not be backed or dumped where persons are working unless guided by a person stationed so

that he or she can see both truck driver and spaces behind truck, applicable where evidence that cement truck that struck plaintiff backed into work area without being guided; evidence sufficient to raise issues of fact as to whether violation was proximate cause of plaintiff's injury); *Fitzgerald v New York City School Const. Authority*, 18 AD3d 807, 796 NYS2d 694 (2d Dept 2005) (§ 23-9.7(d), inapplicable to accident in which "rough terrain" forklift struck plaintiff while backing up); *Scott v American Museum of Natural History*, 3 AD3d 442, 771 NYS2d 499 (1st Dept 2004) (§ 23-9.7(d) is inapplicable to Labor Law § 241(6) action arising out of operation of forklift; safety regulations regarding forklifts specifically set forth in § 23-9.8).

12 NYCRR 23-9.7(e)—Power Operated Equipment; Motor trucks; Riding—*Wetter v Northville Industries Corp.*, 185 AD3d 874, 127 NYS3d 521 (2d Dept 2020) (§ 23-9.7(e), which prohibits riding on trucks without properly constructed seat or platform covers, not applicable to injuries suffered when exiting vehicle); *Eddy v John Hummel Custom Builders, Inc.*, 147 AD3d 16, 43 NYS3d 507 (2d Dept 2016) (§ 23-9.7(e) does not give rise to liability where plaintiff's act of riding on bed of truck was sole proximate cause of accident); *Pruszek v Pine Hollow Country Club, Inc.*, 149 AD3d 986, 52 NYS3d 442 (2d Dept 2017) (§ 23-9.7(e) only applicable where person being transported distance of 5 miles or greater in accordance with Vehicle and Traffic Law § 1222); *Vargas v State*, 273 AD2d 460, 710 NYS2d 609 (2d Dept 2000) (§ 23-9.7(e), which requires properly constructed seat, only applicable in instances where vehicle being used for transportation at time of plaintiff's accident); *Bloomfield v General Elec. Co.*, 198 AD2d 655, 603 NYS2d 606 (3d Dept 1993) (§ 23-9.7(e) applicable where plaintiff was standing in truck bed when it stopped short and plaintiff alleged that truck had no available seats).

12 NYCRR 23-9.8—Lift and Fork Trucks—*Fitzgerald v New York City School Const. Authority*, 18 AD3d 807, 796 NYS2d 694 (2d Dept 2005) (§ 23-9.8, which governs forklift safety, does not contain provision requiring that a person be stationed behind vehicle when backing up and therefore is inapplicable to accident in which "rough terrain" forklift struck plaintiff while backing up); *Basile v ICF Kaiser Engineers Corp.*, 227 AD2d 959, 643 NYS2d 854 (4th Dept 1996) (§ 23-9.8 was inapplicable where plaintiff slipped and fell on stack of pipes).

12 NYCRR 23-9.8(c)—Lift and Fork Trucks-Brakes and load-elevating mechanisms—*Hricus v Aurora Contractors, Inc.*, 63 AD3d 1004, 883 NYS2d 61 (2d Dept 2009) (§ 23-9.8(c), which requires that every power-operated fork and lift truck be provided with a lockable brake and that loading mechanisms be capable of being locked at every elevation, inapplicable where plaintiff attributed accident to factors unrelated to braking mechanism).

12 NYCRR 23-9.8(e)—Power Operated Equipment; Lift and Fork Trucks—*Kuligowski v One Niagara, LLC*, 177 AD3d 1266, 112 NYS3d 383 (4th Dept 2019) (§ 23-9.8(e), which provides that no lift or fork truck shall be used on any surface that is so uneven as to make upsetting likely, is sufficiently specific to serve as a predicate for Labor Law § 241(6) liability and potentially applicable where evidence in record suggests forklift was operating on uneven surface, causing object to fall therefrom); *Oakes v Wal-Mart Real Estate Business Trust*, 99 AD3d 31, 948 NYS2d 748 (3d Dept 2012) (§ 23-9.8(e) is sufficiently specific to serve as a predicate for Labor Law § 241(6) liability).

12 NYCRR 23-9.8(h)—Power Operated Equipment; Lift and Fork Trucks; Support of Pallets—*Kuligowski v One Niagara, LLC*, 177 AD3d 1266, 112 NYS3d 383 (4th Dept 2019) (§ 23-9.8(h), which provides that loaded pallets shall be kept level at all times, is sufficiently specific to serve as a predicate for Labor Law § 241(6) liability and potentially applicable where operation of forklift on uneven surface may have kept loaded pallet from remaining level and caused object to fall).

12 NYCRR 23-9.8(j)—Power Operated Equipment; Lift and Fork Trucks; Prohibited Use—*Kuligowski v One Niagara, LLC*, 177 AD3d 1266, 112 NYS3d 383 (4th Dept 2019) (§ 23-9.8(j), which provides that “[n]o lift or fork truck shall be in motion when the loaded forks are elevated higher than necessary to clear floor obstructions except as required for positioning to deposit the load,” is sufficiently specific to serve as a predicate for Labor Law § 241(6) liability and potentially applicable where defendant failed to offer evidence justifying operation of forklift with forks raised two to three feet from ground).

12 NYCRR 23-9.8(k)—Lift and Fork Trucks; Riding on forks—*Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 942 NYS2d 593 (2d Dept 2012) (§ 23-9.8(k), which provides that no person shall stand or ride on forks of a moving forklift truck, is not sufficiently specific to support a Labor Law § 241(6) claim).

12 NYCRR 23-9.9(a)—Power Operated Equipment; Power Buggies—*Toussaint v Port Authority of New York and New Jersey*, 38 NY3d 89, 168 NYS3d 379, 188 NE3d 571 (2022) (§ 23-9.9(a), which provides that “[n]o person other than a trained and competent operator designated by the employer shall operate a power buggy,” is not sufficiently specific to support a Labor Law § 241(6) claim).

12 NYCRR 56-5.1 and 5.2—Large and small asbestos projects; Holding carts—*Jackson v Williamsville Cent. School*

Dist., 229 AD2d 985, 645 NYS2d 202 (4th Dept 1996) (§ 56-5.1(g) and 56-5.2(b), which require the use of holding carts for cleaned containers of asbestos material after material has been placed in waste decontamination enclosure system, was not applicable because accident occurred before piece of boiler plate was placed in waste contamination system; but see *Creamer v Amsterdam High School*, 241 AD2d 589, 659 NYS2d 560 (3d Dept 1997) (regulations that were not adopted pursuant to 12 NYCRR Part 23 may not serve as basis for liability under Labor Law § 241(6)).

PJI 2:217. Injured Employee—Action Under Statute Imposing Absolute Liability

Section 240 of the Labor Law requires all (contractors, owners) in the (erection, demolition, repairing, altering, painting, cleaning, pointing) of a (building, structure) to furnish or erect for the performance of such work (*[specify device such as:] scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, other devices*), which shall be so (constructed, placed, operated, maintained) as to give proper protection to the person performing such work.

Plaintiff was (employed, engaged) in the (*[state operation such as:]* erection, demolition, repairing, altering, painting, cleaning, pointing) of a (building, structure). If defendant breached this statutory duty and such breach was a substantial factor in causing plaintiff's injuries, the statute imposes liability whether or not defendant was at fault and whether or not there was any fault on the part of plaintiff that contributed to the injury.

If you find that the (scaffolding, hoists, etc.) being used by plaintiff was so (constructed, placed, operated, maintained) as to give proper protection to plaintiff, you will find for defendant on this issue.

If you find that the (scaffolding, hoists, etc.) was not so (constructed, placed, operated, maintained) as to give proper protection to plaintiff in the performance of the work, and that the (construction, placement, operation, maintenance) of the (scaffolding, hoists, etc.) was a substantial fac-

tor in causing plaintiff's injury, you will find for plaintiff on this issue.

Comment

[See also Introductory Statement to this division, supra.]

Caveat 1: The trial court must instruct the jury as to each safety device that evidence indicates was not, but should have been, provided, *Izrailev v Ficarra Furniture of Long Island, Inc.*, 70 NY2d 813, 523 NYS2d 432, 517 NE2d 1318 (1987); *Cammon v New York*, 21 AD3d 196, 799 NYS2d 455 (1st Dept 2005); see *Gonfiantini v Zino*, 184 AD2d 368, 584 NYS2d 847 (1st Dept 1992); *Nastasi v Bradley*, 110 AD2d 628, 487 NYS2d 116 (2d Dept 1985) (trial court's failure to instruct with respect to safety devices other than ladders erroneous as it precluded jury from finding ladders alone were insufficient protection).

Caveat 2: In cases where the evidence raises a question as to whether plaintiff's conduct was the sole proximate cause of his or her injuries, PJI 2:217.2 should be charged, see *Piotrowski v McGuire Manor, Inc.*, 117 AD3d 1390, 986 NYS2d 718 (4th Dept 2014). In cases where the evidence raises a question of fact as to whether plaintiff was a "recalcitrant worker" in that he or she was directed to use, but deliberately and unreasonably chose not to use, available and adequate safety equipment of which he or she was aware and was injured solely as a result of that choice, PJI 2:217.2a should be charged.

Caveat 3: The question of which party has the burden of proof in cases where PJI 2:217.2 is to be charged is not definitively settled. *Piotrowski v McGuire Manor, Inc.*, 117 AD3d 1390, 986 NYS2d 718 (4th Dept 2014) suggests that defendant has the burden of proving that plaintiff's conduct was the sole proximate cause of the injuries or that plaintiff was a "recalcitrant worker" and therefore is not entitled to recover under Labor Law § 240(1). However, *Bellreng v Sicoli & Massaro, Inc.*, 108 AD3d 1027, 969 NYS2d 629 (4th Dept 2013), suggests that the plaintiff has the burden of proof on this issue.

Based on *Gallagher v New York Post*, 14 NY3d 83, 896 NYS2d 732, 923 NE2d 1120 (2010); *Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 790 NYS2d 74, 823 NE2d 439 (2004); *Piotrowski v McGuire Manor, Inc.*, 117 AD3d 1390, 986 NYS2d 718 (4th Dept 2014).

Based on *Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 790 NYS2d 74, 823 NE2d 439 (2004); *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 771 NYS2d 484, 803 NE2d 757 (2003); *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 606 NYS2d 127, 626 NE2d 912 (1993); *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993); *Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55, 604 NE2d 117 (1992); *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 577 NYS2d 219, 583 NE2d 932 (1991); *Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880, 488 NE2d 810 (1985);

Zimmer v Chemung County Performing Arts, Inc., 65 NY2d 513, 493 NYS2d 102, 482 NE2d 898 (1985); *Haimes v New York Telephone Co.*, 46 NY2d 132, 412 NYS2d 863, 385 NE2d 601 (1978); *Allen v Cloutier Const. Corp.*, 44 NY2d 290, 405 NYS2d 630, 376 NE2d 1276 (1978); *Vencebi v Waldorf Astoria Hotel*, 143 AD2d 1004, 533 NYS2d 616 (2d Dept 1988) (citing PJI); see Comment to PJI 2:28.

The pattern charge deals with Labor Law § 240, but may be adapted for any section of the Labor Law that imposes absolute liability, see, e.g., Labor Law § 241(1)–(5); Introductory Statement to this division. In cases where defendant claims the statutory exemption for “owners of one and two-family dwellings who contract for but do not direct or control the work” and there are factual issues with the issues of direction and control, the following charge may be used:

PJI 2:217.1

Under the Labor Law, “owners of one and two family dwellings who contract for but do not direct or control the work” on the dwelling are not liable. Defendant CD, the owner, claims that (he, she) should not be held liable because (he, she) did not direct or control the work. Direction and control means supervision and instruction of the (contractor EF, subcontractor GH or their employees) in the manner or method the work is to be performed. Merely directing where or when the work is to be performed, or inspecting the work contracted for is not the direction or control necessary to hold defendant CD liable. Nor are direction and control established merely by making suggestions or requests from time to time regarding how the work should be done.

Caveat: The Third Department has stated that where PJI 2:217.1 is charged, it is reversible error to omit PJI 2:217, which contains the substantive law of a Labor Law § 240(1) cause of action, *DeGraff v Colantonio*, 202 AD3d 1297, 163 NYS3d 673 (3d Dept 2022) (citing PJI).

I. In General

Labor Law § 240(1) imposes a duty of protection of employees upon owners, contractors and their agents “in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.” The duty consists in providing “scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices.” The foregoing devices are to be furnished in a manner sufficient to give “proper protection” to the workers.

The statute was designed to place the responsibility for a worker’s

safety squarely on the owner and contractor rather than on the worker, *Felker v Corning Inc.*, 90 NY2d 219, 660 NYS2d 349, 682 NE2d 950 (1997); *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 493 NYS2d 102, 482 NE2d 898 (1985). While one significant line of cases has stated that the statute is to be liberally construed to achieve its objectives, *Saint v Syracuse Supply Co.*, 25 NY3d 117, 8 NYS3d 229, 30 NE3d 872 (2015); *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 771 NYS2d 484, 803 NE2d 757 (2003); *Panek v Albany*, 99 NY2d 452, 758 NYS2d 267, 788 NE2d 616 (2003); *Zimmer v Chemung County Performing Arts, Inc.*, *supra*; see *O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 52 NYS3d 68, 74 NE3d 307 (2017), recent Court of Appeals decisions have stressed that the statute “should be construed with a commonsense approach to the realities of the workplace at issue,” *Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 7 NYS3d 263, 30 NE3d 154 (2015); *Salazar v Novalex Contracting Corp.*, 18 NY3d 134, 936 NYS2d 624, 960 NE2d 393 (2011); see *DeRosa v Bovis Lend Lease LMB, Inc.*, 96 AD3d 652, 947 NYS2d 472 (1st Dept 2012) (applying Salazar’s “commonsense approach”); see also *Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1, 935 NYS2d 551, 959 NE2d 488 (2011) (in cases where the objects that injured the plaintiffs were themselves the target of demolition when they fell, “imposing liability for failure to provide protective devices to prevent the walls or objects from falling, when their fall was the goal of the work, would be illogical”). In accordance with the “commonsense approach,” Labor Law § 240(1) should not be interpreted in an illogical manner that would be impractical and contrary to the work performed by the plaintiff, *Nicometi v Vineyards of Fredonia, LLC*, *supra*; *Salazar v Novalex Contracting Corp.*, *supra*; see *Wilinski v 334 East 92nd Housing Development Fund Corp.*, *supra*.

Since Labor Law § 240(1) contains its own specific safety requirements, an owner’s claimed compliance with OSHA regulations generally cannot defeat an injured worker’s *prima facie* showing of entitlement to relief under the state statute, *Dalaba v Schenectady*, 61 AD3d 1151, 876 NYS2d 744 (3d Dept 2009); see *Cruz v Cablevision Systems Corp.*, 120 AD3d 744, 992 NYS2d 281 (2d Dept 2014); *Miranda v Norstar Building Corp.*, 79 AD3d 42, 909 NYS2d 802 (3d Dept 2010).

The first scaffold law, the ancestor to Labor Law § 240(1), was enacted in 1885 as a legislative response to the unsafe conditions confronted by employees who worked at heights and the perceived inadequacy of the common-law duties owed by masters to their servants, see *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 771 NYS2d 484, 803 NE2d 757 (2003). In 1897, the statute was amended to prevent employers from shifting responsibility to injured employees’ coworkers, but it left employers free to invoke the injured workers’ contributory negligence as a defense, *id.* The present statute, Labor Law § 240, was adopted in 1921 and was derived from sections of its predecessor.

Although the statute did not explicitly bar contributory negligence as a defense, in 1948 the Court of Appeals ruled that the purposes of

Labor Law § 240(1) required a rule precluding application of the defense, *Koenig v Patrick Const. Corporation*, 298 NY 313, 83 NE2d 133 (1948); see *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 771 NYS2d 484, 803 NE2d 757 (2003). In *Weininger v Hagedorn & Co.*, 91 NY2d 958, 672 NYS2d 840, 695 NE2d 709 (1998), however, the Court indicated that an employer is not liable under the statute if the employee's own negligence was the sole proximate cause of the injuries. In subsequent cases, the Court of Appeals reiterated and elaborated upon that proposition, *Barreto v Metropolitan Transp. Authority*, 25 NY3d 426, 13 NYS3d 305, 34 NE3d 815 (2015); *Montgomery v Federal Express Corp.*, 4 NY3d 805, 795 NYS2d 490, 828 NE2d 592 (2005); *Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 790 NYS2d 74, 823 NE2d 439 (2004); *Blake v Neighborhood Housing Services of New York City, Inc.*, *supra*.

In addition to the case law regarding the effect of the injured's negligence on the employer's liability, there are over 1,000 appellate cases discussing the other aspects of Labor Law § 240(1), including several dozen decided by the Court of Appeals. The vast majority of these cases were decided after 1980. Two cases decided in the early 1990's clarified the scope of Labor Law § 240(1). First, in *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 577 NYS2d 219, 583 NE2d 932 (1991), the Court of Appeals held that the statute protects only workers engaged in activities that entail a significant inherent risk because of the relative elevation at which the activities must be performed or at which materials or loads must be positioned or secured. Second, in *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993), the Court denied Labor Law § 240(1) recovery to a worker who suffered a strained back because he was forced to remain in a contorted position on the edge of a platform to perform a welding job. Even though his injuries were arguably "related to the effects of gravity," recovery was denied because the plaintiff neither fell nor was struck by a falling object. In rejecting the plaintiff's contention that he was entitled to recovery because of an inadequate, malfunctioning or defectively designed scaffold, stay or hoist, the Ross Court held that the statute was "designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proves inadequate to shield an injured worker from harm directly flowing from the application of the force of gravity to an object or person," see also *Bryant v General Elec. Co.*, 221 AD2d 687, 633 NYS2d 410 (3d Dept 1995) (applying same principle to Labor Law § 240(2)).

Ross was amplified in *Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 895 NYS2d 279, 922 NE2d 865 (2009), in which the Court of Appeals made clear that liability under Labor Law § 240(1) is not limited to cases in which a worker has fallen or has been struck by a falling object. Rather, the Runner Court held, the decisive question under Labor Law § 240(1) is whether the worker's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential. Shortly after Runner was decided, the court stated that, since its decision in

Rocovich, its jurisprudence had evolved, centering around the core premise that a defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability, *Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1, 935 NYS2d 551, 959 NE2d 488 (2011). The precedential value of appellate and trial court cases decided before *Runner*, *Ross* and *Rocovich*, such as *Manning v Lewiston*, 191 AD2d 1035, 595 NYS2d 154 (4th Dept 1993); *Brown v Niagara Mohawk Power Corp.*, 188 AD2d 1014, 591 NYS2d 908 (4th Dept 1992) and *Pietsch v Moog, Inc.*, 156 AD2d 1019, 549 NYS2d 301 (4th Dept 1989), is limited, see *Penaranda v 4933 Realty, LLC*, 115 AD3d 482, 981 NYS2d 690 (1st Dept 2014) (recognizing prior decision in *Modeste v Mega Contracting, Inc.*, 40 AD3d 255, 835 NYS2d 156 (1st Dept 2007), superseded by *Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 895 NYS2d 279, 922 NE2d 865 (2009)); *Moore v Elmwood-Franklin School*, 249 AD2d 923, 672 NYS2d 221 (4th Dept 1998) (abandoning decisions permitting recovery for any fall "at" a height in favor of the more general language of *Ross* and later Court of Appeals cases holding that accident must be caused by the type of hazard contemplated by the statute).

II. Principles of Liability Under Labor Law § 240(1)

A. Absolute Liability

Labor Law §§ 240(1) and 241(1–5) impose absolute liability for violations. In *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 771 NYS2d 484, 803 NE2d 757 (2003), the Court of Appeals noted that the phrases "absolute liability" and "strict liability" are often used interchangeably in the Labor Law § 240(1) context and that it is "imperative" to recognize that such use is different from the use of the term in other legal contexts. The *Blake* Court also observed that it had previously used the phrase "absolute liability" "in the sense that owners or contractors not actually involved in construction can be held liable."

Under the "absolute" or "strict" liability principle, the plaintiff need prove only that the statute was violated and that the violation was a proximate cause of the injury sustained, *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 771 NYS2d 484, 803 NE2d 757 (2003); *Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880, 488 NE2d 810 (1985); *Limauro v City of New York Dept. of Environmental Protection*, 202 AD2d 170, 608 NYS2d 196 (1st Dept 1994); *Figueroa v Manhattanville College*, 193 AD2d 778, 598 NYS2d 77 (2d Dept 1993); see *Barreto v Metropolitan Transp. Authority*, 25 NY3d 426, 13 NYS3d 305, 34 NE3d 815 (2015); *Boshart v Buffalo*, 185 AD2d 706, 586 NYS2d 844 (4th Dept 1992); see also *Doucoure v Atlantic Development Group, LLC*, 18 AD3d 337, 796 NYS2d 48 (1st Dept 2005) (Labor Law § 241-a); *Santos v Sure Iron Works*, 166 AD2d 571, 560 NYS2d 857 (2d Dept 1990). Thus, it is sufficient for the purposes of liability under the statute that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent, *Orellano v 29 East 37th Street Realty Corp.*, 292 AD2d 289, 740 NYS2d 16 (1st Dept 2002).

However, the nondelegable duty imposed by Labor Law § 240(1) applies only if the listed devices are necessary to provide proper protection; otherwise the absence of the devices would not be a proximate cause of the accident, *La France v Niagara Mohawk Power Corp.*, 89 AD2d 757, 453 NYS2d 901 (3d Dept 1982).

Control, direction, or supervision of the work by the owner is not a necessary condition of liability under Labor Law § 240(1), *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 606 NYS2d 127, 626 NE2d 912 (1993); *Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55, 604 NE2d 117 (1992); *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 577 NYS2d 219, 583 NE2d 932 (1991); *Haimes v New York Telephone Co.*, 46 NY2d 132, 412 NYS2d 863, 385 NE2d 601 (1978); see *Barreto v Metropolitan Transp. Authority*, 25 NY3d 426, 13 NYS3d 305, 34 NE3d 815 (2015). Nor does the statute require that the owner have notice of the defect, *Lombardi v Stout*, supra. As a general rule, liability rests solely upon the fact of ownership, and whether the owner contracted for or benefited from the work is irrelevant, *Sanatass v Consolidated Investing Co., Inc.*, 10 NY3d 333, 858 NYS2d 67, 887 NE2d 1125 (2008); *Gordon v Eastern Ry. Supply, Inc.*, supra; *Tronolone v Praxair, Inc.*, 22 AD3d 1031, 804 NYS2d 520 (4th Dept 2005); see Introductory Statement to Injured Employees' Rights Under the Labor Law, III(A)(1), supra; but see *Abbatiello v Lancaster Studio Associates*, 3 NY3d 46, 781 NYS2d 477, 814 NE2d 784 (2004) (no liability under Labor Law § 240(1) where owner wholly unaware that plaintiff was working on premises). However, the property owner was held not subject to liability under Labor Law § 240(1) in the unusual circumstances surrounding the decontamination work in lower Manhattan in the wake of the September 11, 2001 terrorist attack on the World Trade Center, since the New York City Department of Environmental Protection evacuated the premises, solicited bids for the decontamination work, hired plaintiff's employer and refused to permit anyone other than agency staff or workers on the premises, *Campoverde v Liberty, LLC*, 37 AD3d 275, 832 NYS2d 7 (1st Dept 2007). In *Moracho v Open Door Family Medical Center, Inc.*, 74 AD3d 657, 906 NYS2d 7 (1st Dept 2010), the court made it clear that the holding in *Campoverde v Liberty, LLC*, supra, involved "unusual circumstances" and would not be applied to a general contractor that had been prevented from accessing the building's roof during an asbestos abatement project.

Because liability is absolute under Labor Law § 240(1), a spouse's derivative action is unaffected by the negligence, if any, of the injured party, *Spose v Ragu Foods, Inc.*, 124 AD2d 980, 508 NYS2d 810 (4th Dept 1986).

B. Elements of the Cause of Action

1. In General

Labor Law § 240(1) requires that all contractors and owners "furnish or erect, or cause to be furnished or erected for [the erection, demolition, repairing, altering, cleaning or painting of a building or

structure], scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.” The two elements of a Labor Law § 240(1) cause of action are that the statute was violated and that the violation was a proximate cause of the injury, *Barreto v Metropolitan Transp. Authority*, 25 NY3d 426, 13 NYS3d 305, 34 NE3d 815 (2015); *Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 790 NYS2d 74, 823 NE2d 439 (2004); *Salinas v 64 Jefferson Apartments, LLC*, 170 AD3d 1216, 97 NYS3d 136 (2d Dept 2019). The plaintiff must demonstrate both that a violation of the statute—i.e., a failure to provide the required protection at a construction site—proximately caused the injury and that the injury sustained is the type of elevation—related hazard to which the statute applies, *Oakes v Wal-Mart Real Estate Business Trust*, 99 AD3d 31, 948 NYS2d 748 (3d Dept 2012); see *Schutt v Dynasty Transportation of Ohio, Inc.*, 203 AD3d 858, 164 NYS3d 645 (2d Dept 2022) (Labor Law § 240(1) inapplicable where plaintiff slipped on oil, causing hydraulic jack to topple distance of two feet onto plaintiff’s foot); *Chuqui v Amna, LLC*, 203 AD3d 1018, 166 NYS3d 192 (2d Dept 2022) (Labor Law § 240(1) inapplicable where pieces of sheet metal from cart plaintiff was helping to move fell on him); *Seem v Premier Camp Company, LLC*, 200 AD3d 921, 161 NYS3d 117 (2d Dept 2021) (no elevation-related risk where dump truck plaintiff was operating toppled over); *Kammerer v Mercado*, 195 AD3d 1513, 145 NYS3d 888 (4th Dept 2021) (Labor Law § 240(1) inapplicable where liquid from clogged pipe containing caustic substance leaked onto plaintiff and burned her); *Tomala-Campoverde v Trumbull Equities, LLC*, 186 AD3d 522, 129 NYS3d 157 (2d Dept 2020) (where plaintiff was allegedly injured when he pushed with his feet against hoisted beam that was swinging towards him, accident not caused by physically significant elevation differential); *Dominguez v Mirman, Markovits & Landau, P.C.*, 180 AD3d 646, 119 NYS3d 136 (2d Dept 2020) (Labor Law § 240(1) inapplicable where plaintiff was struck by excavator bucket while working at elevated height, because accident was not elevation-related); *Salerno v Diocese of Buffalo*, 161 AD3d 1522, 76 NYS3d 347 (4th Dept 2018) (Labor Law § 240(1) inapplicable where injury caused by safety bar on Bobcat skid loader was not the result of any physically significant elevation differential); *Gualpa v Leon D. DeMatteis Const. Corp.*, 117 AD3d 614, 986 NYS2d 459 (1st Dept 2014) (Labor Law § 240(1) inapplicable to accident caused by block intended to secure plastic tarp rather than to protect worker engaged in work involving elevation-related risk). Thus, the plaintiff must show that the absence of adequate safety devices, or the inadequacy of the safety devices provided to protect the worker, was a proximate cause of his or her injuries, *Nazario v 222 Broadway, LLC*, 135 AD3d 506, 23 NYS3d 192 (1st Dept 2016), *mod* on other grounds, 28 NY3d 1054, 43 NYS3d 251, 65 NE3d 1286 (2016). In addition, a worker who has been injured as a result of a fall or the application of an external force may claim the protection of the statute only if the application of that force was foreseeable, see *Ormsbee v Time Warner Realty Inc.*, 203 AD3d 630, 166 NYS3d 130 (1st Dept 2022) (no elevation-related injury where gang box lid fell while plaintiff was retrieving tools); *Hajderlli v Wiljohn 59 LLC*,

71 AD3d 416, 897 NYS2d 37 (1st Dept 2010) (plaintiff injured when supervisor mistakenly pulled ladder away while plaintiff was still descending; supervisor's act not foreseeable and so far removed from any conceivable violation of Labor Law § 240(1) as to break any causal connection); *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 841 NYS2d 249 (1st Dept 2007); see also *Campbell v New York*, 32 AD3d 703, 821 NYS2d 166 (1st Dept 2006) (foreseeability of particular chain of events that led to application of force of gravity was not "determinative").

With respect to the statutory violation element, the determination of the type of protective safety device required for a particular job depends on the foreseeable risks of harm presented by the nature of the work, *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 841 NYS2d 249 (1st Dept 2007). Consistent with that principle, the court held in *Jones v 414 Equities LLC*, 57 AD3d 65, 866 NYS2d 165 (1st Dept 2008), that to prevail in a Labor Law § 240(1) action based on the failure of a completed and permanent building structure, such as the collapse of a floor, plaintiff must show that the failure of the structure was a foreseeable risk of the task being performed, see *Goya v Longwood Housing Development Fund Company, Inc.*, 192 AD3d 581, 146 NYS3d 59 (1st Dept 2021); *Garcia v Neighborhood Partnership Housing Development Fund Co., Inc.*, 113 AD3d 494, 980 NYS2d 6 (1st Dept 2014); *Mendoza v Highpoint Associates, IX, LLC*, 83 AD3d 1, 919 NYS2d 129 (1st Dept 2011); *Vasquez v Urbahn Associates Inc.*, 79 AD3d 493, 918 NYS2d 1 (1st Dept 2010); see also *Ortega v New York*, 95 AD3d 125, 940 NYS2d 636 (1st Dept 2012) (stressing that foreseeability requirement only applies to collapse of permanent structure); *Espinosa v Azure Holdings II, LP*, 58 AD3d 287, 869 NYS2d 395 (1st Dept 2008). Under that test, evidence that the building as a whole was in an advanced state of disrepair was sufficient to raise a triable question fact but did not establish the requisite foreseeability as a matter of law, *Espinosa v Azure Holdings II, LP*, *supra*. A plaintiff's use of a permanent fire escape ladder to reach the roof was a foreseeable elevation-related hazard, just as if he had been using an extension ladder for the same purpose, *Goya v Longwood Housing Development Fund Company, Inc.*, *supra*. In contrast, foreseeability of a partial building collapse was established as a matter of law where an architect's field report prepared before the demolition work began stated that the building conditions "appear unsafe," a building violation was issued the day of the accident describing the conditions as "hazardous" and ordering that work be stopped, and an expert engineer noted that, a week before the accident, a number of timber joists were sagging and were not shored or posted, *Garcia v Neighborhood Partnership Housing Development Fund Co., Inc.*, *supra*; see *Mena v 485 Seventh Avenue Associates LLC*, 199 AD3d 420, 153 NYS3d 865 (1st Dept 2021) (where plaintiff was using motorized chipping hammer to demolish wall, conditions foreseeable that ceiling slab could collapse and knock him off scaffold).

With respect to causation, an independent intervening act may constitute a superseding cause, and be sufficient to relieve the defendant of

liability, if it is of such an extraordinary nature or so attenuated from the defendant's conduct that responsibilities for the injury should not reasonably be attributed to the defendant, see *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 606 NYS2d 127, 626 NE2d 912 (1993); *Morera v New York City Transit Authority*, 182 AD3d 509, 123 NYS3d 117 (1st Dept 2020); *Morochó v Plainview-Old Bethpage Cent. School Dist.*, 116 AD3d 935, 984 NYS2d 120 (2d Dept 2014). Where a plaintiff was working on a small elevated platform designed to prevent him from being struck by passing trains, the fact that an object being carried by a train was turned sideways in such a manner that the plaintiff was struck by the object was not of such an extraordinary nature so as to relieve the defendants of liability, *Devoy v New York*, 192 AD3d 665, 144 NYS3d 68 (2d Dept 2021). A co-worker's attempt to adjust a pin and brace on a scaffold, which caused it to shake rapidly resulting in plaintiff's fall to the ground, was not of such an extraordinary nature or so attenuated from a violation of Labor Law § 240(1) as to constitute a superseding cause, *deSousa v Dayton T. Brown, Inc.*, 280 AD2d 447, 721 NYS2d 69 (2d Dept 2001); see *Alomia v New York City Transit Authority*, 292 AD2d 403, 738 NYS2d 695 (2d Dept 2002). The same was true of a co-worker's actions in pulling up a piece of sheeting from the floor, causing the sheeting to become entangled with plaintiff's ladder with the result that the ladder fell, *Morochó v Plainview-Old Bethpage Cent. School Dist.*, *supra*. As to cases where plaintiff's own conduct was the sole proximate cause of the accident, see discussion, *infra*.

2. *Failure to Provide Safety Device*

"Proper protection" under Labor Law § 240(1) means that the device must be appropriately placed or erected so that it would have safeguarded the employee and must itself be adequate to protect against the hazards entailed in the task assigned, *Felker v Corning Inc.*, 90 NY2d 219, 660 NYS2d 349, 682 NE2d 950 (1997); *Clark v Fox Meadow Builders Inc.*, 214 AD2d 882, 624 NYS2d 685 (3d Dept 1995); *Conway v New York State Teachers' Retirement System*, 141 AD2d 957, 530 NYS2d 300 (3d Dept 1988). A worker must be provided with a device or devices that adequately protect against a risk arising from a physically significant elevation differential, *Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 895 NYS2d 279, 922 NE2d 865 (2009); see *Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1, 935 NYS2d 551, 959 NE2d 488 (2011). The statute requires, among other things, that a device made available to workers must allow them both to safely perform the work at an elevation without falling and to safely ascend to and descend from the necessary height, *Potter v NYC Partnership Housing Development Fund Co., Inc.*, 13 AD3d 83, 786 NYS2d 438 (1st Dept 2004); see *McEachern v Extell Development Company*, 199 AD3d 464, 154 NYS3d 222 (1st Dept 2021) (plaintiff provided with no safety devices and injured when stepping onto oil barrel to descend into fuel tank room). Critically, however, because Labor Law § 240(1) "should be construed with a common sense approach to the realities of the workplace at issue," *Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 7 NYS3d 263, 30 NE3d 154 (2015); *Salazar v Novalex Contracting*

Corp., 18 NY3d 134, 936 NYS2d 624, 960 NE2d 393 (2011), an owner or contractor is not obligated by the statute to provide a protective device if the provision or installation of the device would have been contrary to the objectives of the work, *Salazar v Novalex Contracting Corp.*, supra; see *Nicometi v Vineyards of Fredonia, LLC*, supra; *Versace v 1540 Broadway L.P.*, 148 AD3d 483, 48 NYS3d 666 (1st Dept 2017) (statute inapplicable where plaintiff elevator mechanic injured while riding in elevator to test it since securing device would defeat purpose of work by precluding plaintiff from riding elevator); see also *Wilinski v 334 East 92nd Housing Development Fund Corp.*, supra (in cases where the objects that injured the plaintiffs were themselves the target of demolition when they fell, “imposing liability for failure to provide protective devices to prevent the walls or objects from falling, when their fall was the goal of the work, would be illogical”). However, a plaintiff is entitled to labor Law 240(1) protection when, as part of a larger demolition project, an object not intended for demolition at the time collapses causing injury, *Wilinski v 334 East 92nd Housing Development Fund Corp.*, supra; *Sinchi v HWA 1290 III LLC*, 184 AD3d 408, 125 NYS3d 415 (1st Dept 2020); *Ragubir v Gibraltar Management Co., Inc.*, 146 AD3d 563, 45 NYS3d 76 (1st Dept 2017).

There are two circumstances when the statute is invoked: when no safety device is provided and when a safety device that is provided fails to furnish proper protection. Failure to provide safety devices required by the statute is a violation and it is no defense that such devices were not available, were not adaptable for use, or were not customarily used, *Stolt v General Foods Corp.*, 81 NY2d 918, 597 NYS2d 650, 613 NE2d 556 (1993); *Hagins v State*, 81 NY2d 921, 597 NYS2d 651, 613 NE2d 557 (1993); *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 493 NYS2d 102, 482 NE2d 898 (1985); see *Hamilton v Kushnir Realty Co.*, 51 AD3d 864, 858 NYS2d 381 (2d Dept 2008). It has been held that impracticality is not a valid excuse for failure to provide a needed safety device, *Pichardo v Urban Renaissance Collaboration Ltd. Partnership*, 51 AD3d 472, 857 NYS2d 144 (1st Dept 2008).

Where it is uncontroverted that none of the safety devices explicitly required by the statute was provided to the plaintiff at the work site and where there is no possible view of the evidence that would negate a finding of proximate cause, the plaintiff is entitled to a directed verdict on liability, *Smith v Hooker Chemical & Plastics Corp.*, 70 NY2d 994, 526 NYS2d 424, 521 NE2d 431 (1988); *Adams v Cimato Bros., Inc.*, 207 AD2d 997, 617 NYS2d 251 (4th Dept 1994); see *Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880, 488 NE2d 810 (1985); *Emmi v Emmi*, 186 AD2d 1025, 588 NYS2d 481 (4th Dept 1992) (even though § 240(2) specifically requires guardrails only where scaffold more than 20 feet high, guardrails must be provided under § 240(1) whenever necessary to provide proper protection); *Cartella v Margaret Woodbury Strong Museum*, 135 AD2d 1089, 523 NYS2d 308 (4th Dept 1987). Thus, in *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 493 NYS2d 102, 482 NE2d 898 (1985), the Court of Appeals held that a directed verdict should have been granted where plaintiff established

that he fell from a vertical column and no ladders had been erected for the specific task he was performing. Likewise, where plaintiff is not provided with any safety device to protect him while working at an elevation, plaintiff is entitled to partial summary judgment under Labor Law § 240(1) on liability, *Miranda v Norstar Building Corp.*, 79 AD3d 42, 909 NYS2d 802 (3d Dept 2010) (partial summary judgment to plaintiff where defendant provided only “safety monitoring system,” which is not a safety device); *Yost v Quartararo*, 64 AD3d 1073, 883 NYS2d 630 (3d Dept 2009); *Nephew v Barcomb*, 260 AD2d 821, 688 NYS2d 751 (3d Dept 1999); see *Barreto v Metropolitan Transp. Authority*, 25 NY3d 426, 13 NYS3d 305, 34 NE3d 815 (2015).

In contrast, defendant was entitled to summary judgment dismissing plaintiff's Labor Law § 240(1) claim where the injured worker, who was working atop a bundle of steel trusses about 10 feet from the ground, climbed into the bundle to avoid being crushed by another bundle which had become unstable and was injured when the bundle into which he had climbed toppled to the ground. *Berg v Albany Ladder Co., Inc.*, 10 NY3d 902, 861 NYS2d 607, 891 NE2d 723 (2008); see *Brownell v Blue Seal Feeds, Inc.*, 89 AD3d 1425, 932 NYS2d 623 (4th Dept 2011). In that situation, the injured worker's proof did not create a question of fact as to whether his fall resulted from the lack of a safety device. *Berg* and *Brownell* should be contrasted with *Naughton v New York*, 94 AD3d 1, 940 NYS2d 21 (1st Dept 2012), where the court awarded plaintiff, who fell from atop a load on a flatbed truck, summary judgment on his § 240(1) claim. In *Naughton*, plaintiff was working on top of a load of wall panels approximately 15 feet off the ground, when one of the bundles of paneling that was being hoisted from the truck swung toward plaintiff and struck him, causing him to fall to the ground. The court determined that plaintiff was entitled to summary judgment as a “falling worker,” as well as under the “falling object” doctrine.

It has been held that the plaintiff is not required to present evidence as to which safety device, if any, would have prevented his injury, *Miranda v Norstar Building Corp.*, 79 AD3d 42, 909 NYS2d 802 (3d Dept 2010); *Cody v State*, 52 AD3d 930, 859 NYS2d 316 (3d Dept 2008); *Noble v AMCC Corp.*, 277 AD2d 20, 714 NYS2d 495 (1st Dept 2000). However, in *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 937 NYS2d 157, 960 NE2d 948 (2011), the court held, in the context of a plaintiff's motion for summary judgment, that the plaintiff must establish that there is a safety device of the kind enumerated in Labor Law § 240(1) that could have prevented his or her fall. Where the defendant does not provide any of the enumerated safety devices, the defendant may satisfy his or her duty by providing “other devices” that give “proper protection,” *Fuller v Catalfamo*, 223 AD2d 850, 636 NYS2d 467 (3d Dept 1996).

The availability of a particular safety device does not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without use of additional precautionary devices or measures, *Tanksley v LCO Building LLC*, 201 AD3d 1323,

162 NYS3d 609 (4th Dept 2022); *Ewing v ADF Const. Corp.*, 16 AD3d 1085, 793 NYS2d 306 (4th Dept 2005); *Waggoner v Lancet Arch, Inc.*, 291 AD2d 831, 737 NYS2d 317 (4th Dept 2002); *Clark v Fox Meadow Builders Inc.*, 214 AD2d 882, 624 NYS2d 685 (3d Dept 1995); see *Nazario v 222 Broadway, LLC*, 28 NY3d 1054, 43 NYS3d 251, 65 NE3d 1286 (2016) (issues of fact whether ladder failed to provide proper protection and whether plaintiff should have been provided with additional safety devices). Thus, where the plaintiff was provided with a safety belt, but there were no safety lines to which the belt could be attached in the work area where plaintiff fell from a steel beam, liability was imposed under Labor Law § 240(1), *DiMuro v Babylon*, 210 AD2d 373, 620 NYS2d 114 (2d Dept 1994); *Desrosiers v Barry, Bette & Led Duke, Inc.*, 189 AD2d 947, 592 NYS2d 826 (3d Dept 1993); *Merante v IBM*, 169 AD2d 710, 564 NYS2d 463 (2d Dept 1991); see *Stigall v State*, 189 AD3d 469, 136 NYS3d 275 (1st Dept 2020) (lanyard failed to prevent falling worker from striking deck below because safety cable positioned too low). Similarly, where the staircase connecting two levels of scaffolds lacked handrails, application of Labor Law § 240(1) was appropriate and the fact that the plaintiff's fall from the staircase may also have been attributable to the presence of cleaning fluid did not create a triable question of fact as to the defendant's liability, *Nunez v Bertelsman Property, Inc.*, 304 AD2d 487, 758 NYS2d 643 (1st Dept 2003). Where the plaintiff was injured in a fall while using stilts in the course of performing construction activities at an elevation, without proper safety equipment such as a ladder or scaffold, liability under Labor Law § 240(1) may attach, *Piche v Synergy Tooling Systems, Inc.*, 150 AD3d 1694, 54 NYS3d 255 (4th Dept 2017); *Matos v Garden State Brick Face of Middle Village, Inc.*, 272 AD2d 70, 707 NYS2d 169 (1st Dept 2000). Further, while a plywood cover over a skylight opening may have provided proper protection while it was in place over the opening, once it was removed the plaintiff was exposed to an elevation-related risk that required additional precautionary measures or devices, *Tanksley v LCO Building LLC*, 201 AD3d 1323, 162 NYS3d 609 (4th Dept 2022).

For a discussion of situations in which safety devices were available at the work site but were not utilized by the injured worker, see *V. Defenses to Labor Law § 240(1) Claims, A. Sole Proximate Cause Doctrine*, *infra*.

3. *Inadequate Safety Device*

The more difficult question is what evidence must be submitted to establish a *prima facie* violation of Labor Law § 240(1) when a safety device was provided. The statutory duty to provide "proper protection" requires that the device be appropriately placed or erected so that it safeguards the employee, *Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880, 488 NE2d 810 (1985); *Haulotte v Prudential Ins. Co. of America*, 266 AD2d 38, 698 NYS2d 24 (1st Dept 1999); *Carrangi v International Paper Co.*, 184 AD2d 137, 591 NYS2d 600 (3d Dept 1992), and that the furnished device itself be adequate to protect against the hazards entailed in the performance of the particular task to which the

employee is assigned, see *Bland v Manocherian*, supra; *Nazario v 222 Broadway, LLC*, 135 AD3d 506, 23 NYS3d 192 (1st Dept 2016), mod on other grounds, 28 NY3d 1054, 43 NYS3d 251, 65 NE3d 1286 (2016); *Cruz v Turner Construction Co.*, 279 AD2d 322, 720 NYS2d 10 (1st Dept 2001); *Arce v 1133 Bldg. Corp.*, 257 AD2d 515, 684 NYS2d 523 (1st Dept 1999); see also *Medouze v Plaza Construction LLC*, 199 AD3d 465, 154 NYS3d 232 (1st Dept 2021) (wooden dunnage intended to hold bundle of metal frames together that broke while plaintiff was lifting bundle was inadequate safety device as matter of law); *Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 44 NYS3d 388 (1st Dept 2017) (harness did not provide adequate fall protection absent appropriate place on which to tie off). Additionally, the statute demands that required safety equipment be stored so that workers can safely gain access to it, *Pearl v Sam Greco Const., Inc.*, 31 AD3d 996, 819 NYS2d 193 (3d Dept 2006) (improper storage of safety equipment on slippery roof). The fact that provided safety devices did not comply with the provisions of the Industrial Code does not establish as a matter of law that those devices did not provide “proper protection” under Labor Law § 240(1), *Perri v Gilbert Johnson Enterprises, Ltd.*, 14 AD3d 681, 790 NYS2d 25 (2d Dept 2005); see *Nazario v 222 Broadway, LLC*, supra. That a safety device complied with industry standards does not, standing alone, establish the adequacy of the device, *O’Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 52 NYS3d 68, 74 NE3d 307 (2017); see *Kelley v Episcopal Church Home and Affiliates, Inc.*, 199 AD3d 1448, 159 NYS3d 281 (4th Dept 2021); *Nazario v 222 Broadway, LLC*, supra.

In *Felker v Corning Inc.*, 90 NY2d 219, 660 NYS2d 349, 682 NE2d 950 (1997), the Court of Appeals indicated that if a ladder is provided that “slipped, tipped, was placed improperly or otherwise failed to support plaintiff at that elevation,” liability could be established, see *Hoxhaj v West 30th HL LLC*, 195 AD3d 503, 145 NYS3d 351 (1st Dept 2021) (unsecured ladder began to wobble and plaintiff fell after losing his equilibrium); *Wu v 34 17th Street Project LLC*, 200 AD3d 508, 155 NYS3d 85 (1st Dept 2021) (ladder was inadequate safety device regardless of whether plaintiff fell because ladder moved or because of drill vibrations); *Rodriguez v Milton Boron, LLC*, 199 AD3d 537, 154 NYS3d 433 (1st Dept 2021) (ladder suddenly moved while plaintiff was reaching overhead to work on smoke detector); *Von Hegel v Brixmor Sunshine Square, LLC*, 180 AD3d 727, 115 NYS3d 712 (2d Dept 2020); *Salinas v 64 Jefferson Apartments, LLC*, 170 AD3d 1216, 97 NYS3d 136 (2d Dept 2019) (ladder moved without any apparent reason, causing plaintiff to fall); *McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 87 NYS3d 86 (2d Dept 2018) (plank of scaffold broke, causing plaintiff to fall); *Ortiz-Cruz v Evers*, 150 AD3d 622, 56 NYS3d 71 (1st Dept 2017) (ladder broke while plaintiff taking measurements in preparation for work to be done on owners’ roof); *Nazario v 222 Broadway, LLC*, 135 AD3d 506, 23 NYS3d 192 (1st Dept 2016), mod on other grounds, 28 NY3d 1054, 43 NYS3d 251, 65 NE3d 1286 (2016); *Woods v Design Center, LLC*, 42 AD3d 876, 839 NYS2d 880 (4th Dept 2007); *Hanna v Gellman*, 29 AD3d 953, 815 NYS2d 713 (2d Dept 2006); *Posillico v Laquila Const., Inc.*, 265 AD2d 394, 696 NYS2d 507 (2d Dept 1999); *Garcia v 1122 East 180th*

Street Corp., 250 AD2d 550, 675 NYS2d 2 (1st Dept 1998). Where plaintiff claims that a ladder was not properly placed, evidence that it was structurally sound and not defective is not relevant, *Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 18 NYS3d 251 (4th Dept 2015); *Woods v Design Center, LLC*, *supra*. However, the fact that the worker fell from a scaffold or ladder does not in itself establish that the device did not provide proper protection, *Cutaia v Board of Managers of 160/170 Varick Street Condominium*, 38 NY3d 1037, 169 NYS3d 902, 190 NE3d 28 (2022) (accident alone insufficient to establish liability); *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 771 NYS2d 484, 803 NE2d 757 (2003); see *O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 52 NYS3d 68, 74 NE3d 307 (2017); *Holly v Chautauqua*, 13 NY3d 931, 895 NYS2d 308, 922 NE2d 897 (2010); *Dupre v Arant*, 151 AD3d 1675, 56 NYS3d 725 (4th Dept 2017). Thus, an owner or contractor is not liable under Labor Law § 240(1) if the injured worker fell because he or she simply lost his or her footing while climbing a properly erected, nondefective ladder that did not malfunction, *Buckley v J.A. Jones/GMO*, 38 AD3d 461, 832 NYS2d 560 (1st Dept 2007); *Cordova v 653 Eleventh Avenue LLC*, 190 AD3d 637, 140 NYS3d 230 (1st Dept 2021) (defendant entitled to summary judgment dismissing Labor Law § 240(1) cause of action where ladder was properly secured to structure and surveillance footage of plaintiff falling showed that ladder did not move or shake, refuting plaintiff's testimony to the contrary). Further, there is no violation of the statute when the sole proximate cause of the accident is the improper use of a ladder that is otherwise sufficient to protect the worker, *Blake v Neighborhood Housing Services of New York City, Inc.*, *supra*; *Meade v Rock-McGraw, Inc.*, 307 AD2d 156, 760 NYS2d 39 (1st Dept 2003); see *Morin v Machnick Builders, Ltd.*, 4 AD3d 668, 772 NYS2d 388 (3d Dept 2004). Likewise, there was no violation where plaintiff either jumped or was blown off ladder by force of unexpected explosion, as there was no evidence that ladder failed or was improperly placed, *Dupre v Arant*, *supra*. Similarly, the Labor Law § 240(1) claim was dismissed where plaintiff stepped from the bottom rung of a ladder onto a drop cloth covering a carpeted floor and tripped over a concealed portable light located underneath the cloth, since the ladder had been effective in preventing plaintiff from falling during his installation of a ceiling sprinkler, *Nieves v Five Boro Air Conditioning & Refrigeration Corp.*, 93 NY2d 914, 690 NYS2d 852, 712 NE2d 1219 (1999).

Plaintiff may establish a *prima facie* case that the defendant violated Labor Law § 240(1) by failing to ensure the proper placement of the ladder in light of the condition of the floor, *Klein v New York*, 89 NY2d 833, 652 NYS2d 723, 675 NE2d 458 (1996); *Handley v J.N. White Associates, Inc.*, 288 AD2d 855, 732 NYS2d 783 (4th Dept 2001); *Anderson v Schul/Mar Const. Corp.*, 212 AD2d 493, 622 NYS2d 310 (2d Dept 1995); see *Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 18 NYS3d 251 (4th Dept 2015) (ladder placed on snow and ice), by failing to secure a ladder that had no protective skids, *Melchor v Singh*, 90 AD3d 866, 935 NYS2d 106 (2d Dept 2011); *Sinzieri v Expositions, Inc.*, 270 AD2d 332, 704 NYS2d 293 (2d Dept 2000); see *Evans v Anheuser-*

Busch, Inc., 277 AD2d 874, 716 NYS2d 268 (4th Dept 2000); *Smith v Pergament Enterprises of S.I.*, 271 AD2d 870, 706 NYS2d 505 (3d Dept 2000), or by failing to prevent the foreseeable presence of an oily substance on the rung of the ladder from which plaintiff fell, *Cruz v Turner Construction Co.*, 279 AD2d 322, 720 NYS2d 10 (1st Dept 2001). Further, there is no need to show that the ladder on which plaintiff was injured was defective if plaintiff establishes that the ladder was unsteady because of the failure to properly secure it, *Nazario v 222 Broadway, LLC*, 135 AD3d 506, 23 NYS3d 192 (1st Dept 2016), *mod* on other grounds, 28 NY3d 1054, 43 NYS3d 251, 65 NE3d 1286 (2016); *Caceres v Standard Realty Associates, Inc.*, 131 AD3d 433, 15 NYS3d 338 (1st Dept 2015); *Montalvo v J. Petrocelli Const., Inc.*, 8 AD3d 173, 780 NYS2d 558 (1st Dept 2004); see *Von Hegel v Brixmor Sunshine Square, LLC*, 180 AD3d 727, 115 NYS3d 712 (2d Dept 2020) (plaintiff's deposition testimony that accident occurred when feet of ladder slipped away from wall *prima facie* proof of statutory violation); *Weicht v New York*, 148 AD3d 551, 49 NYS3d 680 (1st Dept 2017) (workers' compensation report, business record, and statement from defendant owner, vicarious admission, stating that plaintiff was injured when ladder slipped out from under him sufficient to establish Labor Law § 240(1) violation). In *Schultze v 585 West 214th Street Owners Corp.*, 228 AD2d 381, 644 NYS2d 722 (1st Dept 1996); *Rodriguez v New York City Housing Authority*, 194 AD2d 460, 599 NYS2d 263 (1st Dept 1993); *Urrea v Sedgwick Ave. Associates*, 191 AD2d 319, 595 NYS2d 46 (1st Dept 1993); and *Fernandez v MHP Land Associates*, 188 AD2d 417, 591 NYS2d 835 (1st Dept 1992), the courts held that the failure to secure a ladder on which plaintiff was standing constituted a violation of Labor Law § 240(1) as a matter of law. There is a question about the availability of recovery under Labor Law § 240(1) where the accident occurred solely as a result of the injured worker's placement of the ladder, see *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 771 NYS2d 484, 803 NE2d 757 (2003); see also *Canino v Electronic Technologies Co.*, 28 AD3d 932, 813 NYS2d 557 (3d Dept 2006) (fact issue whether accident caused by plaintiff's improper placement of ladder and "ill advised application of lateral force" or instead by inadequacy of ladder for particular task).

In *Laquidara v HRH Const. Corp.*, 283 AD2d 169, 724 NYS2d 53 (1st Dept 2001), although there were ladders and a concrete ramp at the site, the court granted plaintiff summary judgment because of the failure to provide safety devices such as guardrails or safety netting that were adequate to prevent plaintiff from falling from one floor to another. The court concluded that the precise manner in which plaintiff's fall occurred was immaterial because there was no question that plaintiff's injuries were at least partially attributable to defendant's failure; see *Cammon v New York*, 21 AD3d 196, 799 NYS2d 455 (1st Dept 2005).

Courts have declined to award summary judgment on the issue of liability to workers who fell from ladders as the result of receiving an electric shock, finding issues of fact as to the adequacy of the ladder a

safety device, see *Cutaia v Board of Managers of 160/170 Varick Street Condominium*, 38 NY3d 1037, 169 NYS3d 902, 190 NE3d 28 (2022); *Nazario v 222 Broadway, LLC*, 28 NY3d 1054, 43 NYS3d 251, 65 NE3d 1286 (2016); *Jones v Nazareth College of Rochester, LLC*, 147 AD3d 1364, 46 NYS3d 357 (4th Dept 2017); but see *DelRosario v United Nations Federal Credit Union*, 104 AD3d 515, 961 NYS2d 389 (1st Dept 2013). However, where a plaintiff was required to stand on the guardrails of a manlift in order to perform his work and fell after sustaining an electric shock, he was entitled to summary judgment on liability because the manlift was inappropriate for the task at hand, *Healy v BOP One North End LLC*, 203 AD3d 428, 160 NYS3d 603 (1st Dept 2022).

Where adequate safety devices have been provided, an owner or contractor is not required to furnish additional, redundant safety devices, *Albert v Williams Lubricants, Inc.*, 35 AD3d 1115, 828 NYS2d 593 (3d Dept 2006); see *Grove v Cornell University*, 75 AD3d 718, 904 NYS2d 559 (3d Dept 2010), *aff'd as modified*, 17 NY3d 875, 933 NYS2d 635, 957 NE2d 1137 (2011); see also *Nazario v 222 Broadway, LLC*, 28 NY3d 1054, 43 NYS3d 251, 65 NE3d 1286 (2016) (issues of fact whether ladder failed to provide proper protection and whether plaintiff should have been provided with additional safety devices).

Summary judgment is appropriate where the plaintiff establishes a *prima facie* violation of Labor Law § 240(1) that proximately caused the injury by, for example, submitting evidence that the floor where the ladder was placed was covered with “gunk,” *Klein v New York*, 89 NY2d 833, 652 NYS2d 723, 675 NE2d 458 (1996), or by submitting evidence that the ladder “gave way” or collapsed, *Panek v Albany*, 99 NY2d 452, 758 NYS2d 267, 788 NE2d 616 (2003); *Hernandez v 767 Fifth Partners, LLC*, 199 AD3d 484, 154 NYS3d 415 (1st Dept 2021) (where platform of Baker scaffold plaintiff was standing upon collapsed, conflicting facts as to reason for collapse were irrelevant); see *Mullins v Center Line Studios, Inc.*, 199 AD3d 526, 154 NYS3d 432 (1st Dept 2021) (plaintiff entitled to summary judgment where top rung of wooden ladder detached from railing); *Ramirez v I.G.C. Wall Systems, Inc.*, 140 AD3d 1047, 35 NYS3d 159 (2d Dept 2016) (ladder “jerked”). The fact that plaintiff’s injury from an inadequately secured ladder was precipitated by an object that fell on him does not eliminate the causal connection between the Labor Law § 240(1) violation and the accident, *Montalvo v J. Petrocelli Const., Inc.*, 8 AD3d 173, 780 NYS2d 558 (1st Dept 2004).

It is no defense to liability under Labor Law § 240(1) that the safety device collapsed as a result of a defect in the product, *Drew v Correct Mfg. Corp. (Hughes-Keenan Div.)*, 149 AD2d 893, 540 NYS2d 575 (3d Dept 1989). It is also no defense that none of the safety devices specifically enumerated in the statute would have prevented plaintiff’s fall, *Grant v Gutches Timberlands Inc.*, 214 AD2d 909, 625 NYS2d 716 (3d Dept 1995).

4. Proving Inadequacy of Safety Devices Provided at Work Site

In *Blake v Neighborhood Housing Services of New York City, Inc.*,

1 NY3d 280, 771 NYS2d 484, 803 NE2d 757 (2003) (quoting *Beesimer v Albany Avenue/Route 9 Realty, Inc.*, 216 AD2d 853, 629 NYS2d 816 (3d Dept 1995)), the Court of Appeals stated that “ ‘the mere fact that [a plaintiff] fell off the scaffolding surface is insufficient, in and of itself, to establish that the device did not provide proper protection,’ ” see also *O’Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 52 NYS3d 68, 74 NE3d 307 (2017); *Felker v Corning Inc.*, 90 NY2d 219, 660 NYS2d 349, 682 NE2d 950 (1997). However, the Blake Court noted that where a scaffold or ladder collapses or malfunctions for no apparent reason, the plaintiff is entitled to a presumption that the scaffold or ladder was not good enough to afford proper protection, see *Gutierrez v Turner Towers Tenants Corp.*, 202 AD3d 437, 163 NYS3d 6 (1st Dept 2022) (rotten plank of sidewalk bridge broke under plaintiff’s weight); *Debennedetto v Chetrit*, 190 AD3d 933, 140 NYS3d 569 (2d Dept 2021) (plaintiff entitled to summary judgment where planked scaffold on metal brackets affixed to outside of house collapsed for no apparent reason); *Salinas v 64 Jefferson Apartments, LLC*, 170 AD3d 1216, 97 NYS3d 136 (2d Dept 2019) (plaintiff established Labor Law § 240 (1) liability by demonstrating that ladder moved without any apparent reason, causing plaintiff to fall); *Quattrocchi v F.J. Sciamie Const. Corp.*, 44 AD3d 377, 843 NYS2d 564 (1st Dept 2007), *aff’d*, 11 NY3d 757, 866 NYS2d 592, 896 NE2d 75 (2008); *Caceres v Standard Realty Associates, Inc.*, 131 AD3d 433, 15 NYS3d 338 (1st Dept 2015) (evidence that plaintiff fell from un-stabilized ladder and was not provided with equipment to guard against risk of falling while operating drill); *Hanna v Gellman*, 29 AD3d 953, 815 NYS2d 713 (2d Dept 2006) (evidence that ladder tipped while plaintiff working on overhead pipes and not leaning to either side creates presumption that ladder not properly secured). The presumption did not apply where plaintiff relied solely on the fact that he fell from a ladder and there was no evidence that the ladder shook, moved, tipped over, slipped or collapsed, *Esteves-Rivas v W2001Z/15CPW Realty, LLC*, 104 AD3d 802, 961 NYS2d 497 (2d Dept 2013).

Whether a device provided proper protection pursuant to Labor Law § 240(1) is ordinarily a question of fact, except where the device collapsed, slipped, tipped or otherwise failed to perform its function of supporting the worker, *Messina v New York*, 148 AD3d 493, 49 NYS3d 408 (1st Dept 2017); *Woods v Design Center, LLC*, 42 AD3d 876, 839 NYS2d 880 (4th Dept 2007); *Smith v Pergament Enterprises of S.I.*, 271 AD2d 870, 706 NYS2d 505 (3d Dept 2000); *Nephew v Barcomb*, 260 AD2d 821, 688 NYS2d 751 (3d Dept 1999); see *Viruet v Purvis Holdings LLC*, 198 AD3d 587, 156 NYS3d 25 (1st Dept 2021) (no issue of fact where safety device failed); see *Hoxhaj v West 30th HL LLC*, 195 AD3d 503, 145 NYS3d 351 (1st Dept 2021) (no requirement that plaintiff identify exactly what caused unsecured ladder to wobble). Where a plaintiff was injured when he came into contact with a live electrical junction box, and there was evidence that his ladder was properly set up, there was a question of fact as to whether a scaffold would have prevented the accident, *Higgins v TST 375 Hudson, L.L.C.*, 179 AD3d 508, 119 NYS3d 80 (1st Dept 2020).

Expert evidence is often submitted regarding the issue of the ade-

quacy of a particular safety device, see *Quinones v Olmstead Properties, Inc.*, 133 AD3d 87, 18 NYS3d 17 (1st Dept 2015); *Garcia v Neighborhood Partnership Housing Development Fund Co., Inc.*, 113 AD3d 494, 980 NYS2d 6 (1st Dept 2014); *Kropp v Town of Shandaken*, 91 AD3d 1087, 937 NYS2d 345 (3d Dept 2012); *Canosa v Holy Name of Mary Roman Catholic Church*, 83 AD3d 635, 920 NYS2d 390 (2d Dept 2011); *Brown v Concord Nurseries, Inc.*, 53 AD3d 1067, 863 NYS2d 314 (4th Dept 2008). In *O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 52 NYS3d 68, 74 NE3d 307 (2017, 4-3), plaintiff slipped and fell on a temporary exterior metal staircase that was wet due to exposure to the elements. On the plaintiff's motion for summary judgment, the parties submitted conflicting expert evidence as to whether the staircase complied with relevant industry standards and practice and with a purportedly applicable provision of the Occupational Safety and Health Administration, and whether the condition of the staircase created a significant slipping risk. Highlighting the conflicting expert evidence and that this was not a case where no safety device had been provided, the Court determined that triable issues of fact existed as to whether the staircase provided proper protection under the statute. The Court noted that the experts had framed their respective opinions in terms of whether there had been compliance with industry standards; stated that such compliance would not, in itself, establish the adequacy of a safety device; and concluded that defendants' expert's opinion was not limited to evaluating whether the staircase complied with industry standards.

In *Dowling v McCloskey Community Services Corp.*, 45 AD3d 1232, 847 NYS2d 249 (3d Dept 2007), plaintiff established a Labor Law § 240(1) claim *prima facie* by showing that the ladder on which he was painting slipped out from under him, thereby shifting to defendant owner the burden of demonstrating the existence of triable questions as to whether the ladder was adequate and properly placed and whether plaintiff's conduct was the sole proximate cause of the accident.

The mere fact that the actual fall was unwitnessed does not necessarily require the denial of the plaintiff's motion for summary judgment, *Ewing v ADF Const. Corp.*, 16 AD3d 1085, 793 NYS2d 306 (4th Dept 2005); *Perrone v Tishman Speyer Properties, L.P.*, 13 AD3d 146, 787 NYS2d 230 (1st Dept 2004); *Niles v Shue Roofing Co., Inc.*, 219 AD2d 785, 631 NYS2d 464 (3d Dept 1995); *De Rocha v Old Spaghetti Warehouse, Inc.*, 207 AD2d 978, 617 NYS2d 89 (4th Dept 1994). Where there is no substantial challenge to credibility, plaintiff's motion for summary judgment should be granted, *Melchor v Singh*, 90 AD3d 866, 935 NYS2d 106 (2d Dept 2011); *Franco v Jemal*, 280 AD2d 409, 721 NYS2d 51 (1st Dept 2001); *Smith v Pergament Enterprises of S.I.*, 271 AD2d 870, 706 NYS2d 505 (3d Dept 2000); see *Gutierrez v Turner Towers Tenants Corp.*, 202 AD3d 437, 163 NYS3d 6 (1st Dept 2022) (inconsistencies between plaintiff's deposition testimony and accident report insufficient to raise triable issue of fact as to existence of statutory violation); *Cooper v Delliveneri*, 166 AD3d 1152, 86 NYS3d 318 (3d Dept 2018) (variations in plaintiff's account of accident, including height

from which he fell, insufficient to warrant denial of his motion for partial summary judgment). On the other hand, where plaintiff is the sole witness to the accident and a factual question is raised as to whether plaintiff fell while on the ladder or was injured in some other manner, summary judgment for plaintiff is not appropriate, see *Jurski v New York*, 204 AD3d 983, 165 NYS3d 371 (2d Dept 2022); *Lewis v 96 Wythe Acquisition LLC*, 204 AD3d 470, 167 NYS3d 27 (1st Dept 2022); *Alvarez v 2455 8 Ave, LLC*, 202 AD3d 724, 158 NYS3d 890 (2d Dept 2022) (affidavit of superior called into question plaintiff's credibility as to how accident occurred); *Albino v 221-223 West 82 Owners Corp.*, 142 AD3d 799, 37 NYS3d 113 (1st Dept 2016); *Danton v Van Valkenburg*, 13 AD3d 931, 787 NYS2d 431 (3d Dept 2004); *Manna v New York City Housing Authority*, 215 AD2d 335, 627 NYS2d 43 (1st Dept 1995); *Kelly v LeMoyné College*, 199 AD2d 942, 606 NYS2d 376 (3d Dept 1993); *Russell v Rensselaer Polytechnic Institute*, 160 AD2d 1215, 555 NYS2d 480 (3d Dept 1990); *Carlos v Rochester General Hosp.*, 163 AD2d 894, 558 NYS2d 417 (4th Dept 1990); see also *Woszczyna v BJW Associates*, 31 AD3d 754, 820 NYS2d 289 (2d Dept 2006) (summary judgment in favor of plaintiff inappropriate where plaintiff is sole witness and plaintiff's credibility placed in issue). A defendant was entitled to summary judgment dismissing a Labor Law § 240(1) cause of action where the decedent's fall was unwitnessed and there was no direct or circumstantial evidence as to how the accident happened, since any determination by the trier of fact would be based upon speculation, *Public Administrator of Queens County v 124 Ridge LLC*, 203 AD3d 493, 165 NYS3d 36 (1st Dept 2022). Where a plaintiff and his coworker claimed that plaintiff fell from a scaffold because it was unsecured, suddenly moved, and was missing handrails, the defendants raised a triable issue of fact with evidence that the scaffold was immediately inspected after the accident and that it was found to be secure and have handrails in all sections, despite the fact that none of the defendants' witnesses saw the accident happen, *Muco v Board of Education of City of New York*, 203 AD3d 610, 162 NYS3d 736 (1st Dept 2022).

III. Construction Site Accidents Covered by Labor Law § 240(1)

A. In General

Although it is often said that Labor Law § 240(1) applies to both "falling worker" and "falling object" cases, *Narducci v Manhasset Bay Associates*, 96 NY2d 259, 727 NYS2d 37, 750 NE2d 1085 (2001), the statute is not limited to situations in which the worker fell or was struck by a falling object, *Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 895 NYS2d 279, 922 NE2d 865 (2009). Rather, the decisive question is whether the worker's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential, *Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 7 NYS3d 263, 30 NE3d 154 (2015); *Runner v New York Stock Exchange, Inc.*, *supra*; *Kelley v Episcopal Church Home and Affiliates, Inc.*, 199 AD3d 1448, 159 NYS3d 281 (4th Dept 2021) (Labor Law § 240 applicable where plaintiff's co-worker's back

gave out on flight of stairs, causing him to let go of hand cart carrying appliances, which fell and struck plaintiff); see *Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1, 935 NYS2d 551, 959 NE2d 488 (2011); *Pimentel v DE Freight LLC*, 205 AD3d 591, 169 NYS3d 286 (1st Dept 2022) (Labor Law § 240[1] applicable where rusted lift gate of truck collapsed while plaintiff was standing on it to stabilize equipment being lowered to ground); *Royland v McGovern & Company, LLC*, 203 AD3d 677, 167 NYS3d 1 (1st Dept 2022) (§ 240 applicable where section of ramp came loose, causing plaintiff to slide down ramp to sidewalk; distance between top of stairs and sidewalk was physically significant elevation differential); *Hovorka v Applied Products Company, Inc.*, 199 AD3d 520, 154 NYS3d 435 (1st Dept 2021) (where plaintiff fell from retaining wall he was walking on to access job site, activity constituted the type of elevation-related risk contemplated by statute); *Medouze v Plaza Construction LLC*, 199 AD3d 465, 154 NYS3d 232 (1st Dept 2021) (§ 240 applicable where bundle of frames plaintiff was lifting broke apart pulling him down three and one-half feet to loading dock floor); *Aramburu v Midtown West B, LLC*, 126 AD3d 498, 6 NYS3d 227 (1st Dept 2015) (§ 240 applicable where plaintiff slipped and fell on ramp and was struck by reel of wire he and co-worker were in process of guiding down ramp); *Treile v Brooklyn Tillary, LLC*, 120 AD3d 1335, 992 NYS2d 345 (2d Dept 2014) (Labor Law § 240[1] applicable where plaintiff, who was standing on plank on bed of flatbed truck, was catapulted from truck when weight shifted after 8,000 to 10,000-pound bundle of rebar was rolled off truck to ground 4 or 5 feet below); *Penaranda v 4933 Realty, LLC*, 115 AD3d 482, 981 NYS2d 690 (1st Dept 2014) (Labor Law § 240(1) applicable where plaintiff, who was positioned on Bobcat as counterweight for forklift load, was thrown off Bobcat when its back two wheels lifted unexpectedly; court recognizes prior decision in *Modeste v Mega Contracting, Inc.*, 40 AD3d 255, 835 NYS2d 156 (1st Dept 2007), superseded by *Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 895 NYS2d 279, 922 NE2d 865 (2009)); *Harris v New York*, 83 AD3d 104, 923 NYS2d 2 (1st Dept 2011) (Labor Law § 240(1) applicable where plaintiff, who was standing on wooden plank being used as wedge to extricate one-ton slab of concrete that was partially attached to ground, was injured when slab descended too quickly from hoist on to plank, shattering it and causing plaintiff to be thrown to ground); *Potter v Jay E. Potter Lumber Co., Inc.*, 71 AD3d 1565, 900 NYS2d 207 (4th Dept 2010) (Labor Law § 240(1) applicable where plaintiff's forklift tipped over as result of overloading and where adequate safety device not used); *Luongo v New York*, 72 AD3d 609, 899 NYS2d 235 (1st Dept 2010) (Labor Law § 240(1) applicable where plaintiff injured while bracing jack being used to lift improperly secured steel girder). With respect to falling object cases, in determining whether an elevation differential is physically significant versus de minimis, the weight of a falling object and the amount of force it was capable of generating, even over the course of a relatively short descent, must be taken into account, *Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1, 935 NYS2d 551, 959 NE2d 488 (2011); *Runner v New York Stock Exchange, Inc.*, *supra*; *Wright v Ellsworth Partners, LLC*, 143 AD3d 1116, 39 NYS3d 289 (3d Dept 2016); *Jackson v Heitman*

Funds/191 Colonie LLC, 111 AD3d 1208, 976 NYS2d 283 (3d Dept 2013) (despite relatively short distance that object fell, its 600- to 800-pound weight and force it generated when it fell required safety device within Labor Law § 240(1)); *Oakes v Wal-Mart Real Estate Business Trust*, 99 AD3d 31, 948 NYS2d 748 (3d Dept 2012); see *Peters v Structure Tone, Inc.*, 204 AD3d 522, 166 NYS3d 632 (1st Dept 2022) (issues of fact as to whether small bits of debris and chunks of concrete that fell from one floor above and struck plaintiff were objects requiring securing and whether elevation differential was de minimis).

However, the extraordinary protections of the statute do not encompass any and all perils that may be connected in some tangential way with the effects of gravity, *Narducci v Manhasset Bay Associates*, 96 NY2d 259, 727 NYS2d 37, 750 NE2d 1085 (2001); *Nieves v Five Boro Air Conditioning & Refrigeration Corp.*, 93 NY2d 914, 690 NYS2d 852, 712 NE2d 1219 (1999); *Misseritti v Mark IV Const. Co., Inc.*, 86 NY2d 487, 634 NYS2d 35, 657 NE2d 1318 (1995); see *Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 7 NYS3d 263, 30 NE3d 154 (2015) (Labor Law § 240[1] inapplicable where plaintiff slipped on ice and fell while using stilts to install insulation on ceiling; slipping on ice ordinary construction site danger, not elevation-related risk); *Gasques v State*, 15 NY3d 869, 910 NYS2d 415, 937 NE2d 79 (2010) (Labor Law § 240[1] inapplicable where plaintiff's hand injured when it became caught between scaffold and leg of bridge, while the scaffold was ascending; injury was not direct consequence of application of force of gravity to object or person); *Toefer v Long Island R.R.*, 4 NY3d 399, 795 NYS2d 511, 828 NE2d 614 (2005) (fall when working on, or getting down from, surface of a flatbed truck that is between four and five feet off ground not elevation-related risk); *Rodriguez v Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841, 616 NYS2d 900, 640 NE2d 1134 (1994) (plaintiff exposed to usual and ordinary dangers of construction site, not extraordinary elevation risks envisioned by Labor Law § 240(1) in placing 120-pound beam onto ground from an elevation of seven inches above his head with assistance of three co-workers); *Herrera v Kent Avenue Property III LLC*, 203 AD3d 512, 161 NYS3d 766 (1st Dept 2022) (statute not applicable where plaintiff was struck by excavator, despite fact he was bringing debris up earthen ramp and rolled down ramp after being struck); *Branch v 1908 West Ridge Rd, LLC*, 199 AD3d 1362, 154 NYS3d 536 (4th Dept 2021) (statute inapplicable where plaintiff injured back while lifting large metal structure six to eight inches off roof structure so co-workers could apply new roofing material underneath); *Armental v 401 Park Avenue South Associates, LLC*, 182 AD3d 405, 121 NYS3d 259 (1st Dept 2020) (statute not applicable to fall allegedly caused by stepping on pile of unsecured pipes on floor of construction site); *Lemus v New York B Realty Corp.*, 186 AD3d 1351, 128 NYS3d 878 (2d Dept 2020) (Labor Law § 240(1) did not apply where plaintiff injured while he and steel beam he was rotating were at ground level when tool he was using flew into his face because he could not sustain beam's weight); *Tamarez De Jesus v Metro-North Commuter Railroad*, 159 AD3d 951, 73 NYS3d 581 (2d Dept 2018) (plaintiff injured while sawing downed tree resting on catenary wires when tree was

propelled upward by sudden release in tension of the catenary wires and then split in two, striking plaintiff's leg; injuries not direct consequence of the application of force of gravity to object or person); *Sawczynsyn v New York University*, 158 AD3d 510, 73 NYS3d 131 (1st Dept 2018) (plaintiff injured while pulling cart over makeshift ramp that collapsed and fell eight to twelve inches not entitled to Labor Law § 240(1) protection); *Gurewitz v New York*, 175 AD3d 658 (2d Dept 2019) (fence surrounding construction site that blew over and struck plaintiffs was not object being hoisted or secured, or which required securing for purposes of undertaking); *Eddy v John Hummel Custom Builders, Inc.*, 147 AD3d 16, 43 NYS3d 507 (2d Dept 2016) (where plaintiff fell from back of pickup truck and then heavy object from same truck fell onto plaintiff, no elevation-related risk); *Hebbard v United Health Services Hospitals, Inc.*, 135 AD3d 1150, 23 NYS3d 465 (3d Dept 2016) (Labor Law § 240[1] inapplicable where scaffolding frames that tipped onto plaintiff were approximately same height as plaintiff and were resting on same level as him, and plaintiff was engaged in moving them, one at a time, to another place on same floor); *Miles v Buffalo State Alumni Ass'n, Inc.*, 121 AD3d 1573, 993 NYS2d 852 (4th Dept 2014) (plaintiff exposed to general construction site hazard, not hazard envisioned by Labor Law § 240, when he was struck by drywall on cart after the drywall moved; plaintiff was standing on ground, drywall was not being hoisted or secured, and cart was not being hoisted or otherwise moved vertically); *Carrera v Westchester Triangle Housing Development Fund Corp.*, 116 AD3d 585, 984 NYS2d 339 (1st Dept 2014) (Labor Law § 240(1) inapplicable where plaintiff slipped on muddy surface and tripped on object, possibly a rock, while he and co-workers carried metal pipe on shoulders); *Mohamed v Watervliet*, 106 AD3d 1244, 965 NYS2d 637 (3d Dept 2013) (plaintiff's injury, which occurred when he was struck by backhoe bucket suspended from backhoe, was caused by co-worker's negligent operation of backhoe and was consequence of usual and ordinary dangers of construction site); *Oakes v Wal-Mart Real Estate Business Trust*, 99 AD3d 31, 948 NYS2d 748 (3d Dept 2012) (plaintiff exposed to usual and ordinary dangers of construction site, not elevation-related risk, when 10,000-pound truss that had been set upright at ground level was struck by joist on forklift, causing truss to tip over and strike plaintiff, who was the same height or taller than the truss and was also at ground level); *Whitehead v New York*, 79 AD3d 858, 913 NYS2d 697 (2d Dept 2010) (plaintiff exposed to usual dangers of construction site, not risk stemming from physically significant elevation differential, when load of steel tubes that had been placed on floor rolled-out while bindings on load were being removed, causing tube to strike plaintiff's knee); *Makarius v Port Authority of New York and New Jersey*, 76 AD3d 805, 907 NYS2d 658 (1st Dept 2010) (plaintiff exposed to usual dangers of construction site, not risk stemming from physically significant elevation differential, when transformer, mounted six to seven feet off ground, fell and struck plaintiff in head; plaintiff was not working at a height and no "appreciable height differential"—less than two feet—existed between plaintiff's head and transformer); *Shaw v RPA Associates, LLC*, 75 AD3d 634, 906 NYS2d 574 (2d Dept 2010) (Labor Law § 240(1) inapplicable to accident occurring when

truck plaintiff was operating capsized and plaintiff became pinned down in cab of truck); *Farrell v Blue Circle Cement, Inc.*, 13 AD3d 1178, 787 NYS2d 773 (4th Dept 2004) (Labor Law § 240(1) inapplicable to accident occurring when worker slipped when attempting to step down 2½ feet from truck scale to ground); *Thompson v Ludovico*, 246 AD2d 642, 668 NYS2d 238 (2d Dept 1998) (abrogated on other grounds by, *Misicki v Caradonna*, 12 NY3d 511, 882 NYS2d 375, 909 NE2d 1213 (2009)) (§ 240(1) not applicable to plaintiff allegedly injured when boom of truck crane upon which he was working slipped and crushed his arm); see also *Malvestuto v Lancaster*, 201 AD3d 1339, 163 NYS3d 340 (4th Dept 2022) (issue of fact as to whether plaintiff was injured due to risk contemplated by statute where he was struck in leg by bucket of an excavator situated on edge of trench above him). Liability is contingent upon the existence of a hazard contemplated in § 240(1) and the absence or inadequacy of a safety device of the kind enumerated therein, *Narducci v Manhasset Bay Associates*, *supra*.

The Court of Appeals has used differing approaches for analyzing whether the particular facts of individual cases come within the ambit of Labor Law § 240(1). The law in this area continues to evolve and, for that reason, cases decided before *Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 895 NYS2d 279, 922 NE2d 865 (2009), must be read with care, see *Strangio v Severson Environmental Services, Inc.*, 74 AD3d 1892, 905 NYS2d 729 (4th Dept 2010), *aff'd as modified*, 15 NY3d 914, 913 NYS2d 639, 939 NE2d 805 (2010); see also *Harris v New York*, 83 AD3d 104, 923 NYS2d 2 (1st Dept 2011) (stating that *Runner* did not establish new principles, but rather expounded on well-established principles set forth in prior Court of Appeals' decisions); *Makarius v Port Authority of New York and New Jersey*, 76 AD3d 805, 907 NYS2d 658 (1st Dept 2010) (competing opinions debating effect of *Runner* on prior Court of Appeals' decisions).

Through the early 1990's the Court of Appeals construed Labor Law § 240(1) in a broad manner to apply to many different types of construction site accidents. For example, in a 1993 case, *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 606 NYS2d 127, 626 NE2d 912 (1993), plaintiff fell from a ladder while cleaning a railroad car with a hand-held sandblaster. The ladder was tipped after plaintiff activated the trigger of the sandblaster, causing plaintiff to fall to the ground. He was not injured from hitting the ground, but as a result of a defective trigger in the sandblaster that continued to spray him with sand after the fall. The *Gordon* Court stated that the purpose of Labor Law § 240(1) is to protect workers from elevation-related risks and that it "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed," see also *Panek v Albany*, 99 NY2d 452, 758 NYS2d 267, 788 NE2d 616 (2003). The *Gordon* Court noted that plaintiff was working on a ladder and, therefore, was subject to an elevation-related risk. The "core" objective of Labor Law § 240(1) was not met because the ladder did not prevent plaintiff from falling. The Court rejected the defendant's argument that the sandblaster was a superseding cause of plaintiff's injuries. The Court held that defendants

were liable “for all normal and foreseeable consequences of their acts” and that the plaintiff was not required to demonstrate that the precise manner in which the accident or injuries occurred was foreseeable, *Worden v Solvay Paperboard, LLC*, 24 AD3d 1187, 807 NYS2d 237 (4th Dept 2005) (upholding Labor Law § 240(1) cause of action where plaintiff struck by hook from overhead crane while standing on top of load on tractor-trailer bed; plaintiff would not have been required to work from dangerous location if safety device such as ladder, elevated bucket or harness had been provided).

A less expansive view was adopted in *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993). The worker in *Ross* suffered back injuries allegedly because the platform from which his work was performed required that he remain in a strained and contorted position. However, Labor Law § 240(1) was held inapplicable because the “safety device,” i.e., the platform, was deemed to have served its essential purpose of preventing the worker from falling into a shaft, see *Morrison v Christa Const., Inc.*, 305 AD2d 1004, 758 NYS2d 722 (4th Dept 2003) (§ 240(1) inapplicable where bucket used by worker to reach work area inadequate but worker’s injuries resulted from having become stuck in narrow work space rather than from fall); *Mannino v Seasons Affiliates*, 249 AD2d 34, 670 NYS2d 492 (1st Dept 1998) (§ 240(1) inapplicable where plaintiff was injured because placement of scaffold required him to work in awkward position); see also *Robinson v East Medical Center, LP*, 6 NY3d 550, 814 NYS2d 589, 847 NE2d 1162 (2006) (declining to decide whether Labor Law § 240(1) inapplicable where plaintiff’s injuries occurred while he was regaining balance on a ladder that was about to tip rather than from fall).

The Court of Appeals has also interpreted Labor Law § 240(1) in a somewhat narrower manner in cases involving plaintiffs injured by a falling object. With respect to “falling object” cases, the Court held that the fact that an injured plaintiff was working at an elevation when the object fell is of no moment because a different type of hazard is involved, *Narducci v Manhasset Bay Associates*, 96 NY2d 259, 727 NYS2d 37, 750 NE2d 1085 (2001). The hazard posed by working at an elevation is that, in the absence of adequate safety devices such as ladders or scaffolds, the worker might be injured in a fall. By contrast, falling objects are associated with the failure to use different types of safety devices such as ropes, pulleys or irons. The hazard from one type of activity cannot be “transferred” to create liability for a different type of accident. Thus, to assert a falling-object claim under Labor Law § 240(1), plaintiff must show more than simply that an object fell, causing injury to a worker. Under the *Narducci* holding, “[a] plaintiff must show that the object fell, while being hoisted or secured, *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute” (emphasis in original); *Sarata v Metropolitan Transp. Authority*, 134 AD3d 1089, 23 NYS3d 281 (2d Dept 2015); see *Fabrizi v 1095 Ave. of Americas, L.L.C.*, 22 NY3d 658, 985 NYS2d 416, 8 NE3d 791 (2014). In a falling object case, the fact the plaintiff may have been working at an elevation does not necessarily bring the accident within the ambit of

Labor Law § 240(1) where the accident was not caused by the absence or malfunctioning of a hoisting or securing device. Further, in *Fabrizi v 1095 Ave. of Americas, L.L.C.*, supra, the Court of Appeals held that, in falling object cases, the failure of a device to prevent a heavy object from falling is actionable under Labor Law § 240(1) only if the particular device was a safety device “constructed, placed, and operated as to give proper protection” from the object’s falling. Thus, where a compression coupling that had been installed as part of an assembly connecting a vertical and a horizontal conduit failed to prevent the horizontal conduit from falling after a vertical piece of the assembly was removed, the injured worker was not entitled to invoke Labor Law § 240(1), even though there existed a more secure set-screw coupling that arguably might have prevented the accident, *Fabrizi v 1095 Ave. of Americas, L.L.C.*, supra. The Court stressed that both the compression coupling and the set screw coupling would have served the “identical” function of providing support for the conduit assembly and that neither was used to provide worker protection, *id.*

Applying *Narducci v Manhasset Bay Associates*, 96 NY2d 259, 727 NYS2d 37, 750 NE2d 1085 (2001), the Court held in *Roberts v General Elec. Co.*, 97 NY2d 737, 742 NYS2d 188, 768 NE2d 1127 (2002), that Labor Law § 240(1) did not cover plaintiff, an employee of an asbestos removal company, who was injured when a piece of asbestos, which had been cut and deliberately dropped from a chemical tank approximately 12 feet above ground, fell on him. The Court reasoned that the asbestos that fell on plaintiff was not material being hoisted or a load that required securing for the purposes of the undertaking. Labor Law § 240(1) did not apply because this was not a situation where a hoisting or a securing device of the kind enumerated in the statute would have been necessary or even expected. One could reasonably conclude that *Narducci*’s holding is limited to a “falling object” case. All of the pre-*Narducci* falling object cases discussed below must be considered in light of *Narducci*.

When a safety device is provided, injuries allegedly flowing from a deficiency in the device must be related to the hazard that brought about the need for the device in the first instance, *Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 7 NYS3d 263, 30 NE3d 154 (2015) (ice upon which plaintiff slipped and fell while walking across floor on stilts was not risk that occasioned need for safety device; ice was separate, ordinary construction site hazard); *Melber v 6333 Main Street, Inc.*, 91 NY2d 759, 676 NYS2d 104, 698 NE2d 933 (1998) (where plaintiff walking on stilts tripped over conduit protruding from unfinished floor, conduit was not risk that could be avoided by proper placement or utilization of one of devices listed in § 240(1)); see *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993); *Balladares v Southgate Owners Corp.*, 40 AD3d 667, 835 NYS2d 693 (2d Dept 2007) (Labor Law § 240(1) inapplicable where collapse of basement floor during demolition of brick wall with jack hammer unrelated to risk giving rise to need for enumerated safety device); *Vasiliades v Lehrer McGovern & Bovis, Inc.*, 3 AD3d 400, 771 NYS2d 27 (1st Dept

2004) (plaintiff's injury resulted from hazard wholly unrelated to danger that brought about need for ladder and no evidence of any defective condition of ladder or instability in its placement). Additionally, where a safety device has been provided, Labor Law § 240(1) is not applicable to accidents resulting from the collapse or malfunction of the structure on which the work was being performed rather than a malfunction in the safety device itself, *Foote v Lyonsdale Energy Ltd. Partnership*, 23 AD3d 924, 805 NYS2d 163 (3d Dept 2005) (plaintiff standing on guard-railed catwalk affixed to wood chip stacker injured when stacker collapsed due to faulty suspension cable). Where the accident is found to be covered by Labor Law § 240(1), the defendant will be held liable for all injuries proximately resulting from the plaintiff's fall, *Sikorski v Burroughs Drive Apartments, Inc.*, 306 AD2d 844, 762 NYS2d 718 (4th Dept 2003) (recovery permissible where worker handling drywall sheet allegedly fell from board that was two and a half feet off the ground and struck by drywall, even though not itself a falling object).

B. Requirement That Accident Arise From Elevation-Related Risk

Further limitations of the statute are illustrated by an examination of the holding in *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 577 NYS2d 219, 583 NE2d 932 (1991), that for absolute liability to be imposed under the statute, it must be shown that the plaintiff's injury resulted from an occupational hazard against which the Legislature intended to protect, see *Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 7 NYS3d 263, 30 NE3d 154 (2015); *Salazar v Novalex Contracting Corp.*, 18 NY3d 134, 936 NYS2d 624, 960 NE2d 393 (2011); *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 839 NYS2d 714, 870 NE2d 1144 (2007) (in cases involving window cleaning accidents, liability depends on whether task created "elevation-related risk of the kind that the safety devices listed in section 240(1) protect against"). The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of: (a) a difference between the elevation level of the required work and a lower level; or (b) a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured, *Rocovich v Consolidated Edison Co.*, *supra*; *Corona v HHSC 13th St. Dev. Corp.*, 197 AD3d 1025, 153 NYS3d 448 (1st Dept 2021) (injury resulting from stepping on two wet two-by-fours that slipped out from under plaintiff not covered elevation-related hazard); *Chuqui v Amna, LLC*, 203 AD3d 1018, 166 NYS3d 192 (2d Dept 2022) (Labor Law § 240(1) inapplicable where pieces of sheet metal from cart plaintiff was helping to move fell on him); *Lombardi v New York*, 175 AD3d 1521, 109 NYS3d 373 (2d Dept 2019) (where metal plate used to cover excavated trench in roadway struck plaintiff as it was being removed, plaintiff's injury did not result from type of elevation-related hazard contemplated by statute); *Carrangi v International Paper Co.*, 184 AD2d 137, 591 NYS2d 600 (3d Dept 1992) (assembly of crane, during which plaintiff struck by crane's cable, was performed at ground level and entailed no elevation-related risk); see *Abreu v Manhattan Plaza Associates*, 214 AD2d 526, 625 NYS2d 234 (2d Dept 1995). Labor Law § 240(1)

does not apply to accidents that are not related to the effects of gravity and could have happened at ground level, *DiPasquale v M.J. Ogiony Builders, Inc.*, 60 AD3d 1338, 875 NYS2d 375 (4th Dept 2009). Absent an elevation differential, the protections of Labor Law § 240(1) are not implicated simply because the injury is caused by the effects of gravity upon an object, even where a device specified by the statute might have prevented the accident, *Oakes v Wal-Mart Real Estate Business Trust*, 99 AD3d 31, 948 NYS2d 748 (3d Dept 2012).

The kind of accident triggering Labor Law § 240(1) coverage is one that will sustain the allegation that an adequate scaffold, hoist, stay, ladder or other protective device would have shielded the injured worker from harm directly flowing from the application of the force of gravity to an object or person, *Salazar v Novalex Contracting Corp.*, 18 NY3d 134, 936 NYS2d 624, 960 NE2d 393 (2011). Thus, the party claiming a right to recover under Labor Law § 240(1) has the burden of showing that an elevation-related risk existed and that adequate safety devices were not provided, *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 839 NYS2d 714, 870 NE2d 1144 (2007). In connection with the burden of showing that an elevation-related risk existed, the plaintiff must establish that there is a safety device of the kind enumerated in Labor Law § 240(1) that could have prevented the accident, see *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 937 NYS2d 157, 960 NE2d 948 (2011); *Escobar v Safi*, 150 AD3d 1081, 55 NYS3d 350 (2d Dept 2017); *Aramburu v Midtown West B, LLC*, 126 AD3d 498, 6 NYS3d 227 (1st Dept 2015). Moreover, in a case involving a “falling worker,” the plaintiff, in connection with the burden of showing that an elevation-related risk existed, must establish that he or she was obliged to work at a height to complete the task, see *Ortiz v Varsity Holdings, LLC*, *supra*; *Broggy v Rockefeller Group, Inc.*, *supra*; *Szymkowiak v New York Power Authority*, 203 AD3d 1618, 166 NYS3d 759 (4th Dept 2022); see *Gonzalez v DOLP 205 Properties II, LLC*, 206 AD3d 468, 171 NYS3d 61 (1st Dept 2022) (issue of fact as to elevation-related risk where worker injured falling from stilts was instructed to work only at ground level). For the statute to be applicable, the plaintiff must have been exposed to an elevation-related risk attendant to his or her work as it was intended or supposed to be performed, see *Durasno v 680 Fifth Avenue Associates, L.P.*, 203 AD3d 455, 164 NYS3d 594 (1st Dept 2022) (issue of fact as to whether plaintiff could clean windows with squeegee attached to extension pole or whether ladder was required to apply sufficient force to glass); *S. V. L. by Yohanny L. v PBM, LLC*, 191 AD3d 564, 142 NYS3d 523 (1st Dept 2021) (issue of fact as to whether tilt-in windows should have been cleaned from inside of building rather than from the outside). The following cases applied the rationale stated in *Rocovich*, finding the plaintiff’s claim within the purview of the statute: *Suwareh v State*, 24 AD3d 380, 806 NYS2d 524 (1st Dept 2005); *Gottstine v Dunlop Tire Corp.*, 272 AD2d 863, 709 NYS2d 259 (4th Dept 2000) (worker fell through opening in system of rebar mats suspended over pit); *Grant v Gutchess Timberlands Inc.*, 214 AD2d 909, 625 NYS2d 716 (3d Dept 1995) (injury to worker’s face when he slipped on edge of roof and hit face on roof while falling to ground); *Bilderback v Agway Petroleum Corp.*, 185 AD2d 372, 586 NYS2d 152 (3d Dept 1992) (injury occurred because of force of gravity

upon elevated load on unstable forklift); see *Worden v Solvay Paperboard, LLC*, 24 AD3d 1187, 807 NYS2d 237 (4th Dept 2005) (upholding Labor Law § 240(1) cause of action where plaintiff struck by hook from overhead crane while standing on top of load on tractor-trailer bed; plaintiff would not have been required to work from dangerous location in safety device such as ladder, elevated bucket or harness had been provided); see also *Ortiz v Varsity Holdings, LLC*, *supra*. In one novel application of *Rocovich*, Labor Law § 240(1) was held applicable to an accident in which a worker was injured when he fell into a creek from a platform floating on top of the creek, *Dooley v Peerless Importers, Inc.*, 42 AD3d 199, 837 NYS2d 720 (2d Dept 2007); but see *Ames v Norstar Bldg. Corp.*, 19 AD3d 1016, 796 NYS2d 784 (4th Dept 2005) (Labor Law § 240(1) inapplicable where worker injured while attempting to gain access to building's first floor from chest-high threshold, since first-floor work are not elevated work site). Whether work poses an elevation-related hazard may be an issue of fact, see *Payne v NSH Community Services, Inc.*, 203 AD3d 546, 165 NYS3d 494 (1st Dept 2022) (question of fact whether rebar mat was 12 inches or 2 inches from ground).

In *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993), plaintiff, a welder, claimed that he sustained injuries as the result of having to do his work in a contorted position, perched on a platform, and stretched forward and down to reach the seam that needed welding. The Court held that, while this makeshift scaffold might have been deficient or unsafe, the device did serve the core objective of Labor Law § 240(1), i.e., preventing the worker from falling. Since plaintiff did not fall and the device was not defectively designed and did not malfunction, plaintiff could not rely on Labor Law § 240(1) as a basis for recovery, see *Smith v New York State Elec. & Gas Corp.*, 82 NY2d 781, 604 NYS2d 540, 624 NE2d 677 (1993); *Bryant v General Elec. Co.*, 221 AD2d 687, 633 NYS2d 410 (3d Dept 1995); *Moutray v Baron*, 244 AD2d 618, 663 NYS2d 926 (3d Dept 1997) (requirement of gravity-related risk not satisfied where malfunctioning scaffold fractured worker's foot when he lowered it too far); *Kelleher v Power Authority of State of N.Y.*, 211 AD2d 918, 621 NYS2d 156 (3d Dept 1995) (worker injured by drill he was using when he attempted to steady himself after ladder shifted is not covered since no fall).

The requirement of a gravity-related risk has been applied to preclude recovery under Labor Law § 240(1) even in cases where the worker's injuries resulted from a fall, *Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 7 NYS3d 263, 30 NE3d 154 (2015); *Cohen v Memorial Sloan-Kettering Cancer Center*, 11 NY3d 823, 868 NYS2d 578, 897 NE2d 1059 (2008); *Keavey v New York State Dormitory Authority*, 6 NY3d 859, 816 NYS2d 722, 849 NE2d 945 (2006) (falling into 5- to 6-inch gap in eight-foot stack of insulation board not gravity-related risk covered by Labor Law § 240(1)); *Reyes v Astoria 31st Street Developers, LLC*, 190 AD3d 872, 139 NYS3d 352 (2d Dept 2021) (where plaintiff lost balance while attempting to assist coworkers pass long piece of rebar through excavation site and fell to bottom of nine-foot

hill, accident not caused by elevation-related risk contemplated by statute); *Pope v Safety and Quality Plus, Inc.*, 74 AD3d 1040, 903 NYS2d 124 (2d Dept 2010) (worker fell from unguarded edge of elevated concrete platform while walking and talking to foreman); *Monterroza v State University Const. Fund*, 56 AD3d 629, 869 NYS2d 113 (2d Dept 2008) (falling onto concrete platform after attempting to climb out of wet ground-level dumpster not gravity-related risk covered by Labor Law § 240(1)); *Favreau v Barnett and Barnett, LLC*, 47 AD3d 996, 849 NYS2d 691 (3d Dept 2008) (worker on roof slipped on ice patch and fell backward but did not fall off roof); see *Garcia v Market Associates*, 123 AD3d 661, 998 NYS2d 193 (2d Dept 2014) (collapse of concrete flooring, caused by weight of truck resting on it, resulting in front end of truck falling into basement, not risk that Labor Law § 240(1) safety devices would have protected against). On the other hand, where a gravity-related risk was present, a fall is not required, *Sunun v Klein*, 188 AD3d 507, 135 NYS3d 386 (1st Dept 2020) (plaintiff injured in gravity-related accident where he sank, above his knee level, into mud in recently backfilled trench); *Suwareh v State*, 24 AD3d 380, 806 NYS2d 524 (1st Dept 2005) (plaintiff injured in gravity-related accident when he lost balance while trying to haul bucket of hot tar up to roof with rope and, in leaning so as to avoid fall, spilled hot tar onto feet).

In *Misseritti v Mark IV Const. Co., Inc.*, 86 NY2d 487, 634 NYS2d 35, 657 NE2d 1318 (1995), decedent was injured when a completed, concrete-block firewall collapsed upon him. Plaintiff alleged, among other things, that the injuries were caused by defendant's failure to comply with Labor Law § 240(1) in failing to furnish or erect "reasonably safe scaffolding, braces, and other devices . . . so constructed, placed and operated as to give proper protection to [decedent] in the course of his employment." The Court of Appeals held that the "braces" referred to in § 240(1) mean those used to support elevated worksites, and not braces designed to shore up or lend support to a completed structure, see also *Dias v Stahl*, 256 AD2d 235, 682 NYS2d 383 (1st Dept 1998) (§ 240(1) does not apply to action based on failure of metal straps supporting air conditioning ducts); *Amato v State*, 241 AD2d 400, 660 NYS2d 576 (1st Dept 1997). Because there was no showing that plaintiff was working at an elevated level at the time of the accident and the collapse of a completed firewall is not the type of elevation-related accident that § 240(1) is intended to guard against, defendant's motion for summary judgment was properly granted, *Misseritti v Mark IV Const. Co., Inc.*, supra; see *Gurewitz v New York*, 175 AD3d 658 (2d Dept 2019) (risk that construction site perimeter fence would blow over and strike workers not an elevation-related risk contemplated by statute); *Kaminski v 53rd Street and Madison Tower Development, LLC*, 70 AD3d 530, 895 NYS2d 76 (1st Dept 2010) (Labor Law § 240(1) not applicable where plaintiff injured when portion of building's exterior wall collapsed and fell onto him; injury resulting from being struck by object loosened by vibrations is hazard incidental to workplace, not elevation-related risk); *Friot v Wal-Mart Stores Inc.*, 240 AD2d 890, 659 NYS2d 126 (3d Dept 1997) (risk of being pinned at ground level by dismantled earthen fill not elevation-related risk contemplated by statute); *Merkle v Weibrecht*, 234 AD2d 696, 650 NYS2d 471 (3d Dept 1996) (risk of

becoming pinned at ground level by sewer access door not elevation-related risk contemplated by statute).

If an object falls from a minuscule height, the statute's protection does not apply, *Thompson v Ludovico*, 246 AD2d 642, 668 NYS2d 238 (2d Dept 1998) (abrogated on other grounds by, *Misicki v Caradonna*, 12 NY3d 511, 882 NYS2d 375, 909 NE2d 1213 (2009)); *Schreiner v Cremosa Cheese Corp.*, 202 AD2d 657, 609 NYS2d 322 (2d Dept 1994); see *Atkinson v State*, 20 AD3d 739, 798 NYS2d 230 (3d Dept 2005); *Almanzar v Goval Realty Corp.*, 286 AD2d 278, 729 NYS2d 133 (1st Dept 2001); *Oakes v Wal-Mart Real Estate Business Trust*, 99 AD3d 31, 948 NYS2d 748 (3d Dept 2012) (*Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 895 NYS2d 279, 922 NE2d 865 (2009), did not hold that height differential can never be de minimis when accident was gravity-related; nor did it overturn prior decisions finding certain height differentials insufficient to sustain liability despite harm flowing directly from application of force of gravity to object). However, the height from which the injury-producing object fell is not always the sole or dispositive consideration. Rather, in ascertaining whether an elevation differential is physically significant versus de minimis, the weight of a falling object and the amount of force it was capable of generating, even over the course of a relatively short descent, must be taken into account, *Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 895 NYS2d 279, 922 NE2d 865 (2009); *Hawver v Steele*, 204 AD3d 1125, 166 NYS3d 369 (3d Dept 2022) (summary judgment denied where barn doors being repaired fell onto plaintiff; insufficient evidence regarding elevation differential, plaintiff's height, weight of doors, distance doors fell and force generated by fall); *Christiansen v Bonacio Const., Inc.*, 129 AD3d 1156, 10 NYS3d 683 (3d Dept 2015); *Jackson v Heitman Funds/191 Colonie LLC*, 111 AD3d 1208, 976 NYS2d 283 (3d Dept 2013); *Oakes v Wal-Mart Real Estate Business Trust*, *supra*. For example, Labor Law § 240(1) was held applicable where the worker's job was to pry from a wall an 80-pound electrical panel that was positioned six to seven feet from the ground, *Cardenas v One State Street, LLC*, 68 AD3d 436, 890 NYS2d 41 (1st Dept 2009). Since the panel was bulky and too heavy to be held in the worker's hands as he removed and lowered it and since no hoist or other safety devices were provided, the worker had to allow it to fall to the ground. Although the elevation differential was "slight," the court held that the worker's task posed a significant risk to safety arising from the panel's position above the ground and, thus, a hoisting or securing device of the type enumerated in Labor Law § 240(1) was required, *Cardenas v One State Street, LLC*, *supra*; see *Treile v Brooklyn Tillary, LLC*, 120 AD3d 1335, 992 NYS2d 345 (2d Dept 2014) (8,000 to 10,000-pound weight of bundle of rebar and force it generated when it fell 4 or 5 feet required Labor Law § 240[1] safety device, such as hoist); *Jackson v Heitman Funds/191 Colonie LLC*, *supra* (despite relatively short distance that object fell, its 600- to 800-pound weight and force it generated when it fell required safety device within Labor Law § 240(1)); *Salinas v Barney Skanska Const. Co.*, 2 AD3d 619, 769 NYS2d 559 (2d Dept 2003) (plaintiff entitled to summary judgment under § 240(1) even though he was injured by duct that fell from height

of only 20 inches above his head, where duct weighed several hundred pounds, plaintiff had to stand directly underneath it and no safety devices were used to lower duct); *Kuylen v KPP 107th Street, LLC*, 203 AD3d 465, 160 NYS3d 866 (1st Dept 2022) (where stack of sheetrock panels leaning against wall fell onto plaintiff, issues of fact whether injuries flowed directly from force of gravity, elevation differential was de minimis, and combined weight of panels could generate significant force); but see *Makarius v Port Authority of New York and New Jersey*, 76 AD3d 805, 907 NYS2d 658 (1st Dept 2010) (plaintiff exposed to usual dangers of construction site, not risk stemming from physically significant elevation differential, when transformer, mounted six to seven feet off ground, fell and struck plaintiff in head; plaintiff was not working at a height and no “appreciable height differential”—less than two feet—existed between plaintiff’s head and transformer).

On the other hand, in cases involving workers who fall, the extent of the elevation differential may not necessarily determine the existence of an elevation-related risk, *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 577 NYS2d 219, 583 NE2d 932 (1991); *Pimentel v DE Freight LLC*, 205 AD3d 591, 169 NYS3d 286 (1st Dept 2022) (four to five foot fall on collapsing lift gate sufficient for liability under Labor Law § 240(1)); *Vitucci v Durst Pyramid LLC*, 205 AD3d 441, 168 NYS3d 45 (1st Dept 2022) (Labor Law § 240(1) applicable where plaintiff fell from edge of bathtub while installing shower curtain rod); *Sunun v Klein*, 188 AD3d 507, 135 NYS3d 386 (1st Dept 2020) (elevation differential sufficient where plaintiff sank into mud in recently backfilled trench above his knee level); *Favaloro v Port Authority of New York & New Jersey*, 191 AD3d 524, 143 NYS3d 4 (1st Dept 2021) (where plaintiff stepped on unsecured plywood in area below grade level, causing plywood to fly up and plaintiff to fall into hole up to his hip); *Hoyos v NY-1095 Avenue of the Americas, LLC*, 156 AD3d 491, 67 NYS3d 597 (1st Dept 2017) (§ 240(1) applicable where plaintiff fell approximately four feet from loading dock to ground); *Wilson v Niagara University*, 43 AD3d 1292, 842 NYS2d 819 (4th Dept 2007) (Labor Law § 240(1) applicable where worker injured in attempting to use overturned bucket to descend into 3- to 4-foot-deep crawl space); *Mann v Meridian Centre Associates, LLC*, 17 AD3d 1143, 794 NYS2d 272 (4th Dept 2005) (fall of 40 inches sufficient elevation differential to bring worker within protection of § 240(1); liability cannot be reduced to bright-line rule); *Amo v Little Rapids Corp.*, 268 AD2d 712, 701 NYS2d 517 (3d Dept 2000). Therefore, where a defective wooden plank caused plaintiff to lose his balance and fall approximately 18 inches to the top of a scaffold, thereby twisting his knee, plaintiff stated a valid claim under Labor Law § 240(1), *Siago v Garbade Const. Co.*, 262 AD2d 945, 701 NYS2d 538 (4th Dept 1999); see *Abreo v URS Greiner Woodward Clyde*, 60 AD3d 878, 875 NYS2d 577 (2d Dept 2009) (Labor Law § 240(1) cause of action stated where worker standing on stack of bricks piled onto scaffold fell to scaffold planking); *Gottstine v Dunlop Tire Corp.*, 272 AD2d 863, 709 NYS2d 259 (4th Dept 2000). Similarly, where plaintiff was knocked off an 18-inch high, overturned drywall bucket, plaintiff stated a valid Labor Law § 240(1) claim, *Norton v John P. Bell & Sons, Inc.*, 237 AD2d

928, 654 NYS2d 512 (4th Dept 1997); see *Amo v Little Rapids Corp.*, supra (fall of 15 to 16 inches sufficient elevation differential to bring worker within protection of scaffold law). The First Department has held that a worker on a platform elevated two feet from the ground is subject to the protection of the statute, *Gettys v Port Authority of New York and New Jersey*, 248 AD2d 226, 670 NYS2d 28 (1st Dept 1998); *Casabianca v Port Authority of New York and New Jersey*, 237 AD2d 112, 655 NYS2d 2 (1st Dept 1997). However, some courts have held that height differentials of approximately one foot do not pose elevation-related risks, *Torkel v NYU Hospitals Center*, 63 AD3d 587, 883 NYS2d 8 (1st Dept 2009) (12- to 18-inch height differential); *DeStefano v Amtad New York, Inc.*, 269 AD2d 229, 703 NYS2d 34 (1st Dept 2000) (12-inch ramp); *DeMayo v 1000 Northern of New York Co.*, 246 AD2d 506, 667 NYS2d 400 (2d Dept 1998) (13-inch step from ground to shanty entrance).

The Court of Appeals has not yet addressed whether the collapse of a permanent floor or similar structure is an elevation-related risk. In *Jones v 414 Equities LLC*, 57 AD3d 65, 866 NYS2d 165 (1st Dept 2008), the First Department reviewed the case law and concluded that there was considerable inconsistency in the results reached by various Departments. For example, the Second Department has held that the collapse of a permanent floor can lead to liability under Labor Law § 240(1) if the risk of collapse was foreseeable, *Shipkoski v Watch Case Factory Associates*, 292 AD2d 587, 741 NYS2d 55 (2d Dept 2002); see *De Jara v 44-14 Newtown Road Apartment Corp.*, 307 AD2d 948, 763 NYS2d 654 (2d Dept 2003); *Richardson v Matarese*, 206 AD2d 353, 614 NYS2d 424 (2d Dept 1994); see also *Taylor v V.A.W. of America, Inc.*, 276 AD2d 621, 714 NYS2d 321 (2d Dept 2000) (foreseeable collapse of roof); but see *Caruana v Lexington Village Condominiums at Bay Shore*, 23 AD3d 509, 806 NYS2d 634 (2d Dept 2005) (Labor Law § 240(1) inapplicable to collapse of balcony, which was “permanent appurtenance” rather than scaffold). In contrast, the Third Department has held that a Labor Law § 240(1) cause of action cannot be maintained for injuries resulting from the collapse of a permanent floor, *D’Egidio v Frontier Ins. Co.*, 270 AD2d 763, 704 NYS2d 750 (3d Dept 2000); *Avelino v 26 Railroad Ave. Inc.*, 252 AD2d 912, 676 NYS2d 342 (3d Dept 1998); but see *Beard v State*, 25 AD3d 989, 808 NYS2d 802 (3d Dept 2006) (Labor Law § 240(1) cause of action lies where permanent bridge that was being demolished was not structurally sound collapsed); *Seguin v Massena Aluminum Recovery Co. Inc.*, 229 AD2d 839, 645 NYS2d 630 (3d Dept 1996) (Labor Law § 240(1) cause of action permitted where worker fell through decayed permanent roof). Decisions in the Fourth Department differ on the subject, *Bradford v State*, 17 AD3d 995, 794 NYS2d 522 (4th Dept 2005) (indicating in dictum that permanency of collapsed structure not a reason for precluding Labor Law § 240(1) liability); *Sponholz v Benderson Property Development, Inc.*, 266 AD2d 815, 697 NYS2d 432 (4th Dept 1999) (precluding Labor Law § 240(1) cause of action for collapse of permanent staircase); *Dombrowski v Schwartz*, 217 AD2d 914, 629 NYS2d 924 (4th Dept 1995) (same); *Collins v County of Monroe Indus. Development Agency (COMIDA)*, 167 AD2d 914, 561

NYS2d 995 (4th Dept 1990) (permitting Labor Law § 240(1) action for injuries resulting from collapse of concrete floor in underground parking garage). For its part, the First Department has rejected analyses based on whether the collapsed structure was or was not “permanent” and, relying instead on the rationale in *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 841 NYS2d 249 (1st Dept 2007), has held that the proper inquiry is whether the failure of the structure was a foreseeable risk of the task being performed, *Jones v 414 Equities LLC*, supra; see *Mendoza v Highpoint Associates, IX, LLC*, 83 AD3d 1, 919 NYS2d 129 (1st Dept 2011); *Espinosa v Azure Holdings II, LP*, 58 AD3d 287, 869 NYS2d 395 (1st Dept 2008). Under that test, evidence that the building as a whole was in an advanced state of disrepair was sufficient to raise a triable question of fact, but did not establish the requisite foreseeability as a matter of law, *Espinosa v Azure Holdings II, LP*, supra.

Where plaintiff is injured in assisting another party who has fallen from a height, the “danger invites rescue” doctrine is not applicable to plaintiff’s Labor Law § 240(1) claim, *Del Vecchio v State*, 246 AD2d 498, 667 NYS2d 401 (2d Dept 1998); see *George v State*, 251 AD2d 541, 674 NYS2d 742 (2d Dept 1998). Therefore, where plaintiff did not fall from a height in attempting to save the other party, plaintiff is not entitled to recover under Labor Law § 240(1), *Del Vecchio v State*, supra. A plaintiff cannot recover for psychological injuries under Labor Law § 240(1) on a theory that plaintiff was within the zone of danger of an elevation-related hazard to which another was exposed, *Fernandez v Abalene Oil Co., Inc.*, 91 AD3d 906, 938 NYS2d 119 (2d Dept 2012).

C. Sites Covered By Labor Law § 240(1)

The duty imposed by Labor Law § 240(1) extends to the whole construction site, not only to those areas immediately involved in the work, *Orr v David Christa Const., Inc.*, 206 AD2d 881, 615 NYS2d 543 (4th Dept 1994); *Adams v Fred Alvaro Const. Corp., Inc.*, 161 AD2d 1014, 557 NYS2d 584 (3d Dept 1990); *Reinitz v Arc Elec. Const. Co., Inc.*, 104 AD2d 247, 483 NYS2d 821 (3d Dept 1984); *Rosenbaum v Lefrak Corp.*, 80 AD2d 337, 438 NYS2d 794 (1st Dept 1981); see *Hagins v State*, 81 NY2d 921, 597 NYS2d 651, 613 NE2d 557 (1993); see also *D’Alto v 22-24 129th Street, LLC*, 76 AD3d 503, 906 NYS2d 79 (2d Dept 2010) (§ 240(1) applied to accident occurring on cement truck parked 100 feet outside of construction site where worker had prepared cement for delivery to site just prior to accident and worker had been instructed to wait in line with other cement trucks before entering site); but see *Sprague v Louis Picciano, Inc.*, 100 AD2d 247, 474 NYS2d 591 (3d Dept 1984).

The safety devices enumerated under Labor Law § 240(1) are for the use or protection of persons in gaining access to or working at the sites where elevation poses a risk, *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 577 NYS2d 219, 583 NE2d 932 (1991); *Ciraolo v Melville Court Associates*, 221 AD2d 582, 634 NYS2d 205 (2d Dept 1995). Thus, where plaintiff and other workers had to walk on a sidewalk bridge to

retrieve tools, Labor Law § 240(1) required that this bridge be so constructed as to provide the workers with proper protection, *Jablonski v Everest Const. and Trade Corp.*, 264 AD2d 381, 693 NYS2d 229 (2d Dept 1999); *Hoyos v NY-1095 Avenue of the Americas, LLC*, 156 AD3d 491, 67 NYS3d 597 (1st Dept 2017); *Birbilis v Rapp*, 205 AD2d 569, 613 NYS2d 414 (2d Dept 1994). However, Labor Law § 240(1) does not apply to a fall from an unsecured plank where the plank was used as a passageway or stairway, *Paul v Ryan Homes, Inc.*, 5 AD3d 58, 774 NYS2d 225 (4th Dept 2004); *Kavanaugh v Marrano/Marc Equity Corp.*, 225 AD2d 1037, 639 NYS2d 772 (4th Dept 1996); *Straight v McCarthy Bros. Co.*, 222 AD2d 775, 634 NYS2d 272 (3d Dept 1995) (§ 240(1) inapplicable where plank from which plaintiff fell being used as passageway for laborers to transport materials and debris and not in performance of plaintiff's work and where plaintiff had another means of access to building); see also *Sahota v Celaj*, 11 AD3d 308, 783 NYS2d 536 (1st Dept 2004) (no recovery where scaffold on which worker performed his work functioned properly; worker injured when he tried to descend using fire escape and securing mechanism broke, causing fire escape ladder to crash down on his arm). The First Department disagrees with the Paul line of cases, which emanate from the Third and Fourth Departments, and has held that a plaintiff injured as a result of a fall from a plank may recover under Labor Law § 240(1), provided the plaintiff establish that he or she was engaged in a protected activity and exposed to an elevation-related hazard for which no (or inadequate) safety devices were provided, *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 917 NYS2d 130 (1st Dept 2011); see *Jones v 414 Equities LLC*, 57 AD3d 65, 866 NYS2d 165 (1st Dept 2008).

D. Injuries Resulting From Worker's Falling From a Height

In *Melber v 6333 Main Street, Inc.*, 91 NY2d 759, 676 NYS2d 104, 698 NE2d 933 (1998), the Court of Appeals held that Labor Law § 240(1) was not applicable where plaintiff was working on stilts and tripped over an electrical conduit because the proper erection, construction, placement or operation of one or more of the devices listed in Labor Law § 240(1) would not have prevented plaintiff's injuries. The 42-inch stilts upon which plaintiff stood when he tripped over the protruding conduit performed their proper function and allowed plaintiff to complete his work at a height safely. Plaintiff's fall resulted from a separate hazard which did not interfere with or increase the danger of injury in the performance of the elevation-related task. The Court added, however, that if the stilts failed while plaintiff was installing the metal studs in the top of the drywall, a different case would be presented. Applying *Melber*, the Court in *Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 7 NYS3d 263, 30 NE3d 154 (2015), concluded that Labor Law § 240(1) was not applicable where plaintiff was working on stilts and slipped and fell on ice on the floor that he was traversing. The *Nicometi* Court stressed that the fall resulted from a hazard separate and apart from the one that occasioned the use of the stilts, which did not collapse, break or otherwise fail, and that the protective equipment envisioned by the statute was not designed to avert the hazard that caused plaintiff to slip and fall. In contrast to *Nicometi*, a plaintiff who allegedly fell

from a retaining wall due to an icy condition was entitled to summary judgment on the issue of liability, as the statute applies to situations where a slippery surface combined with an elevation-related hazard proximately causes injury, *Hovorka v Applied Products Company, Inc.*, 199 AD3d 520, 154 NYS3d 435 (1st Dept 2021). Labor Law § 240(1) was held not applicable where plaintiff, who was standing on a guardrailed catwalk affixed to an elevated wood chip stacker, was injured as a result of the collapse of the stacker due to a faulty cable, since it was the stacker rather than the safety device, i.e., the catwalk, that failed, *Foote v Lyonsdale Energy Ltd. Partnership*, 23 AD3d 924, 805 NYS2d 163 (3d Dept 2005). However, where a plaintiff who was working approximately 180 feet above ground on a cell phone tower, wearing a full body harness that was tied off to a part of the tower, was required to lower himself down from a horizontal boom using “‘choker slings’” that looked like “‘giant rubber band[s]’” was injured when he fell and the slings latched around his wrists, halted his fall after a short distance allegedly causing injuries to his wrist and shoulder, the court found that Labor Law 240(1) was applicable but that there were issues of fact whether the safety devices provided proper protection, and whether the absence of additional safety devices was a proximate cause of his injuries, *Cullen v AT&T, Inc.*, 140 AD3d 1588, 32 NYS3d 757 (4th Dept 2016).

Where a plaintiff is injured in a fall from a worksite caused by an elevation-related risk but is prevented from hitting the ground by some other obstruction, there is a sufficient statutory violation, *Striegel v Hillcrest Heights Development Corp.*, 100 NY2d 974, 768 NYS2d 727, 800 NE2d 1093 (2003); *Scribner v State*, 130 AD3d 1207, 13 NYS3d 637 (3d Dept 2015) (worker fell from roof onto scaffolding 2-5 feet below); *Abreo v URS Greiner Woodward Clyde*, 60 AD3d 878, 875 NYS2d 577 (2d Dept 2009) (worker standing on stack of bricks piled onto scaffold fell to scaffold planking); *Lopez v Boston Properties Inc.*, 41 AD3d 259, 838 NYS2d 527 (1st Dept 2007) (plaintiff's fall broken by safety line and harness); *Franklin v Dormitory Authority*, 291 AD2d 854, 736 NYS2d 816 (4th Dept 2002); *Gramigna v Morse Diesel, Inc.*, 210 AD2d 115, 620 NYS2d 58 (1st Dept 1994) (plaintiff's body lodged between scaffold and wall); *Pietsch v Moog, Inc.*, 156 AD2d 1019, 549 NYS2d 301 (4th Dept 1989) (same); see *Montalvo v J. Petrocelli Const., Inc.*, 8 AD3d 173, 780 NYS2d 558 (1st Dept 2004); *Kyle v New York*, 268 AD2d 192, 707 NYS2d 445 (1st Dept 2000); *Prekulaj v Terano Realty, Inc.*, 235 AD2d 201, 652 NYS2d 10 (1st Dept 1997).

The statute also applies where the force of gravity requires the worker to act to prevent himself or herself from falling from an elevated worksite, *Peters v Kissling Interests, Inc.*, 63 AD3d 1519, 880 NYS2d 797 (4th Dept 2009) (worker grabbed sash to prevent fall from window sill and cut by shattered glass); see *Latteri v Port of Authority of New York and New Jersey*, 205 AD3d 546, 166 NYS3d 529 (1st Dept 2022) (worker injured shoulder when he grabbed overhead metal truss to avoid falling from height). Thus, a worker who fell from the top of a roof all the way down to the eaves was not precluded from recovering under

Labor Law § 240(1) because his fall to the ground was halted when several protruding nails snagged his pants, *Striegel v Hillcrest Heights Development Corp.*, supra. Similarly, the collapse of a floor that causes a worker to fall even partially through it presents an elevation-related risk, even though plaintiff did not fall to the floor below, *Robertti v Chang*, 227 AD2d 542, 642 NYS2d 715 (2d Dept 1996); see *Kyle v New York*, 268 AD2d 192, 707 NYS2d 445 (1st Dept 2000); *O'Connor v Lincoln Metrocenter Partners, L.P.*, 266 AD2d 60, 698 NYS2d 632 (1st Dept 1999); *Adams v North-Star Const. Co., Inc.*, 249 AD2d 1001, 672 NYS2d 166 (4th Dept 1998); but see *Balladares v Southgate Owners Corp.*, 40 AD3d 667, 835 NYS2d 693 (2d Dept 2007) (Labor Law § 240(1) inapplicable where collapse of basement floor during demolition of brick wall with jackhammer unrelated to risk giving rise to need for enumerated safety device).

However, in *Alvia v Teman Elec. Contracting, Inc.*, 287 AD2d 421, 731 NYS2d 462 (2d Dept 2001), the court held that a hole in the permanent floor did not furnish an elevation-related risk of falling to the floor below; but see *Leshaj v Long Lake Associates*, 24 AD3d 928, 805 NYS2d 692 (3d Dept 2005) (Labor Law § 240(1) applied where plaintiff fell from permanently installed floor on second level of house under construction when he stepped backward into open space between exposed wall studs; safety devices were required because plaintiff was required to work in close proximity to steep elevation and absence of finished walls on second floor exposed plaintiff to elevation-related risk). Likewise, a worker's fall into a five- to six-inch gap between insulation boards that were stacked in eight-foot piles was not a gravity-related accident encompassed by Labor Law § 240(1), *Keavey v New York State Dormitory Authority*, 6 NY3d 859, 816 NYS2d 722, 849 NE2d 945 (2006).

Where plaintiff is directed to perform work that entails two separate and distinct elevation-related risks, the worker must be provided with protective devices to protect against both risks, *Felker v Corning Inc.*, 90 NY2d 219, 660 NYS2d 349, 682 NE2d 950 (1997); *Tassone v Mid-Valley Oil Co. Inc.*, 291 AD2d 623, 738 NYS2d 103 (3d Dept 2002) (although ladder properly fulfilled its purpose of providing plaintiff with access to roof, no safety device provided to protect plaintiff against second risk of falling from roof once he gained access to it); *Barnaby v A. & C. Properties*, 188 AD2d 958, 592 NYS2d 98 (3d Dept 1992). Thus, where a worker was required to elevate himself to reach over an eight-foot alcove wall to work over a suspended ceiling, the failure to provide a device to protect the worker from falling over the alcove wall and through a suspended ceiling to the floor below is a violation of Labor Law § 240(1), *Felker v Corning Inc.*, supra. Similarly, where a worker was required to elevate himself above the floor of the interior of a building to frame a window some 15 to 20 feet above the exterior ground, the failure to provide a device to protect the worker from the risk of falling through the upper story window opening gave rise to liability under Labor Law § 240(1), *Barnaby v A. & C. Properties*, supra; see *Terry v Young Men's Hebrew Ass'n of Washington Heights, Inc.*, 168 AD2d 399, 563 NYS2d 408 (1st Dept 1990), *aff'd*, 78 NY2d 978, 574 NYS2d 935,

580 NE2d 407 (1991). Where a scaffold shielded the plaintiff from the risk posed by the location of his worksite some six feet above the ground, but did not protect him from the distinctly separate, elevation-related hazard created by the need to suspend a 50-pound piece of sheet rock above his head, there was a violation of the statute, *Sasso v NYMED Inc.*, 238 AD2d 799, 656 NYS2d 509 (3d Dept 1997).

The collapse of a permanent work site, which causes a worker to fall therefrom, constitutes a prima facie violation of Labor Law § 240(1), *Bradford v State*, 17 AD3d 995, 794 NYS2d 522 (4th Dept 2005); *Richardson v Matarese*, 206 AD2d 353, 614 NYS2d 424 (2d Dept 1994); see *Beard v State*, 25 AD3d 989, 808 NYS2d 802 (3d Dept 2006) (plaintiff fell when bridge collapsed while plaintiff was in process of being taken apart in sections).

Labor Law § 240(1) applies not only to workers utilizing scaffold or hoisting devices, but also to workers injured in the process of erecting or demolishing such devices, *Metus v Ladies Mile Inc.*, 51 AD3d 537, 858 NYS2d 142 (1st Dept 2008); *Kyle v New York*, 268 AD2d 192, 707 NYS2d 445 (1st Dept 2000).

E. Injuries Resulting From Falling Objects

The fact that gravity worked upon the object that caused plaintiff's injury is insufficient by itself to support a Labor Law § 240(1) claim, *Fabrizi v 1095 Ave. of Americas, L.L.C.*, 22 NY3d 658, 985 NYS2d 416, 8 NE3d 791 (2014); *Narducci v Manhasset Bay Associates*, 96 NY2d 259, 727 NYS2d 37, 750 NE2d 1085 (2001); *Hebbard v United Health Services Hospitals, Inc.*, 135 AD3d 1150, 23 NYS3d 465 (3d Dept 2016); *Oakes v Wal-Mart Real Estate Business Trust*, 99 AD3d 31, 948 NYS2d 748 (3d Dept 2012) (*Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 895 NYS2d 279, 922 NE2d 865 (2009), did not overturn core holdings in *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993), and *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 577 NYS2d 219, 583 NE2d 932 (1991), that Labor Law § 240(1) is aimed only at elevation-related risks); *Almanzar v Goval Realty Corp.*, 286 AD2d 278, 729 NYS2d 133 (1st Dept 2001). Labor Law § 240(1) applies where the falling of an object is related to a significant risk inherent in the relative elevation at which materials or loads must be positioned or secured, *Zervos v New York*, 8 AD3d 477, 779 NYS2d 106 (2d Dept 2004) (§ 240(1) applicable where evidence that plaintiff struck by brick falling from bucket being used to hoist bricks to building's roof); see *Mayorquin v Carriage House Owner's Corp.*, 202 AD3d 541, 163 NYS3d 51 (1st Dept 2022) (plaintiff struck by unsecured brick). In *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 841 NYS2d 249 (1st Dept 2007), the court reiterated that the essential factor in determining whether an object requires securing was and remains whether the object presents a foreseeable elevation risk in light of the work being undertaken. Thus, Labor Law § 240(1) did not apply to injuries resulting from falling counterweights in an elevator shaft where it could not reasonably be expected that the frame holding the

counterweights would tilt or move in such a way as to cause the counterweights to fall, *Buckley v Columbia Grammar and Preparatory*, supra. The *Buckley* court explicitly rejected the notion that the decision in *Outar v New York*, 5 NY3d 731, 799 NYS2d 770, 832 NE2d 1186 (2005), had changed the law regarding what types of objects or loads must be properly secured, see *Erby v 36 LLC*, 193 AD3d 412, 146 NYS3d 245 (1st Dept 2021) (issue of fact as to whether air conditioner unit installed by plaintiff's employer that partially detached from ceiling and struck plaintiff in head was object required to be secured for purpose of plaintiff's work in installing canvas device to ductwork). In addition to the requirement of a foreseeable elevation-related risk, Labor Law § 240(1) requires that the object that fell did so because of the absence or inadequacy of a device whose purpose was to provide safety to workers, *Fabrizi v 1095 Ave. of Americas, L.L.C.*, supra; *Christiansen v Bonacio Const., Inc.*, 129 AD3d 1156, 10 NYS3d 683 (3d Dept 2015).

In *Narducci v Manhasset Bay Associates*, 96 NY2d 259, 727 NYS2d 37, 750 NE2d 1085 (2001) (emphasis in original), the Court of Appeals held that “[a]bsolute liability for falling objects under Labor Law § 240(1) arises only when there is a failure to use necessary and adequate hoisting or securing devices” and “the object fell, while being hoisted or secured, *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute,” see *Fabrizi v 1095 Ave. of Americas, L.L.C.*, 22 NY3d 658, 985 NYS2d 416, 8 NE3d 791 (2014); *Kammerer v Mercado*, 195 AD3d 1513, 145 NYS3d 888 (4th Dept 2021) (liquid from clogged pipe containing caustic substance that leaked onto plaintiff and burned her was not material being hoisted or load requiring securing); *Henriquez v Grant*, 186 AD3d 577, 129 NYS3d 121 (2d Dept 2020) (plaintiff, who was struck by falling plank, denied summary judgment where no proof submitted to establish plank fell because of absence or inadequacy of safety devices); *Sarata v Metropolitan Transp. Authority*, 134 AD3d 1089, 23 NYS3d 281 (2d Dept 2015); *Zirkel v Frontier Communications of America, Inc.*, 29 AD3d 1188, 815 NYS2d 324 (3d Dept 2006) (§ 240(1) inapplicable where worker engaged in removing old utility poles through use of hydraulic winch was struck by pole that fell before it was attached to winch); *Atkinson v State*, 20 AD3d 739, 798 NYS2d 230 (3d Dept 2005) (§ 240(1) not applicable where material that fell was not being hoisted or secured); *Rosado v Briarwoods Farm, Inc.*, 19 AD3d 396, 796 NYS2d 394 (2d Dept 2005) (§ 240(1) inapplicable where worker killed when bundles of lumber resting on framing of uncompleted porch fell on him); *Perillo v Lehigh Const. Group, Inc.*, 17 AD3d 1136, 795 NYS2d 808 (4th Dept 2005) (§ 240(1) inapplicable where plaintiff struck by remains of partially demolished partition wall; remains were not “materials or loads” that were being “hoisted or secured”); *Love v New York State Thruway Authority*, 17 AD3d 1000, 794 NYS2d 166 (4th Dept 2005) (§ 240(1) inapplicable where object that struck plaintiff was not being hoisted or secured when it fell); *Shaheen v Hueber-Breuer Const. Co., Inc.*, 4 AD3d 761, 772 NYS2d 156 (4th Dept 2004) (§ 240(1) inapplicable where plaintiff injured by falling rope coil which was pushed off scaffold by co-worker); *Bennett v SDS Holdings*, 309 AD2d 1212, 764 NYS2d 763 (4th Dept 2003) (denying § 240(1) protection where top plate of wall frame fell when plaintiff

removed last frame stud from base plate; plate was not being hoisted or secured when it fell and was part of wall plaintiff was demolishing, which was at same elevation as plaintiff); *Bradley v San-Gra Corp.*, 301 AD2d 709, 753 NYS2d 556 (3d Dept 2003) (§ 240(1) not applicable where worker struck by piece of concrete ribbon that had been hoisted by forklift and then placed on wall); *Fischer v State*, 291 AD2d 815, 737 NYS2d 204 (4th Dept 2002) (piece of concrete being dislodged from ground at top of excavation by backhoe was not being hoisted or secured and did not fall because of absence or inadequacy of safety device enumerated in statute); *Handley v J.N. White Associates, Inc.*, 288 AD2d 855, 732 NYS2d 783 (4th Dept 2001) (where plaintiff standing on raised lift installing ducts and newly installed section of duct fell, striking and injuring his left wrist, § 240(1) did not apply because duct not being hoisted or secured at time it fell); *Fegundes v New York Telephone Co.*, 285 AD2d 526, 728 NYS2d 79 (2d Dept 2001) (§ 240(1) did not apply to plaintiff injured by conduit on which he was working when it came loose from lockbox on ceiling and struck his hand); *Corey v Gorick Const. Co. Inc.*, 271 AD2d 911, 706 NYS2d 512 (3d Dept 2000) (beam intentionally dropped by backhoe in course of demolition project did not fall because improperly hoisted or inadequately secured).

The plaintiff in *Narducci v Manhasset Bay Associates*, 96 NY2d 259, 727 NYS2d 37, 750 NE2d 1085 (2001), was injured when a piece of glass from an adjacent window frame fell toward him as he stood on a ladder. The Court of Appeals held that Labor Law § 240(1) did not apply, since the glass was not material being hoisted or a load that required securing for the purpose of the work; rather the falling glass was a general hazard of the workplace, see *Misseritti v Mark IV Const. Co., Inc.*, 86 NY2d 487, 634 NYS2d 35, 657 NE2d 1318 (1995); *Seales v Trident Structural Corp.*, 142 AD3d 1153, 38 NYS3d 49 (2d Dept 2016); *Christiansen v Bonacio Const., Inc.*, 129 AD3d 1156, 10 NYS3d 683 (3d Dept 2015); *Sahota v Celaj*, 11 AD3d 308, 783 NYS2d 536 (1st Dept 2004) (no recovery where worker injured when locking mechanism on fire escape ladder failed and ladder struck his arm).

Applying *Narducci*, the Court of Appeals subsequently held that Labor Law § 240(1) did not cover an asbestos-removal worker who was injured when he was hit by a piece of asbestos that had been cut and deliberately dropped from a chemical tank approximately 12 feet above ground, *Roberts v General Elec. Co.*, 97 NY2d 737, 742 NYS2d 188, 768 NE2d 1127 (2002); see *Albuquerque v New York*, 188 AD3d 515, 132 NYS3d 604 (1st Dept 2020) (bracing timber thrown into trench was load requiring securing despite fact it was deliberately lowered down); *Sarata v Metropolitan Transp. Authority*, 134 AD3d 1089, 23 NYS3d 281 (2d Dept 2015) (§ 240[1] applicable where plaintiff was struck by concrete debris that was intentionally dislodged from elevated structure and allowed to fall to ground; debris was suppose to land in area surrounded by barricade and vertical netting, which devices were designed to protect workers from falling debris, but piece that struck plaintiff passed through opening in net); *La Veglia v St. Francis Hosp.*, 78 AD3d 1123, 912 NYS2d 611 (2d Dept 2010) (§ 240(1) applicable where plaintiff,

who was responsible for unclogging opening of debris chute that ran from fourth floor of building to ground floor, was struck by metal stud—or debris dislodged by stud—that was intentionally thrown into the chute). Labor Law § 240(1) was held inapplicable where a mason positioned at the third level of a scaffold was struck by blocks that were being stored on the fourth level, since the fourth-level blocks were to be used in the mason’s work later the same day and were constantly replenished; thus, it was not a situation in which “hoisting” or “securing” under the statute was necessary or even expected, *McLaughlin v Malone & Tate Builders, Inc.*, 13 AD3d 859, 787 NYS2d 157 (3d Dept 2004).

In *Outar v New York*, 5 NY3d 731, 799 NYS2d 770, 832 NE2d 1186 (2005), plaintiff, a railroad track worker, was injured when an unsecured dolly that was used in his work and stored on top of a five-and-one-half-foot “bench wall” adjacent to the work site fell and hit him. The Court of Appeals ruled that plaintiffs were entitled to summary judgment on the issue of liability under Labor Law § 240(1) because the elevation differential was sufficient to trigger the statute’s protection and the dolly was an object that required securing for purposes of the undertaking. Relying on *Outar*, the Court stated in *Quattrocchi v F.J. Sciamie Const. Corp.*, 11 NY3d 757, 866 NYS2d 592, 896 NE2d 75 (2008), that “falling object liability is not limited to cases in which the falling object is being actively hoisted or secured,” see *Seales v Trident Structural Corp.*, 142 AD3d 1153, 38 NYS3d 49 (2d Dept 2016); *Sarata v Metropolitan Transp. Authority*, 134 AD3d 1089, 23 NYS3d 281 (2d Dept 2015); *Podobedov v East Coast Const. Group, Inc.*, 133 AD3d 733, 21 NYS3d 128 (2d Dept 2015); *Boyle v 42nd Street Development Project, Inc.*, 38 AD3d 404, 835 NYS2d 7 (1st Dept 2007); but see *Brownell v Blue Seal Feeds, Inc.*, 89 AD3d 1425, 932 NYS2d 623 (4th Dept 2011). Thus, a Labor Law § 240(1) claim was cognizable where planks that had been laid across the top of two swinging doors for use as a makeshift shelf fell on plaintiff as he walked through the doorway and hit one of the doors with his shoulder, *Quattrocchi v F.J. Sciamie Const. Corp.*, supra. Similarly, in *Thompson v St. Charles Condominiums*, 303 AD2d 152, 756 NYS2d 530 (1st Dept 2003), the collapse of a scaffold holding cinder blocks, which fell onto plaintiff, was deemed an appropriate basis for recovery under Labor Law § 240(1), see *Rivas-Pichardo v 292 Fifth Avenue Holdings, LLC*, 198 AD3d 826, 156 NYS3d 85 (2d Dept 2021) (Labor Law § 240 applicable where plaintiff was struck by bricks deliberately dumped down elevator shaft being used as debris chute); *Hensel v Aviator FSC, Inc.*, 198 AD3d 884, 156 NYS3d 98 (2d Dept 2021) (§ 240 applicable where plaintiff was hit in head by 200-pound board being unloaded from raised forklift, which had been modified and lacked load guides and guard rails); *Rincon v New York City Housing Authority*, 202 AD3d 421, 158 NYS3d 567 (1st Dept 2022) (§ 240[1] applicable where plaintiff was struck by wrench accidentally dropped by coworker and project manager specifically recommended use of tethering devices while working from heights); *Sarata v Metropolitan Transp. Authority*, supra (§ 240[1] applicable where plaintiff was struck by concrete debris that was intentionally dislodged from elevated structure and allowed to fall to ground; debris was suppose to land in area sur-

rounded by barricade and vertical netting, which devices were designed to protect workers from falling debris, but piece that struck plaintiff passed through opening in net); *Petteys v Rome*, 23 AD3d 1123, 804 NYS2d 879 (4th Dept 2005) (Labor Law § 240(1) applicable where co-worker failed to catch piece of steel being removed from structure and piece fell on plaintiff; evidence adduced that safety devices had previously been used for same procedure); *Orner v Port Authority of New York and New Jersey*, 293 AD2d 517, 740 NYS2d 414 (2d Dept 2002) (Labor Law § 240(1) applicable where plaintiff struck by unsecured roofing material falling from roof). Where an object required to be secured has fallen, it is not a defense that some securing devices were provided, *Harris v 170 East End Ave., LLC*, 71 AD3d 408, 896 NYS2d 51 (1st Dept 2010).

It has been held that if an object is at the same level as the worker and falls on the worker, the statute does not apply, see *Trippi v Main-Huron, LLC*, 28 AD3d 1069, 814 NYS2d 444 (4th Dept 2006); *Daley v City of New York Metropolitan Transp. Authority*, 277 AD2d 88, 716 NYS2d 50 (1st Dept 2000); *Brink v Yeshiva University*, 259 AD2d 265, 686 NYS2d 15 (1st Dept 1999); *Phillips v New York*, 228 AD2d 570, 644 NYS2d 764 (2d Dept 1996) (abrogated on other grounds by, *Misicki v Caradonna*, 12 NY3d 511, 882 NYS2d 375, 909 NE2d 1213 (2009)); *Dupuy v Hayner Hoyt Corp.*, 221 AD2d 901, 634 NYS2d 17 (4th Dept 1995); *Corsaro v Mt. Calvary Cemetery, Inc.*, 214 AD2d 950, 626 NYS2d 634 (4th Dept 1995); *Smerka v Niagara Mohawk Power Corp.*, 206 AD2d 891, 616 NYS2d 114 (4th Dept 1994); *Maracle v DiFranco*, 197 AD2d 877, 602 NYS2d 481 (4th Dept 1993). However, the Court of Appeals has rejected the “same level” rule, *Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1, 935 NYS2d 551, 959 NE2d 488 (2011). In *Wilinski*, the court, employing Runner’s “single decisive question” analysis, i.e., whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential, found that the plaintiff, who was struck by two 10-foot metal plumbing pipes that rose from the floor on which he was working and were dislodged when struck by demolition debris, was exposed to an elevation-related risk.

Generally, if an object falls from a minuscule height, the statute does not apply, *Thompson v Ludovico*, 246 AD2d 642, 668 NYS2d 238 (2d Dept 1998) (abrogated on other grounds by, *Misicki v Caradonna*, 12 NY3d 511, 882 NYS2d 375, 909 NE2d 1213 (2009)); *Schreiner v Cremosa Cheese Corp.*, 202 AD2d 657, 609 NYS2d 322 (2d Dept 1994); see *Wright v Ellsworth Partners, LLC*, 143 AD3d 1116, 39 NYS3d 289 (3d Dept 2016) (Labor Law § 240[1] liability precluded if determined that no height differential existed); *Oakes v Wal-Mart Real Estate Business Trust*, 99 AD3d 31, 948 NYS2d 748 (3d Dept 2012); *Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 895 NYS2d 279, 922 NE2d 865 (2009), did not hold that height differential can never be de minimis when accident was gravity-related; nor did it overturn prior decisions finding certain height differentials insufficient to sustain li-

ability despite harm flowing directly from application of force of gravity to object); *Almanzar v Goval Realty Corp.*, 286 AD2d 278, 729 NYS2d 133 (1st Dept 2001); *Bailey v Benderson*, 255 AD2d 927, 680 NYS2d 779 (4th Dept 1998) (because one end of ladder that struck plaintiff was at ground level and plaintiff was walking at ground level, ladder did not constitute falling object), but the extent of the elevation differential between the worker and the object being hoisted is not necessarily determinative. Rather, in ascertaining whether an elevation differential is physically significant versus de minimis, the weight of a falling object and the amount of force it was capable of generating, even over the course of a relatively short descent, must be taken into account, *Runner v New York Stock Exchange, Inc.*, supra; *Wright v Ellsworth Partners, LLC*, supra; *Schoendorf v 589 Fifth TIC I LLC*, 206 AD3d 416, 168 NYS3d 473 (1st Dept 2022) (4 to 5 inches sufficient under circumstances); *Christiansen v Bonacio Const., Inc.*, 129 AD3d 1156, 10 NYS3d 683 (3d Dept 2015); *Jackson v Heitman Funds/191 Colonie LLC*, 111 AD3d 1208, 976 NYS2d 283 (3d Dept 2013); *Oakes v Wal-Mart Real Estate Business Trust*, supra.

Thus, where the object that fell on the worker was being hoisted, the fact that plaintiff was at the same level as the ultimate destination of the object is of no consequence, *Brown v VJB Const. Corp.*, 50 AD3d 373, 857 NYS2d 56 (1st Dept 2008). *Brown* held that Labor Law § 240(1) was applicable where a 1,000-pound granite slab, which had to be hoisted three feet above grade in order to be transported horizontally, fell due to a defective clamp while it was being hoisted and injured plaintiff, who was standing on the ground, *Brown v VJB Const. Corp.*, supra; see *Padilla v Touro College University System*, 204 AD3d 415, 166 NYS3d 152 (1st Dept 2022) (Labor Law § 240(1) potentially applicable where sheetrock stacked against wall fell on plaintiff when he attempted to move sheetrock to access wires); *Shaw v Scepter, Inc.*, 187 AD3d 1662, 133 NYS3d 709 (4th Dept 2020) (Labor Law § 240(1) potentially applicable where man lift plaintiff was maneuvering toppled from back of flatbed truck upon discovery or actual notice); *Treile v Brooklyn Tillary, LLC*, 120 AD3d 1335, 992 NYS2d 345 (2d Dept 2014) (Labor Law § 240[1] applicable where plaintiff, who was standing on plank on bed of flatbed truck, was catapulted from truck when weight shifted after 8,000 to 10,000-pound bundle of rebar was rolled off truck to ground 4 or 5 feet below; safety device, such as hoist, was required to secure bundle); *Cardenas v One State Street, LLC*, 68 AD3d 436, 890 NYS2d 41 (1st Dept 2009) (Labor Law § 240(1) applicable where worker was required to pry 80-pound electrical panel that was affixed to a wall from its position six to seven feet above ground; hoist or securing device required because panel too heavy and bulky to be safely lowered by hand); *Salinas v Barney Skanska Const. Co.*, 2 AD3d 619, 769 NYS2d 559 (2d Dept 2003) (plaintiff entitled to summary judgment under § 240(1) even though injured by duct that fell from height of only 20 inches above his head, where duct weighed several hundred pounds, plaintiff had to stand directly underneath it and no safety devices were used to lower the duct); but see *Makarius v Port Authority of New York and New Jersey*, 76 AD3d 805, 907 NYS2d 658 (1st Dept 2010) (plaintiff

exposed to usual dangers of construction site, not risk stemming from physically significant elevation differential, when transformer, mounted six to seven feet off ground, fell and struck plaintiff in head; plaintiff was not working at a height and no “appreciable height differential”—less than two feet—existed between plaintiff’s head and transformer).

The fall of an object carried by hand does not implicate the special protections afforded by Labor Law § 240(1), *Outar v New York*, 286 AD2d 671, 730 NYS2d 138 (2d Dept 2001), *aff’d*, 5 NY3d 731, 799 NYS2d 770, 832 NE2d 1186 (2005); see *Schwab v A.J. Martini Inc.*, 288 AD2d 654, 732 NYS2d 474 (3d Dept 2001); *Carroll v Timko Contracting Corp.*, 264 AD2d 706, 694 NYS2d 744 (2d Dept 1999). Thus, where plaintiff was injured carrying a ladder that toppled on him, he was not entitled to recovery under the statute, *Corbett v Hogan*, 248 AD2d 983, 670 NYS2d 273 (4th Dept 1998).

In “falling object” cases, the plaintiff need not be struck by the improperly secured material that fell in order to recover, *Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 895 NYS2d 279, 922 NE2d 865 (2009); *Jackson v Heitman Funds/191 Colonie LLC*, 111 AD3d 1208, 976 NYS2d 283 (3d Dept 2013); *Oakes v Wal-Mart Real Estate Business Trust*, 99 AD3d 31, 948 NYS2d 748 (3d Dept 2012); *Kollbeck v 417 FS Realty LLC*, 4 AD3d 314, 772 NYS2d 688 (1st Dept 2004); but see *Brownell v Blue Seal Feeds, Inc.*, 89 AD3d 1425, 932 NYS2d 623 (4th Dept 2011). The relevant inquiry is whether the harm flows directly from the application of the force of gravity to the object, *Runner v New York Stock Exchange, Inc.*, *supra*. Thus, Labor Law § 240(1) was applicable where a roll carrier used to dispense roofing material from a heavy roll allegedly slipped on an icy roof, causing the roll to drop and the carrier’s T-handle to rapidly move upward and hit plaintiff in the head, *Jackson v Heitman Funds/191 Colonie LLC*, *supra*; see *Agli v 21 East 90 Apartments Corp.*, 195 AD3d 458, 149 NYS3d 72 (1st Dept 2021) (Labor Law § 240 applicable where hand truck being used to lower 500-pound steel bedplate “jerked” causing plaintiff to slip); *Gove v Pavarini McGovern, LLC*, 110 AD3d 601, 973 NYS2d 617 (1st Dept 2013) (plaintiff injured when he slipped on unknown substance after bundle of rebar being lowered by co-worker fell on him and he struggled to keep himself and bundle from falling from unguarded platform onto workers below). Similarly, Labor Law § 240(1) was applicable where a wire reel that plaintiff and his coworkers were attempting to lower down a set of stairs using a rope that was wrapped around a metal bar descended too quickly and pulled plaintiff’s hands so that they jammed into the bar, *Runner v New York Stock Exchange, Inc.*, *supra*. Although the “falling object,” i.e., the wire reel, did not itself strike plaintiff, plaintiff was potentially entitled to recover under Labor Law § 240(1) based on expert testimony that a pulley or hoist should have been used, *id*; see *Treile v Brooklyn Tillary, LLC*, 120 AD3d 1335, 992 NYS2d 345 (2d Dept 2014) (Labor Law § 240[1] applicable where plaintiff, who was standing on plank on bed of flatbed truck, was catapulted from truck when weight shifted after 8,000 to 10,000-pound bundle of rebar was rolled off truck to ground 4 or 5 feet below; safety device, such as hoist, was required to

secure bundle). In *Oakes*, the court stated that, “it does not appear that the [Runner] Court intended to equate the single decisive question of whether there was a failure to provide protection against a physically significant elevation differential with the relevant inquiry in falling object cases of whether the harm flows directly from the application of the force of gravity to an object. Put another way, there is no indication in *Runner* that the Court intended to impose a blanket rule that a physically significant elevation differential exists whenever an injury is gravity-related or gravity can be said to have contributed to the injury,” *Oakes v Wal-Mart Real Estate Business Trust*, *supra*. Labor Law § 240(1) was held applicable where plaintiff’s injury was caused by an effort to prevent an object from falling, *Lopez v Boston Properties Inc.*, 41 AD3d 259, 838 NYS2d 527 (1st Dept 2007). Thus, a worker who fell from a beam when he grabbed a falling bucket to prevent harm to a coworker below was entitled to recover under Labor Law § 240(1), *Lopez v Boston Properties Inc.*, *supra*. In *Van Eken v Consolidated Edison Co. of New York*, 294 AD2d 352, 742 NYS2d 94 (2d Dept 2002), the plaintiff sustained injuries when a falling object caused the plaintiff’s co-worker to drop a tool which struck the plaintiff, and the plaintiff was allowed to recover damages under Labor Law § 240(1); see also *Kollbeck v 417 FS Realty LLC*, *supra* (plaintiff injured back as result of having to tighten his grip on chain to prevent chain-block from falling). Similarly, where plaintiff was injured because the elevator he was hoisting fell, the fact that plaintiff was on top of rather than below the load being hoisted did not prevent plaintiff from recovering under Labor Law § 240(1), *Sharp v Scandic Wall Ltd. Partnership*, 306 AD2d 39, 760 NYS2d 478 (1st Dept 2003); see also *Malloy v Madison Forty-Five Co.*, 13 AD3d 55, 786 NYS2d 433 (1st Dept 2004) (Labor Law § 240(1) liability could be imposed based on testimony that failure to provide adequate hoist forced plaintiff to drop beams rather than place them on dumpster so that beams shifted and slid off dumpster lid immediately after being dropped).

F. Injuries Resulting From Objects or Workers Falling From Trucks and Other Vehicles

Cases involving a plaintiff’s fall from a truck, or material falling from a truck, are legion. As a matter of law, the risk of alighting from a construction vehicle not equipped with a step to assist operators in their entry or exit from the vehicle is not an elevation-related risk that calls for any protective devices of the types listed in Labor Law § 240(1), *Bond v York Hunter Const., Inc.*, 95 NY2d 883, 715 NYS2d 209, 738 NE2d 356 (2000); see *Lessard v Niagara Mohawk Power Corp.*, 277 AD2d 941, 715 NYS2d 816 (4th Dept 2000). Similarly, as a matter of law, a four- to five-foot descent from a flatbed trailer or similar surface does not present the sort of elevation-related risk that triggers Labor Law § 240(1)’s coverage, although a 10-foot drop could require the use of a ladder or other safety device, *Toefer v Long Island R.R.*, 4 NY3d 399, 795 NYS2d 511, 828 NE2d 614 (2005); *Lavore v Kir Munsey Park 020, LLC*, 40 AD3d 711, 835 NYS2d 708; see *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 937 NYS2d 157, 960 NE2d 948 (2011) (a worker may rea-

sonably be expected to protect himself or herself by exercising due care in stepping down from a flatbed truck).

The risk of falling from the back of a pickup truck while being transported to a location for the placement of cones on a roadway to block traffic is not an elevation-related risk, *Dilluvio v New York*, 95 NY2d 928, 721 NYS2d 603, 744 NE2d 138 (2000); see *Eddy v John Hummel Custom Builders, Inc.*, 147 AD3d 16, 43 NYS3d 507 (2d Dept 2016). The Appellate Division opinion in *Dilluvio* concluded that there was no significant risk posed by the mere elevation differential between the tailgate of the pickup upon which plaintiff was seated and the ground, which was only three feet, *Dilluvio v New York*, 264 AD2d 115, 704 NYS2d 550 (1st Dept 2000), *aff'd*, 95 NY2d 928, 721 NYS2d 603, 744 NE2d 138 (2000); see *Burgos v Group Management, Inc.*, 271 AD2d 314, 706 NYS2d 108 (1st Dept 2000). Several cases have denied recovery under Labor Law § 240(1) where plaintiff fell from a truck or trailer, *James v Alpha Painting & Const. Co., Inc.*, 152 AD3d 447, 59 NYS3d 21 (1st Dept 2017) (plaintiffs were thrown from “boom truck” that struck overhead road sign on bridge); *Lavore v Kir Munsey Park 020, LLC*, 40 AD3d 711, 835 NYS2d 708 (plaintiff fell when descending from side of truck bed, which was approximately five feet from ground); *Piccolo v St. John’s Home for the Aging*, 11 AD3d 884, 782 NYS2d 475 (4th Dept 2004) (surface of flatbed truck not elevated work surface under § 240(1)); *Tillman v Triou’s Custom Homes, Inc.*, 253 AD2d 254, 687 NYS2d 506 (4th Dept 1999) (plaintiff unloading cement blocks from back of flatbed truck with boom when truck tipped, causing plaintiff to fall four and one-half feet to ground); *DePuy v Sibley, Lindsay & Curr Co., Inc.*, 225 AD2d 1069, 639 NYS2d 207 (4th Dept 1996) (plaintiff fell three to four feet after ramp used to move cabinet from truck collapsed); *Gaul v Motorola, Inc.*, 216 AD2d 879, 628 NYS2d 992 (4th Dept 1995) (plaintiff tripped and fell out of trailer); *Colopy v William C. McCombs, Inc.*, 203 AD2d 920, 611 NYS2d 83 (4th Dept 1994) (plaintiff fell from truck to ground after being struck by truck’s hydraulic boom); *Cipolla v S.M. Flickinger Co., Inc.*, 175 AD2d 677 (4th Dept 1991) (plaintiff fell to floor while stepping down from truck’s damaged metal running board, about one and one-half feet from floor); see *Garcia v Market Associates*, 123 AD3d 661, 998 NYS2d 193 (2d Dept 2014) (Labor Law § 240[1] inapplicable when concrete flooring on which truck plaintiff occupied collapsed due to weight of truck, causing front end of truck to fall into basement); *Shaw v RPA Associates, LLC*, 75 AD3d 634, 906 NYS2d 574 (2d Dept 2010) (Labor Law § 240(1) inapplicable to accident occurring when truck plaintiff was operating capsized and plaintiff became pinned down in cab of truck); *Finch v Conrail*, 241 AD2d 952, 661 NYS2d 327 (4th Dept 1997) (stepping into concealed hole from back of truck not covered by statute).

The task of unloading a truck is not an elevation-related risk simply because there is a difference in elevation between the ground and the truck bed, *Jacome v State*, 266 AD2d 345, 698 NYS2d 320 (2d Dept 1999). Labor Law § 240(1) does not generally apply when workers are injured by material that falls as it is being loaded onto or unloaded

from a truck, *Cabezas v Consolidated Edison*, 296 AD2d 522, 745 NYS2d 210 (2d Dept 2002); *Bartley v Accu-Glo Elec. Corp.*, 272 AD2d 352, 708 NYS2d 127 (2d Dept 2000); see *Kobetitsch v P.M. Maintenance*, 308 AD2d 510, 764 NYS2d 856 (2d Dept 2003); see also *Shaw v Scepter, Inc.*, 187 AD3d 1662, 133 NYS3d 709 (4th Dept 2020) (Labor Law § 240(1) potentially applicable where man lift plaintiff was maneuvering toppled from back of flatbed truck); *Myiow v New York*, 143 AD3d 433, 39 NYS3d 1 (1st Dept 2016) (Labor Law 240(1) applicable where worker preparing steel beam to be lifted off truck by crane fell 13-14 feet off steel beams on flatbed when piece of wood separating beams broke and worker was not provided with adequate safety device); *Fontaine v Juniper Associates*, 67 AD3d 608, 888 NYS2d 409 (1st Dept 2009) (Labor Law § 240(1) applicable where worker struck by lumber that fell from edge of flatbed truck; lumber had been stacked above worker's head and piled inches from edge of flatbed), even when there is a difference in elevation between the ground and the truck bed. Accidents occurring during the moving of objects down a ramp from the rear of a truck to the pavement, in which the plaintiff is injured by the movement of the object, do not involve the extraordinary elevation risks contemplated by Labor Law § 240(1), *Cabezas v Consolidated Edison*, supra; *Flihan v Cornell University*, 237 AD2d 921, 654 NYS2d 507 (4th Dept 1997). No recovery was allowed where plaintiff was injured when a wooden pole being used as a lever to lower beams from a four-foot high truck bed flew up at him and propelled him backward onto the ground, *Toefer v Long Island R.R.*, 4 NY3d 399, 795 NYS2d 511, 828 NE2d 614 (2005). Plaintiff's contention that a hoist instead of a wooden pole should have been used was rejected because the purpose of the hoist would have been to prevent the beams and not the worker from falling. However, the statute's protection may be available where the object was high enough when it was being loaded or unloaded to pose a significant risk arising from the elevation differential, *Kobetitsch v P.M. Maintenance*, supra. Moreover, in *Giacomazzo v Exxon Corp.*, 185 AD2d 145, 586 NYS2d 112 (1st Dept 1992), the risk of material falling from a hoist tailgate of a truck was held to be within the hazards contemplated by Labor Law § 240(1).

There is an apparent conflict in cases where a device supporting material on a truck fails, causing the load to give way and injure plaintiff. In *Phelan v State*, 238 AD2d 882, 661 NYS2d 109 (4th Dept 1997), claimant was standing in the bed of a truck guiding guardrails onto the truck. After the load was positioned, claimant felt the load shift and move toward him. He either fell or jumped approximately seven feet to the ground, but did not sustain injuries in the fall. Rather, plaintiff was injured when the guardrails fell from the truck bed and struck him, causing severe crushing injuries. The court concluded that "an incident involving objects falling from the bed of a flatbed truck is not the type of special, elevation-related hazard contemplated by Labor Law § 240(1)." In *Webster v Wetzel*, 262 AD2d 1038, 691 NYS2d 848 (4th Dept 1999), the court relied on *Phelan* in concluding that plaintiff, who was injured when the rear gate of a dump truck gave way and released 10 tons of stone on him, was not entitled to recovery under

Labor Law § 240(1). Similarly, in *Malecki v Wal-Mart Stores, Inc.*, 222 AD2d 1010, 635 NYS2d 888 (4th Dept 1995), Labor Law § 240(1) was not applicable where plaintiff was injured when a 2,000-pound bundle of steel slid off a forklift and fell three feet onto plaintiff's foot. There are, however, several cases allowing recovery in similar circumstances. In *Myiow v New York*, 143 AD3d 433, 39 NYS3d 1 (1st Dept 2016), plaintiff was preparing a steel beam to be lifted off of a truck by a crane and then hoisted for installation. This task required plaintiff to stand on the beams in order to wrap a steel rope around a beam for it to be hoisted. Plaintiff and several beams fell 13-14 feet to the ground when a piece of flat wooden skids separating the beams, broke. The court held that Labor Law 240(1) was applicable because the defendants failed to provide plaintiff with an adequate safety device to prevent his fall from steel beams placed on a flatbed trailer. In *Monroe v Bardin*, 249 AD2d 650, 671 NYS2d 191 (3d Dept 1998), plaintiff was standing on top of a bundle of logs on a tractor-trailer, at an elevation of approximately seven and a half to eight feet above the ground, when the bands supporting the logs broke, freeing the logs and causing plaintiff to be propelled off the trailer. The court concluded that the absence of an appropriate safety device such as a forklift, hoist or crane required plaintiff to stand atop the load in connection with the unloading operation, and that the elevation differential between that position and the lower surrounding ground was a proximate cause of plaintiff's injuries. In *Curley v Gateway Communications Inc.*, 250 AD2d 888, 672 NYS2d 523 (3d Dept 1998), plaintiff was on top of a load of 18- to 20-foot pieces of pipe that rested on the bed of a truck and began removing the restraints. The entire load of pipe rolled off the side of the truck and carried plaintiff to the ground, where one or more of the pipes fell on him, causing injury. The court affirmed the award of partial summary judgment to the plaintiff under Labor Law § 240(1) because he was exposed to the risk of falling from atop the flatbed truck to the ground below. Furthermore, the court ruled that "the absence of an appropriate safety device such as a forklift, hoist or crane was a proximate cause of plaintiff's injuries," see also *Cox v LaBarge Bros. Co., Inc.*, 154 AD2d 947, 547 NYS2d 167 (4th Dept 1989) (plaintiff, who fell from top tier of gas pipes he was unloading from flatbed truck, established entitlement to judgment under § 240(1) by presenting uncontroverted proof that no safety devices were provided and that absence of safety devices caused injuries). In a case where recovery under the statute was sustained, plaintiff established that the injury was not simply caused by a fall from the truck bed, but from an elevation above the truck bed and because of defective or missing safety equipment, *Naughton v New York*, 94 AD3d 1, 940 NYS2d 21 (1st Dept 2012); *Intelisano v Sam Greco Const., Inc.*, 68 AD3d 1321, 890 NYS2d 683 (3d Dept 2009) (plaintiff injured when he tried to climb to reach top of 10-foot high bundles resting on flatbed).

Being catapulted forward when the Bobcat on which plaintiff was positioned as a counterweight became unstable is the type of gravity-related event that may give rise to liability under Labor Law § 240(1), *Penaranda v 4933 Realty, LLC*, 118 AD3d 596, 991 NYS2d 30 (1st Dept

2014) (disapproving earlier holding in *Modeste v Mega Contracting, Inc.*, 40 AD3d 255, 835 NYS2d 156 (1st Dept 2007)). The same is true of a similar accident occurring on a forklift, *Potter v Jay E. Potter Lumber Co., Inc.*, 71 AD3d 1565, 900 NYS2d 207 (4th Dept 2010).

G. Accidents Involving Excavations and Trenches

The fact that levels or floors may exist below the work surface does not, by itself, compel the conclusion that the work surface is an elevated one under Labor Law § 240(1), *Wells v British American Development Corp.*, 2 AD3d 1141, 770 NYS2d 161 (3d Dept 2003). Mere proximity to an elevation differential alone is not sufficient to trigger the protection of Labor Law § 240(1), *id* (§ 240(1) not available to worker working in excavation on four- to six-inch ledge when ground underneath him collapsed and he fell into pit that was five to six feet deep). Labor Law § 240(1) also has no application to the cave-in of a trench, *O'Connell v Consolidated Edison Co. of New York, Inc.*, 276 AD2d 608, 714 NYS2d 328 (2d Dept 2000); *Pinheiro v Montrose Imp. Dist.*, 224 AD2d 777, 636 NYS2d 942 (3d Dept 1996); *Becker v Tallamy, Van Kuren, Gertis & Associates*, 221 AD2d 1014, 634 NYS2d 282 (4th Dept 1995); *Rogers v Niagara*, 209 AD2d 1034, 619 NYS2d 472 (4th Dept 1994); *Keleher v First Presbyterian Church of Lockport*, 158 AD2d 946, 551 NYS2d 708 (4th Dept 1990); see *Bellantoni v I.C.E. Const. Corp.*, 271 AD2d 560, 706 NYS2d 146 (2d Dept 2000) (slip on unsteady block at edge of swimming pool); *Gielow v Rosa Coplon Home*, 251 AD2d 970, 674 NYS2d 551 (4th Dept 1998) (§ 240(1) inapplicable to worker injured when she slid down slope into excavation).

Liability under Labor Law § 240(1) is available for excavation-related accidents only if the worker's injuries resulted from work that was required to be performed at the upper level of a height, *Wells v British American Development Corp.*, 2 AD3d 1141, 770 NYS2d 161 (3d Dept 2003). The relevant inquiry is whether the hazard is one directly flowing from the application of the force of gravity to the person, *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 917 NYS2d 130 (1st Dept 2011) (fall from plank used to get into excavation to retrieve tools); *Bell v Bengomo Realty, Inc.*, 36 AD3d 479, 829 NYS2d 42 (1st Dept 2007) (worker required to take measurements at edge of trench when asphalt on which he had to stand gave way); *Bockmier v Niagara Recycling, Inc.*, 265 AD2d 897, 696 NYS2d 605 (4th Dept 1999) (worker stepped or jumped into excavation); *Trillo v New York*, 262 AD2d 121, 691 NYS2d 515 (1st Dept 1999) (collapse of wooden sheeting over trench); *Toohar v Willets Point Contracting Corp.*, 213 AD2d 856, 623 NYS2d 431 (3d Dept 1995) (collapse of shoring timber). One who is required to work on a terraced hillside is entitled to the protection of § 240(1), *DeLong v State Street Associates L.P.*, 211 AD2d 891, 621 NYS2d 172 (3d Dept 1995) (calling into question *Kimball v Fort Ticonderoga Ass'n, Inc.*, 167 AD2d 581, 563 NYS2d 209 (3d Dept 1990)); see *Amo v Little Rapids Corp.*, 268 AD2d 712, 701 NYS2d 517 (3d Dept 2000).

While Labor Law § 240(1) liability may attach for certain

excavation-related accidents, the statute is inapplicable where plaintiff stepped into a hole at ground level, *Wrobel v Pendleton*, 120 AD3d 963, 991 NYS2d 218 (4th Dept 2014); *Duke v Eastman Kodak Co.*, 248 AD2d 990, 669 NYS2d 991 (4th Dept 1998).

H. Accidents Involving Holes in Floor and Manholes.

The First Department has repeatedly held that Labor Law § 240(1) is violated when workers fall through unprotected floor openings or holes, *Alonzo v Safe Harbors of the Hudson Housing Development Fund Co., Inc.*, 104 AD3d 446, 961 NYS2d 91 (1st Dept 2013). Thus, recovery has been allowed to workers injured by falling through openings intended to be used to pass debris from one floor to another, *id.*; stepping from a ladder into a hole exposed by missing floor tile, *McCoo v Lollytogs, Ltd.*, 251 AD2d 195, 675 NYS2d 35 (1st Dept 1998); when a plywood covering of a hole shifted and gave way, *O'Connor v Lincoln Metrocenter Partners, L.P.*, 266 AD2d 60, 698 NYS2d 632 (1st Dept 1999); and when a ceiling painter stepped into a hole in the floor, *Carpio v Tishman Const. Corp. of New York*, 240 AD2d 234, 658 NYS2d 919 (1st Dept 1997); *Serpe v Eyris Productions, Inc.*, 243 AD2d 375, 663 NYS2d 542 (1st Dept 1997).

The Fourth Department also has held that a fall through an opening in the floor entitles the worker to the protections of Labor Law § 240(1), *McKay v Weeden*, 148 AD3d 1718, 50 NYS3d 684 (4th Dept 2017); *Russell v Baker Road Development, Inc.*, 278 AD2d 790, 723 NYS2d 577 (4th Dept 2000); *Skinner v Oneida-Herkimer Solid Waste Management Auth.*, 275 AD2d 890, 713 NYS2d 794 (4th Dept 2000); *Ring v Bristol Builders, Inc.*, 272 AD2d 877, 707 NYS2d 568 (4th Dept 2000).

The Third Department, however, has ruled that § 240 (1) does not encompass the peril of falling through a hole in the work floor where the work itself did not entail elevation-related hazards, *Coleman v Crumb Rubber Mfrs.*, 92 AD3d 1128, 940 NYS2d 170 (3d Dept 2012); *D'Egidio v Frontier Ins. Co.*, 270 AD2d 763, 704 NYS2d 750 (3d Dept 2000).

The Second Department has held that a fall into a hole in the workplace floor that was used to lower materials and equipment to a level below was covered under Labor Law § 240(1), *Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 823 NYS2d 416 (2d Dept 2006); *Klos v New York City Transit Authority*, 240 AD2d 635, 659 NYS2d 97 (2d Dept 1997) (fall through delivery opening in sidewalk while delivering materials to vault below sidewalk); see *Mejia v 69 Mamaroneck Road Corp.*, 203 AD3d 815, 164 NYS3d 207 (2d Dept 2022) (plaintiff fell through uncovered and unguarded opening in roof that was concealed by ice and water shield); *Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 87 NYS3d 189 (2d Dept 2018) (worker's fall through open unfinished stairwell constituted Labor Law § 240(1) violation). However, a 12-inch by 16-inch hole in the work place floor that caused the worker to fall

into a protruding conduit was found to be an ordinary and usual peril of the workplace and not covered by § 240(1), *Alvia v Teman Elec. Contracting, Inc.*, 287 AD2d 421, 731 NYS2d 462 (2d Dept 2001). A worker who fell into an uncovered grease pit inside a building was not entitled to the protections of § 240(1) because the actual work site was outside the building at ground level, *Rossi v Mount Vernon Hosp.*, 265 AD2d 542, 697 NYS2d 164 (2d Dept 1999).

Section 240(1) is not implicated when a worker is injured due to the collapse of a permanent floor upon which he or she is working unless the work presents a foreseeable need for safety devices, *Jones v 414 Equities LLC*, 57 AD3d 65, 866 NYS2d 165 (1st Dept 2008); *Balladares v Southgate Owners Corp.*, 40 AD3d 667, 835 NYS2d 693 (2d Dept 2007); *Bonse v Katrine Apartment Associates*, 28 AD3d 990, 813 NYS2d 578 (3d Dept 2006); *Avelino v 26 Railroad Ave., Inc.*, 252 AD2d 912, 676 NYS2d 342 (3d Dept 1998).

A fall through an uncovered manhole may provide a gravity-related hazard or peril subject to Labor Law § 240(1), *Dos Santos v Consolidated Edison of New York, Inc.*, 104 AD3d 606, 963 NYS2d 12 (1st Dept 2013) (manhole is a structure); *Allen v Buffalo*, 161 AD2d 1134, 555 NYS2d 944 (4th Dept 1990) (workers required to enter manholes that were left uncovered but difficult to see due to recent snowfall); see *Barreto v Metropolitan Transp. Authority*, 25 NY3d 426, 13 NYS3d 305, 34 NE3d 815 (2015) (assuming without deciding that fall through uncovered manhole is gravity-related hazard); see *Piccone v Metropolitan Transit Authority*, 205 AD3d 628, 169 NYS3d 290 (1st Dept 2022) (plaintiff entitled to summary judgment on issue of liability where he fell through manhole he was attempting to cover); but see *Masullo v New York*, 253 AD2d 541, 677 NYS2d 162 (2d Dept 1998).

Falling through a hole in the roof is an elevation-related risk within the meaning of Labor Law § 240(1), *Clark v Fox Meadow Builders Inc.*, 214 AD2d 882, 624 NYS2d 685 (3d Dept 1995); *Orcutt v American Linen Supply Co.*, 212 AD2d 979, 623 NYS2d 457 (4th Dept 1995). Likewise, a partial fall through a hole caused by the shifting boards of a scaffold is covered by Labor Law § 240(1), *Becerra v New York*, 261 AD2d 188, 690 NYS2d 52 (1st Dept 1999).

IV. Other Statutory Terms Used in Labor Law § 240(1)

A. Activities to Which Labor Law § 240(1) Applies

1. In General

Labor Law § 240(1) imposes the duty to protect workers engaged in “the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.” Since “painting,” “altering” and “cleaning” are discrete categories under the statute, cleaning activities that are not conducted at construction sites are not necessarily excluded from the statute’s coverage, *Swiderska v New York University*, 10 NY3d

792, 856 NYS2d 533, 886 NE2d 155 (2008) (cleaning 10-foot high windows in college dormitory); *Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460, 869 NYS2d 172 (2d Dept 2008) (applying liquid with aluminum pigment to roof); see *Dahar v Holland Ladder & Mfg. Co.*, 18 NY3d 521, 941 NYS2d 31, 964 NE2d 402 (2012); *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 839 NYS2d 714, 870 NE2d 1144 (2007).

Whether plaintiff was involved in a protected activity under the statute depends on several factors, including whether plaintiff was employed by a company that was carrying out a construction or alteration project, whether plaintiff's work was ongoing and contemporaneous with that work, whether plaintiff was involved in performing alteration or construction work and whether plaintiff's work was part of a separate phase easily distinguishable from the construction and alteration work, *Prats v Port Authority of New York and New Jersey*, 100 NY2d 878, 768 NYS2d 178, 800 NE2d 351 (2003); see *Sochan v Mueller*, 162 AD3d 1621, 78 NYS3d 608 (4th Dept 2018) (plaintiff engaged in covered activity where he fell during "pre-job survey," since his inspection and subsequent anticipated work were not separate and distinct phases of larger project); *DeJesus v 888 Seventh Ave. LLC*, 114 AD3d 587, 981 NYS2d 60 (1st Dept 2014) (plaintiff operating scaffold for caulkers, who could not have safely discharged duties without him); *Martinez v New York*, 93 NY2d 322, 690 NYS2d 524, 712 NE2d 689 (1999); *Randall v Time Warner Cable, Inc.*, 81 AD3d 1149, 916 NYS2d 656 (3d Dept 2011); *Fitzpatrick v State*, 25 AD3d 755, 809 NYS2d 515 (2d Dept 2006); *Smith v Innovative Dynamics, Inc.*, 24 AD3d 1000, 809 NYS2d 216 (3d Dept 2005); *Campisi v Epos Contracting Corp.*, 299 AD2d 4, 747 NYS2d 218 (1st Dept 2002). Job titles are not dispositive, but plaintiff's status as a member of a team carrying out an enumerated activity and the fact that plaintiff was personally involved in the construction or alteration activities are factors weighing heavily in favor of a protected activity, *Prats v Port Authority of New York and New Jersey*, *supra*; see *DeJesus v 888 Seventh Ave. LLC*, *supra* (plaintiff operating scaffold for caulkers, who could not have safely discharged duties without him). Further, it is not important how the parties generally characterize the injured worker's role but rather what type of work the plaintiff was performing at the time of the injury, *Prats v Port Authority of New York and New Jersey*, *supra*; *Joblon v Solow*, 91 NY2d 457, 672 NYS2d 286, 695 NE2d 237 (1998); see *Panek v Albany*, 99 NY2d 452, 758 NYS2d 267, 788 NE2d 616 (2003); *Preston v APCH, Inc.*, 175 AD3d 850, 107 NYS3d 515 (4th Dept 2019), *aff'd*, 34 NY3d 1136, 119 NYS3d 419, 142 NE3d 102 (2020) (while contract may provide some evidence of type of work being performed, worker not entitled to protection afforded by Labor Law § 240(1) simply because contract repeatedly uses term "construction").

The Court of Appeals has rejected an analysis that considers whether the injured plaintiff's work was an "integral and necessary part of a larger project within the purview of section 240(1)," since that test "improperly enlarges the reach of the statute beyond its clear terms," *Martinez v New York*, 93 NY2d 322, 690 NYS2d 524, 712 NE2d 689 (1999); *Simon v Granite Bldg. 2, LLC*, 114 AD3d 749, 980 NYS2d

489 (2d Dept 2014) (no protected activity where accident occurred when plaintiffs drove into parking garage to begin work as wallpaper hangers in newly constructed office building); *Crossett v Wing Farm, Inc.*, 79 AD3d 1334, 912 NYS2d 751 (3d Dept 2010); *Adair v Bestek Lighting and Staging Corp.*, 298 AD2d 153, 748 NYS2d 362 (1st Dept 2002) (post-construction focusing of lights on stage). That analysis has been used in earlier cases involving Labor Law § 241(6), see *Simms v Elm Ridge Associates*, 259 AD2d 538, 686 NYS2d 469 (2d Dept 1999) (delivery of combination clothes washer-dryer weighing several hundred pounds to be installed was integral part of construction process); *Williams v G.H. Development and Const. Co. Inc.*, 250 AD2d 959, 672 NYS2d 937 (3d Dept 1998) (delivering bath unit to construction site was integral part of construction process).

The statutory duty may attach to an area where material or equipment is being readied for use, see *Shaw v Scepter, Inc.*, 187 AD3d 1662, 133 NYS3d 709 (4th Dept 2020); *Rossi v Mount Vernon Hosp.*, 265 AD2d 542, 697 NYS2d 164 (2d Dept 1999); *Higgins v E.I. du Pont de Nemours Co.*, 186 AD2d 1011, 588 NYS2d 674 (4th Dept 1992) (liability may be imposed where plaintiff is traveling to and from trailer containing tools and provisions essential for performance of work), or to passageways leading to the work site, *Gherardi v New York*, 49 AD3d 280, 852 NYS2d 126 (1st Dept 2008); *Whalen v New York*, 270 AD2d 340, 704 NYS2d 305 (2d Dept 2000); see also *McGarry v CVP 1 LLC*, 55 AD3d 441, 866 NYS2d 76 (1st Dept 2008) (worker injured while in process of retrieving safety equipment needed to start work day); *Shields v General Elec. Co.*, 3 AD3d 715, 771 NYS2d 249 (3d Dept 2004) (fabrication and welding of duct to be installed in building which was under construction constituted “construction”). Liability may arise under the statute even where the ramp, passageway or other instrumentality that led to the accident was not erected for workers’ use, *Gherardi v New York*, *supra*; see *Royland v McGovern & Company, LLC*, 203 AD3d 677, 167 NYS3d 1 (1st Dept 2022) (plaintiff injured while pulling floor buffing machine up ramp constructed by subcontractor responsible for transporting parts unrelated to plaintiff’s work).

Labor Law § 240(1) affords no protection to a plaintiff injured before any activity covered by the statute was underway, *Panek v Albany*, 99 NY2d 452, 758 NYS2d 267, 788 NE2d 616 (2003); *Martinez v New York*, 93 NY2d 322, 690 NYS2d 524, 712 NE2d 689 (1999); *Chiarello v J & D Leasing Co.*, 299 AD2d 183, 749 NYS2d 33 (1st Dept 2002); see *Shaw v Scepter, Inc.*, 187 AD3d 1662, 133 NYS3d 709 (4th Dept 2020) (delivery of equipment not covered activity if delivered to inactive construction site or being stockpiled for future use); *Simon v Granite Bldg. 2, LLC*, 114 AD3d 749, 980 NYS2d 489 (2d Dept 2014) (even assuming wallpaper hanging were covered activity, Labor Law § 240(1) inapplicable to accident occurring when plaintiffs drove into parking garage adjacent to newly constructed building in which plaintiffs were to begin work). Similarly, the statute affords no protection to a worker whose protected activity has ceased and who has undertaken a different, non-protected activity, *Beehner v Eckerd Corp.*, 3 NY3d 751, 788 NYS2d 637, 821

NE2d 941 (2004); *Ferenczi v Port Authority of New York and New Jersey*, 34 AD3d 722, 826 NYS2d 329 (2d Dept 2006); *Fairchild v Servidone Const. Corp.*, 288 AD2d 665, 733 NYS2d 735 (3d Dept 2001) (abrogated on other grounds by, *Misicki v Caradonna*, 12 NY3d 511, 882 NYS2d 375, 909 NE2d 1213 (2009)); see *Kirk v Outokumpu American Brass, Inc.*, 33 AD3d 1136, 823 NYS2d 556 (3d Dept 2006) (plaintiff performing routine maintenance work not covered by Labor Law § 240(1) by virtue of unrelated construction and repair work elsewhere on job site). An issue of fact was created as to the applicability of Labor Law § 240(1) where the worker was injured as he descended a ladder to retrieve his tools after inspecting a rooftop heating unit in response to an emergency call to investigate and fix a malfunctioning heating unit, *Pakenham v Westmere Realty, LLC*, 58 AD3d 986, 871 NYS2d 456 (3d Dept 2009).

The Second Department has held that an injury occurring during a worker's lunch break is not within the coverage of Labor Law § 240(1), *Keenan v Just Kids Learning Center*, 297 AD2d 708, 747 NYS2d 393 (2d Dept 2002); but see *Brown v Brause Plaza, LLC*, 19 AD3d 626, 798 NYS2d 501 (2d Dept 2005) (recognizing Labor Law § 241(6) cause of action for a lunch-break accident without discussing issue). In contrast, in *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 802 NYS2d 41 (1st Dept 2005), the First Department held that Labor Law § 240(1) was available to a worker who fell from a sidewalk bridge after the parapet wall collapsed during his lunch break. In so ruling, the First Department stressed that the sidewalk bridge was used as a staging area and for storing equipment and mixing cement, see also *Kourors v State*, 288 AD2d 566, 732 NYS2d 277 (3d Dept 2001) (recognizing Labor Law § 240(1) cause of action for injuries occurring when claimant was leaving work area for lunch break).

2. *Demolition*

Demolition is defined in 12 NYCRR § 23-1.4(b)(16) as “[t]he work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment.” Based on this definition, the court held in *Quinlan v New York*, 293 AD2d 262, 739 NYS2d 706 (1st Dept 2002), that neither the creation of a hole in a wall nor an attempt to repair a hole constitutes “demolition.” Similarly, in *Baranello v Rudin Management Co.*, 13 AD3d 245, 785 NYS2d 918 (1st Dept 2004), the court held that removal of portion of wall is not “demolition” as defined in § 23-1.4(b)(16). The mere act of dismantling an automobile or boat, unrelated to any other project, is not “demolition” within the meaning of Labor Law § 241(6), *Coyago v Mapa Properties, Inc.*, 73 AD3d 664, 901 NYS2d 616 (1st Dept 2010). The disassembly and removal of boards used to form the walls of an indoor soccer field, each of which measured between 6 and 12 feet long and weighed more than 100 pounds, constituted demolition, *Hensel v Aviator FSC, Inc.*, 198 AD3d 884, 156 NYS3d 98 (2d Dept 2021). The dismantling of free-standing shelves composed of component pieces attached in a definite manner constitutes “demolition,” *Kharie v South Shore Record Management, Inc.*, 118 AD3d 955,

988 NYS2d 654 (2d Dept 2014). An accident that occurred while plaintiff was loading boxes onto a truck was a covered activity, as the work was ancillary to demolition of a concert stage and plaintiff was a member of the demolition team, *Finocchi v Live Nation Inc.*, 204 AD3d 1432, 167 NYS3d 280 (4th Dept 2022).

The removal of air handlers that were affixed with bolts to an I-beam on the second floor ceiling of a tower that was to be demolished constitutes “alteration” but does not constitute “demolition” where it was performed before the commencement of any work by the demolition contractor, *Panek v Albany*, 99 NY2d 452, 758 NYS2d 267, 788 NE2d 616 (2003). Because the *Panek* Court did not consider whether plaintiff’s work was “incidental or necessary” to the impending demolition, its rationale raises doubt concerning the continuing validity of cases that utilize such an analysis, see *Rosen v General Elec. Co.*, 204 AD2d 978, 614 NYS2d 951 (4th Dept 1994) (salvaging and removing materials and equipment at a plant scheduled for demolition not “demolition” work because not incidental or necessary to demolition); *Meehan v Mobil Oil Corp.*, 184 AD2d 1021, 584 NYS2d 680 (4th Dept 1992) (removal of tire rack from wall of gas station not incidental or necessary to, or integral part of, scheduled demolition work).

3. *Alteration*

Where plaintiff is engaged in work constituting a significant physical change to the configuration or composition of a building, plaintiff is “altering” it within the meaning of Labor Law § 240(1), *Saint v Syracuse Supply Co.*, 25 NY3d 117, 8 NYS3d 229, 30 NE3d 872 (2015); *Sanatass v Consolidated Investing Co., Inc.*, 10 NY3d 333, 858 NYS2d 67, 887 NE2d 1125 (2008); *Panek v Albany*, 99 NY2d 452, 758 NYS2d 267, 788 NE2d 616 (2003); *Joblon v Solow*, 91 NY2d 457, 672 NYS2d 286, 695 NE2d 237 (1998); *Aguilar v Henry Marine Service, Inc.*, 12 AD3d 542, 785 NYS2d 95 (2d Dept 2004); *Smith v Pergament Enterprises of S.I.*, 271 AD2d 870, 706 NYS2d 505 (3d Dept 2000). In determining whether a particular project constitutes “alteration,” the court must examine the totality of the work, *Saint v Syracuse Supply Co.*, *supra*; *Maes v 408 W. 39 LLC*, 24 AD3d 298, 808 NYS2d 613 (1st Dept 2005); *Aguilar v Henry Marine Service, Inc.*, 12 AD3d 542, 785 NYS2d 95 (2d Dept 2004); see *Belding v Verizon New York, Inc.*, 14 NY3d 751, 898 NYS2d 539, 925 NE2d 577 (2010) (applying bomb blast film to lobby windows significantly alters structure by changing how windows react to explosions, impacts and elements). The change to the building or structure the work is meant to effect need not be of a permanent nature to constitute an “alteration,” *Saint v Syracuse Supply Co.*, *supra*; *Mananghaya v Bronx-Lebanon Hospital Center*, 165 AD3d 117, 83 NYS3d 444 (1st Dept 2018).

Working on a building is insufficient by itself for the imposition of liability under Labor Law § 240(1), *Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430, 843 NYS2d 237 (1st Dept 2007), and not every change in a structure is an “alteration,” *Joblon v Solow*, 91 NY2d 457, 672 NYS2d

286, 695 NE2d 237 (1998). Thus, implementing a change to a structure that is inherent to the structure itself cannot be deemed an alteration, *Len v State*, 74 AD3d 1597, 906 NYS2d 622 (3d Dept 2010) (moving movable parts of dam not alteration of dam). Although work that alters the structural integrity of a building may qualify as an alteration for Labor Law purposes, a change in structural integrity is not necessarily required for the work to qualify as an alteration, *Mananghaya v Bronx-Lebanon Hospital Center*, 165 AD3d 117, 83 NYS3d 444 (1st Dept 2018).

Generally, simple, routine activities such as maintenance and decorative modifications are not within the activities protected by Labor Law § 240(1), *Panek v Albany*, 99 NY2d 452, 758 NYS2d 267, 788 NE2d 616 (2003); *Joblon v Solow*, 91 NY2d 457, 672 NYS2d 286, 695 NE2d 237 (1998); see *Wormuth v Freeman Interiors, Ltd.*, 34 AD3d 1329, 824 NYS2d 855 (4th Dept 2006) (installing draperies); see *Saint v Syracuse Supply Co.*, 25 NY3d 117, 8 NYS3d 229, 30 NE3d 872 (2015). Wallpapering that is not incidental to any other enumerated activity in Labor Law § 240(1) does not constitute either “painting” or “alteration,” *Schroeder v Kalenak Painting & Paperhanging, Inc.*, 27 AD3d 1097, 811 NYS2d 240 (4th Dept 2006), *aff’d*, 7 NY3d 797, 821 NYS2d 804, 854 NE2d 1268 (2006); *La Fontaine v Albany Management Inc.*, 257 AD2d 319, 691 NYS2d 640 (3d Dept 1999); see *Simon v Granite Bldg. 2, LLC*, 114 AD3d 749, 980 NYS2d 489 (2d Dept 2014) (wallpapering not enumerated activity where no proof that activity part of larger construction project). In *La Fontaine v Albany Management Inc.*, 257 AD2d 319, 691 NYS2d 640 (3d Dept 1999), the Third Department left open the question whether wallpapering activities that are incidental to an activity listed in Labor Law § 240(1) may be covered in some circumstances. The Second Department has held that scraping and painting a wall to prepare it for the application of wallpaper is an activity covered under Labor Law § 240(1) even if those activities are not incidental to other activities listed in the statute, *Loreto v 376 St. Johns Condominium, Inc.*, 15 AD3d 454, 790 NYS2d 190 (2d Dept 2005). Changing a light bulb is not within the scope of Labor Law § 240(1), *Joblon v Solow*, supra; *Smith v Shell Oil Co.*, 85 NY2d 1000, 630 NYS2d 962, 654 NE2d 1210 (1995); *Lioce v Theatre Row Studios*, 7 AD3d 493, 776 NYS2d 89 (2d Dept 2004) (installing lights for theatrical production). Changing photo cells, which are inexpensive items with limited useful life spans and require regular replacements, also ordinarily constitutes routine maintenance, *Fitzpatrick v State*, 25 AD3d 755, 809 NYS2d 515 (2d Dept 2006). However, plaintiff was engaged in a covered activity when he engaged in replacing photo cells as part of replacing a light fixture on a lighting pole in connection with a project to restore lighting to a parking lot, *id.*

By contrast, bringing an electrical power supply capable of supporting a clock into a room, which requires both extending the wiring within a utility room and chiseling a hole through a concrete wall to reach the clock, is more than a simple, routine activity and is significant enough to fall within the meaning of “altering” under Labor Law § 240(1), *Joblon v Solow*, 91 NY2d 457, 672 NYS2d 286, 695 NE2d 237 (1998); see *Saint*

v Syracuse Supply Co., 25 NY3d 117, 8 NYS3d 229, 30 NE3d 872 (2015) (attaching custom-made wooden extensions to billboard frame, which changed the dimensions of the frame, constituted alteration); Belding v Verizon New York, Inc., 14 NY3d 751, 898 NYS2d 539, 925 NE2d 577 (2010) (applying bomb blast film to lobby windows significantly alters structure by changing how windows react to explosions, impacts and elements); Sanatass v Consolidated Investing Co., Inc., 10 NY3d 333, 858 NYS2d 67, 887 NE2d 1125 (2008) (“alteration” includes drilling holes in and affixing metal rods to ceiling and installing air condition ducts in preparation for installation of large air conditioning unit); Nucci v Suffolk, 204 AD3d 817, 166 NYS3d 672 (2d Dept 2022) (boarding up windows of vacant house); Kharie v South Shore Record Management, Inc., 118 AD3d 955, 988 NYS2d 654 (2d Dept 2014) (dismantling free-standing shelves composed of component pieces attached in definite manner); Randall v Time Warner Cable, Inc., 81 AD3d 1149, 916 NYS2d 656 (3d Dept 2011) (replacing cable shortly after performing other tasks relating to upgrading customer’s cable television and Internet service as part of alteration of customer’s house); Ferris v Benbow Chemical Packaging, Inc., 74 AD3d 1831, 905 NYS2d 394 (4th Dept 2010) (installing pipe system for cleaning storage tanks); Wade v Atlantic Cooling Tower Services, Inc., 56 AD3d 547, 867 NYS2d 489 (2d Dept 2008) (disassembling pipes of defunct sprinkler system attached to rooftop cooling tower); Smith v Innovative Dynamics, Inc., 24 AD3d 1000, 809 NYS2d 216 (3d Dept 2005) (installation of solar-powered infrared camera system on utility pole constitutes alteration of structure); Samuel v Simone Dev. Co., 13 AD3d 112, 786 NYS2d 163 (1st Dept 2004) (installing carpet to finished walls as soundproofing for recording studio rather than for cosmetic purposes constitutes “alteration”); Velasco v Green-Wood Cemetery, 8 AD3d 88, 779 NYS2d 459 (1st Dept 2004) (replacing loose and broken slate roof tiles, cleaning gutters, installing new flashing cement, installing new copper flashing and repairing a roof leak constitute “alteration” rather than “routine maintenance”); Sarigul v New York Telephone Co., 4 AD3d 168, 772 NYS2d 653 (1st Dept 2004) (stripping insulation from pre-existing cable wire attached to telephone pole constituted “altering” of structure); Lang v Charles Mancuso & Son, Inc., 298 AD2d 960, 747 NYS2d 663 (4th Dept 2002) (replacing 50 to 75 feet of beverage supply lines constituted “altering” or “repairing” of structure); Tassone v Mid-Valley Oil Co. Inc., 291 AD2d 623, 738 NYS2d 103 (3d Dept 2002) (mounting of satellite dish support structure on roof of building and routing of wire from unit’s radio frequency head through interior of building to connection points inside building involved “altering” of structure); Smith v Pergament Enterprises of S.I., 271 AD2d 870, 706 NYS2d 505 (3d Dept 2000) (running computer cables above ceiling, through interior of walls and through holes cut in walls to install computer equipment involved significant physical change to building); Bedassee v 3500 Snyder Ave. Owners, Corp., 266 AD2d 250, 698 NYS2d 289 (2d Dept 1999) (installing cable wire at building is “alteration”); but see Rhodes-Evans v 111 Chelsea LLC, 44 AD3d 430, 843 NYS2d 237 (1st Dept 2007) (locating fiber and splicing it to an existing fiber optic cable at cable box for one building tenant not “alteration”). Likewise, where plaintiff was standing

on a ladder and running a computer and telephone cable through a ceiling from an existing computer room in an office to newly leased space that would be used as a telecommunications center, plaintiff was engaged in “altering” a building or structure, *Weininger v Hagedorn & Co.*, 91 NY2d 958, 672 NYS2d 840, 695 NE2d 709 (1998); see *Emery v Steinway, Inc.*, 178 AD3d 613, 116 NYS3d 227 (1st Dept 2019) (in action arising under Labor Law § 241(6), issue of fact as to whether plaintiff was engaged in “alteration” where he was injured while moving single ceiling tile out of way to snake cable through fully installed drop ceiling).

In determining whether plaintiff’s work constituted the “erection” or “alteration” of a structure, courts should not “isolate the moment of injury and ignore the general context of the work,” *Saint v Syracuse Supply Co.*, 25 NY3d 117, 8 NYS3d 229, 30 NE3d 872 (2015); *Prats v Port Authority of New York and New Jersey*, 100 NY2d 878, 768 NYS2d 178, 800 NE2d 351 (2003); see *Belding v Verizon New York, Inc.*, 14 NY3d 751, 898 NYS2d 539, 925 NE2d 577 (2010) (applying bomb blast film to lobby windows significantly alters structure by changing how windows react to explosions, impacts and elements); *Rooney v D.P. Consulting Corp.*, 204 AD3d 428, 166 NYS3d 155 (1st Dept 2022) (work performed on elevator, which was intended to secure premises in preparation for renovation project, constituted altering); *Mananghaya v Bronx-Lebanon Hospital Center*, 165 AD3d 117, 83 NYS3d 444 (1st Dept 2018) (worker killed during disconnection of portable chilling unit was engaged in covered activity, since chiller significantly altered crucial building-wide system by changing way building reacted to elements); *Randall v Time Warner Cable, Inc.*, 81 AD3d 1149, 916 NYS2d 656 (3d Dept 2011) (replacing cable shortly after performing other tasks relating to upgrading customer’s cable television and Internet service as part of alteration of customer’s house); *Smith v Innovative Dynamics, Inc.*, 24 AD3d 1000, 809 NYS2d 216 (3d Dept 2005) (plaintiff engaged in affixing solar-powered infrared camera system to utility pole covered by Labor Law § 240(1) where project not complete until attachments in place); *Makaj v Metropolitan Transp. Authority*, 18 AD3d 625, 796 NYS2d 621 (2d Dept 2005) (preparatory work).

The removal of an old video screen in an auditorium prior to the installation of a new one constitutes the alteration of a structure, *Morales v New York*, 245 AD2d 431, 666 NYS2d 200 (2d Dept 1997); see *Guzman v Gumley-Haft, Inc.*, 274 AD2d 555, 712 NYS2d 45 (2d Dept 2000) (removal and reinstallation of security camera system constitutes repair or alteration of building). The replacement of large windows because their thermal seals had failed constitutes “altering” the building, *Randall v Time Warner Cable, Inc.*, 81 AD3d 1149, 916 NYS2d 656 (3d Dept 2011) (replacing cable shortly after performing other tasks relating to upgrading customer’s cable television and Internet service as part of alteration of customer’s house); *Enright v Buffalo Technology Building B Partnership*, 278 AD2d 927, 718 NYS2d 764 (4th Dept 2000).

It has been held that “altering” includes moving plywood to clear

work site where curb was under construction, *Penaranda v 4933 Realty, LLC*, 118 AD3d 596, 991 NYS2d 30 (1st Dept 2014), and the installation of a temporary “for sale” sign on the elevated part of a brick commercial building, *Buckley v Radovich*, 211 AD2d 652, 621 NYS2d 638 (2d Dept 1995); see *Steves v Campus Industries*, 288 AD2d 914, 732 NYS2d 821 (4th Dept 2001). Altering includes attaching custom-made wooden extensions to a billboard frame, which changed the dimensions of the frame, *Saint v Syracuse Supply Co.*, 25 NY3d 117, 8 NYS3d 229, 30 NE3d 872 (2015). However, “altering” does not include applying a new advertisement to the face of a billboard atop a building, since the changes were not structural and were more akin to cosmetic maintenance or decorative modification, *Munoz v DJZ Realty, LLC.*, 5 NY3d 747, 800 NYS2d 866, 834 NE2d 776 (2005). That principle applies to the removal of a temporary sign, even where the sign is bolted onto the exterior wall of a building, *Anderson v Schwartz*, 24 AD3d 234, 808 NYS2d 26 (1st Dept 2005); see also *Maes v 408 W. 39 LLC*, 24 AD3d 298, 808 NYS2d 613 (1st Dept 2005) (loosening nuts securing banner to building not “alteration”). The installation of siding, *Custer v Jordan*, 107 AD3d 1555, 968 NYS2d 754 (4th Dept 2013), and storm windows, *Bundy v Grant*, 29 AD2d 1017, 289 NYS2d 428 (3d Dept 1968), constitutes “repairing” or “altering” a building. However, stapling sheet plastic over windows, *Czaska v Lenn Lease Ltd.*, 251 AD2d 965, 674 NYS2d 559 (4th Dept 1998), and installing or replacing window screens does not, *Rogala v Van Bourgondien*, 263 AD2d 535, 693 NYS2d 204 (2d Dept 1999). Railroad track replacement work constitutes “repair” or “alteration” work, *Wallin v New York*, 232 AD2d 548, 649 NYS2d 159 (2d Dept 1996).

The removal of air handlers that were affixed with bolts to an I-beam on the second floor ceiling of a tower that was to be demolished constitutes “alteration,” since it requires making a significant physical change to the configuration or composition of the building, *Panek v Albany*, 99 NY2d 452, 758 NYS2d 267, 788 NE2d 616 (2003); see also *Lozo v Crown Zellerbach Corp.*, 142 AD2d 949, 530 NYS2d 373 (4th Dept 1988) (§ 241(6) case); but see *Silva v New York Telephone Co.*, 267 AD2d 634, 699 NYS2d 621 (3d Dept 1999). The fact that a demolition of the structure was impending does not foreclose a determination that plaintiff was performing duties in the nature of an alteration, see *Panek v Albany*, *supra*.

Placing a piece of tape over an electric eye to disable it does not constitute “repairing” or “altering” of a “building or structure,” *Howe v 1660 Grand Island Blvd., Inc.*, 209 AD2d 934, 619 NYS2d 227 (4th Dept 1994). Similarly, engaging exclusively in maintenance functions such as seeing to the heating and cooling of a building, taking utility meter readings, assembling tools for the maintenance and operation of the building and arranging a stockroom does not constitute “repairing” or “altering” of a “building or structure,” *Agli v Turner Const. Co., Inc.*, 246 AD2d 16, 676 NYS2d 54 (1st Dept 1998). A person decorating a room for a party by hanging streamers is not engaged in “alteration” of a building or structure, *Brice v Lafayette Country Club, Inc.*, 177 AD2d 957, 578 NYS2d 311 (4th Dept 1991).

4. *Construction and Erection*

Numerous cases hold that “construction” includes certain preparatory or ancillary work that was “necessary and incidental” to or an “integral part of” a construction project, *Johnson v Rapisarda*, 262 AD2d 365, 691 NYS2d 130 (2d Dept 1999) (removal of surplus roofing material in connection with completion of roof repair); *Curley v Gateway Communications Inc.*, 250 AD2d 888, 672 NYS2d 523 (3d Dept 1998) (unloading pipe from flatbed truck at construction site); *Martin v Back O’Beyond, Inc.*, 198 AD2d 479, 604 NYS2d 205 (2d Dept 1993) (measuring of windows); *Adams v Fred Alvaro Const. Corp., Inc.*, 161 AD2d 1014, 557 NYS2d 584 (3d Dept 1990) (unloading building supplies). However, in *Martinez v New York*, 93 NY2d 322, 690 NYS2d 524, 712 NE2d 689 (1999), the Court of Appeals specifically rejected an analysis that considers whether the injured plaintiff’s work was an “integral and necessary part of a larger project within the purview of section 240(1).” The holdings and rationales in all of the prior cases, including those discussed *infra*, must be considered in light of *Martinez*.

In determining whether plaintiff’s work constituted the “erection” or “alteration” of a structure, courts should not “isolate the moment of injury and ignore the general context of the work,” *Prats v Port Authority of New York and New Jersey*, 100 NY2d 878, 768 NYS2d 178, 800 NE2d 351 (2003); see *Smith v Innovative Dynamics, Inc.*, 24 AD3d 1000, 809 NYS2d 216 (3d Dept 2005) (plaintiff engaged in affixing solar-powered infrared camera system to utility pole covered by Labor Law § 240(1) where project not complete until attachments in place); *Makaj v Metropolitan Transp. Authority*, 18 AD3d 625, 796 NYS2d 621 (2d Dept 2005) (preparatory work).

“Construction” includes hydroseeding of a 33-home construction project, *Gale v Running Brook Builders, Inc.*, 261 AD2d 436, 690 NYS2d 89 (2d Dept 1999), and inspecting the steel and bolts on a construction site, *Iannelli v Olympia & York Battery Park Co.*, 190 AD2d 775, 593 NYS2d 553 (2d Dept 1993); see also *Covey v Iroquois Gas Transmission System, L.P.*, 89 NY2d 952, 655 NYS2d 854, 678 NE2d 466 (1997) (replacing hydraulic fluid in backhoe adjacent to pipeline trench); *Cox v LaBarge Bros. Co., Inc.*, 154 AD2d 947, 547 NYS2d 167 (4th Dept 1989) (unloading and placing lengths of pipe along construction site for installation in a pipeline).

Plaintiff’s act of cleaning a tank that was used to produce and store material needed for the construction of a pumping station is also within the statute because the work performed by plaintiff was part of the construction of the pumping station, a structure as defined by Labor Law § 240(1), *Cabri v ICOS Corp. of America*, 240 AD2d 456, 658 NYS2d 646 (2d Dept 1997); see *Bish v Odell Farms Partnership*, 119 AD3d 1337, 989 NYS2d 719 (4th Dept 2014) (routine cleaning of cement truck following delivery of cement to job site not covered activity under Labor Law § 240[1]). However, “construction” does not include conduct within a normal product manufacturing process in which plaintiff was engaged,

Jock v Fien, 80 NY2d 965, 590 NYS2d 878, 605 NE2d 365 (1992); Preston v APCH, Inc., 175 AD3d 850, 107 NYS3d 515 (4th Dept 2019), *aff'd*, 34 NY3d 1136, 119 NYS3d 419, 142 NE3d 102 (2020); see Flores v ERC Holding LLC, 87 AD3d 419, 928 NYS2d 7 (1st Dept 2011); Vernieri v Empire Realty Co., 219 AD2d 593, 631 NYS2d 378 (2d Dept 1995); Warsaw v Eastern Rock Products, Inc., 193 AD2d 1115, 599 NYS2d 207 (4th Dept 1993), or the removal of bolts on a crane and the replacement of a part, DiBenedetto v Port Authority of New York and New Jersey, 293 AD2d 399, 742 NYS2d 207 (1st Dept 2002). A plaintiff was not engaged in construction where he was welding together a five-ton rotor compartment, which was to be delivered to an out-of-state customer, even though the relevant contract repeatedly used the word “construction” and the plaintiff’s employer contracted to provide technical assistance at the installation site, Preston v APCH, Inc., *supra*.

The construction or “erection” category of work referred to in Labor Law § 240(1) includes compiling a “punch list,” Griffin v New York City Transit Authority, 16 AD3d 202, 791 NYS2d 98 (1st Dept 2005); Greenfield v Macherich Queens Ltd. Partnership, 3 AD3d 429, 771 NYS2d 498 (1st Dept 2004), and performing HVAC testing, Fernandes v Equitable Life Assurance Society of U.S., 4 AD3d 214, 774 NYS2d 4 (1st Dept 2004). However, “erection” does not include attaching an optional part to a pre-assembled “structure,” Hodges v Boland’s Excavating and Topsoil, Inc., 24 AD3d 1089, 807 NYS2d 421 (3d Dept 2005) (affixing chute to pre-assembled power screen).

a. Tree Removal and Trimming

While a tree is neither a building nor a structure, Crossett v Wing Farm, Inc., 79 AD3d 1334, 912 NYS2d 751 (3d Dept 2010); Lysiak v Murray Realty Co., 227 AD2d 746, 642 NYS2d 350 (3d Dept 1996); Serviss v Long Island Lighting Co., 226 AD2d 442, 640 NYS2d 590 (2d Dept 1996), Labor Law § 240(1) applies nevertheless to a tree removal operation performed as part of erecting, demolishing, or renovating a building or structure, Lombardi v Stout, 80 NY2d 290, 590 NYS2d 55, 604 NE2d 117 (1992); Tamarez De Jesus v Metro-North Commuter Railroad, 159 AD3d 951, 73 NYS3d 581 (2d Dept 2018); Palmer v Butts, 256 AD2d 1178, 684 NYS2d 924 (4th Dept 1998); McGregor v Bravo, 251 AD2d 1002, 674 NYS2d 240 (4th Dept 1998), abrogating Mamo v Rochester Gas and Elec. Corp., 209 AD2d 948, 619 NYS2d 426 (4th Dept 1994); Mosher v St. Joseph’s Villa, 184 AD2d 1000, 584 NYS2d 678 (4th Dept 1992). Thus, tree removal performed to facilitate an enumerated activity falls within the ambit of the statute, Krencik v Oakgrove Construction, Inc., 186 AD3d 1006, 129 NYS3d 567 (4th Dept 2020) (issue of fact as to whether tree removal was ancillary to ongoing culvert construction work).

Labor Law § 240(1) does not apply to a tree trimming operation that was performed as part of routine maintenance, Gavin v Long Island Lighting Co., 255 AD2d 551, 681 NYS2d 87 (2d Dept 1998); Serviss v Long Island Lighting Co., 226 AD2d 442, 640 NYS2d 590 (2d Dept 1996) (pruning branches of tree to prevent interference with power lines

constitutes routine maintenance in a non-construction context); *Havens v Witte*, 214 AD2d 958, 626 NYS2d 930 (4th Dept 1995). Similarly, although construction work was taking place on the site, the planting of trees around the back and sides of a supermarket does not constitute “construction” within the meaning of Labor Law § 240(1), *Rogers v C/S Associates Ltd. Partnership I*, by TCG-I Associates Inc., 273 AD2d 523, 708 NYS2d 524 (3d Dept 2000); see *Olarte v Morgan*, 148 AD3d 918, 49 NYS3d 532 (2d Dept 2017) (tree branch cutting not part of larger renovation project); *Crossett v Wing Farm, Inc.*, 79 AD3d 1334, 912 NYS2d 751 (3d Dept 2010) (tree removal not part of construction; tree removal was “easily distinguishable” from construction occurring on adjacent property). Neither does tree removal work that was completed a few months before house construction work began, where the tree removal was “a separate phase easily distinguishable from other parts of the construction project,” *Rivera v Santos*, 35 AD3d 700, 827 NYS2d 222 (2d Dept 2006).

Labor Law § 240(1) does not apply to a tree removal operation undertaken to protect an apartment building on the premises from any harm if the tree falls, *McGregor v Bravo*, 251 AD2d 1002, 674 NYS2d 240 (4th Dept 1998); see *Gavin v Long Island Lighting Co.*, 255 AD2d 551, 681 NYS2d 87 (2d Dept 1998); *Callea v Niagara Mohawk Power Corp.*, 254 AD2d 696, 677 NYS2d 862 (4th Dept 1998) (removing tree limbs that interfered with power line not protected activity under Labor Law § 240(1)); but see *Tamarez De Jesus v Metro-North Commuter Railroad*, 159 AD3d 951, 73 NYS3d 581 (2d Dept 2018) (plaintiff was engaged in enumerated activity where injured while sawing downed tree as first step in effectuating repairs to catenary wires). In *Young v Barden & Robeson Corp.*, 247 AD2d 755, 669 NYS2d 389 (3d Dept 1998), the court held that Labor Law § 240(1) did not apply where plaintiff was struck by a tree that was being removed as an integral part of the site preparation because the tree had neither been hoisted nor secured at a level above the work site prior to its unexpected fall and plaintiff was working at ground level at the time of the accident.

b. Work on Air Conditioning Units

The removal of air handlers that were affixed with bolts to an I-beam on the second floor ceiling of a tower that was to be demolished constitutes “alteration,” since it requires making a significant physical change to the configuration or composition of the building, *Panek v Albany*, 99 NY2d 452, 758 NYS2d 267, 788 NE2d 616 (2003). Installing an air conditioner on the roof of a building falls within the protections of Labor Law § 240, *Perez v New York City Indus. Development Agency*, 223 AD2d 628, 636 NYS2d 851 (2d Dept 1996), as does the repair of a nonfunctioning air conditioner unit built into the wall of a building, *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 (2d Dept 1997); see *Franco v Jemal*, 280 AD2d 409, 721 NYS2d 51 (1st Dept 2001), modified on reargument, (May 22, 2001) (plaintiff fell from ladder while ascending roof to repair rooftop central air conditioning unit); *Fuller v NC3, Inc.*, 256 AD2d 1126, 684 NYS2d 723 (4th Dept 1998).

(plaintiff fell while ascending ladder to roof to repair malfunctioning air conditioner).

However, changing an electrical switch on a rooftop air conditioner so that the unit can be turned off for the season is not “construction” or “renovation” under the statute, *Rowlett v Great South Bay Associates*, 237 AD2d 183, 655 NYS2d 16 (1st Dept 1997). Similarly, routine maintenance on an air conditioning system does not constitute construction or demolition of a building and does not come within the ambit of the statute, *Raposo v WAM Great Neck Ass’n II, L.P.*, 251 AD2d 392, 674 NYS2d 112 (2d Dept 1998), nor does the replacement of parts in an air conditioner that wear out periodically, *Esposito v New York City Indus. Development Agency*, 1 NY3d 526, 770 NYS2d 682, 802 NE2d 1080 (2003); *Anderson v Olympia & York Tower B Co.*, 14 AD3d 520, 789 NYS2d 190 (2d Dept 2005); *Jehle v Adams Hotel Associates*, 264 AD2d 354, 695 NYS2d 22 (1st Dept 1999); see *Cantalupo v Arco Plumbing & Heating, Inc.*, 194 AD3d 686, 148 NYS3d 224 (2d Dept 2021) (issue of fact as to whether replacement of 500-pound division plate on air conditioning unit was repair or routine maintenance).

5. *Renovation*

“Renovation” that includes demolition and construction within an existing building comes within the scope of the statute, *Keefner v Albany*, 77 AD2d 747, 430 NYS2d 877 (3d Dept 1980). However, temporary storage of a door in storeroom twenty feet from area being renovated is not within the immediate renovation site and, therefore, is not “renovation” within statute, *DeTommaso v M.J. Fitzgerald Const. Co.*, 138 AD2d 341, 525 NYS2d 632 (2d Dept 1988).

6. *Cleaning*

“Cleaning” as that term is used in Labor Law § 240 is not limited to cleaning incidental to construction, demolition or repair work, *Soto v J. Crew Inc.*, 21 NY3d 562, 976 NYS2d 421, 998 NE2d 1045 (2013); *Dahar v Holland Ladder & Mfg. Co.*, 18 NY3d 521, 941 NYS2d 31, 964 NE2d 402 (2012); *Swiderska v New York University*, 10 NY3d 792, 856 NYS2d 533, 886 NE2d 155 (2008); *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 839 NYS2d 714, 870 NE2d 1144 (2007); *Wicks v Trigen-Syracuse Energy Corp.*, 64 AD3d 75, 877 NYS2d 791 (4th Dept 2009); see *Buendia v New York Nat. Bank*, 223 AD2d 456, 637 NYS2d 70 (1st Dept 1996). Thus, commercial window cleaning involving an elevation-related risk is within the ambit of Labor Law § 240(1), while routine household window cleaning is not, *Soto v J. Crew Inc.*, 21 NY3d 562, 976 NYS2d 421, 998 NE2d 1045 (2013); *Dahar v Holland Ladder & Mfg. Co.*, 18 NY3d 521, 941 NYS2d 31, 964 NE2d 402 (2012), see *Swiderska v New York University*, 10 NY3d 792, 856 NYS2d 533, 886 NE2d 155 (2008) (commercial window cleaning); *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 839 NYS2d 714, 870 NE2d 1144 (2007) (commercial window cleaning); *Bauer v Female Academy of Sacred Heart*, 97 NY2d 445, 741 NYS2d 491, 767 NE2d 1136 (2002) (commercial cleaning of exterior

windows); *Brown v Christopher Street Owners Corp.*, 87 NY2d 938, 641 NYS2d 221, 663 NE2d 1251 (1996) (routine household window washing); *Connors v Boorstein*, 4 NY2d 172, 173 NYS2d 288, 149 NE2d 721 (1958) (routine household window washing); *Padovano v Teddy's Realty Associates, Ltd.*, 56 AD3d 444, 866 NYS2d 743 (2d Dept 2008) (routine household window washing). However, the term "cleaning" is not limited to commercial window washing, *Soto v J. Crew Inc.*, *supra*. In ascertaining whether an activity outside the sphere of commercial window washing is a covered "cleaning" activity, the courts should apply the following factors: (1) whether the activity is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as a part of the ordinary maintenance and care of commercial premises; (2) whether specialized equipment or expertise or an unusual deployment of labor is required; (3) whether the activity generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) whether the activity is unrelated to any ongoing construction, renovation, painting, alteration or repair project, *Soto v J. Crew Inc.*, *supra*; *Fuhlbruck v 3170 Delaware, LLC*, 196 AD3d 1090, 151 NYS3d 306 (4th Dept 2021); see *Ixcoy v Pavlou*, 189 AD3d 542, 133 NYS3d 819 (1st Dept 2020) (applicable to cleaning exterior exhaust fan on angled roof without safety device); *Dorador v Trump Palace Condominium*, 126 AD3d 603, 6 NYS3d 236 (1st Dept 2015) (under *Soto* factors, application of masking tape to windows in preparation for stripping and relacquering of brass on facade of large building constituted cleaning; task not ordinary maintenance and plaintiff's work on scaffold six to seven feet above sidewalk involved significant elevation risk). The first factor does not involve a fact-specific assessment of the plaintiff's regular tasks; rather, the question is whether the type of work would be expected to recur with relative frequency as part of the ordinary maintenance and care of a commercial property, *Healy v EST Downtown, LLC*, 38 NY3d 998, 168 NYS3d 5, 188 NE3d 131 (2022).

The issue of whether an activity constitutes cleaning within the meaning of the statute is one for the court to decide after reviewing all relevant factors, and the presence or absence of any one factor is not necessarily dispositive if, viewed in totality, the remaining factors militate in favor of placing the task in one category or the other, *Soto v J. Crew Inc.*, 21 NY3d 562, 976 NYS2d 421, 998 NE2d 1045 (2013).

"Cleaning" under Labor Law § 240 does include cleaning the top of a newly constructed glass enclosure for the first time, *Roldan v Molyneux*, 227 AD2d 240, 642 NYS2d 297 (1st Dept 1996). Where plaintiff was engaged in the removal of snow and ice to protect and enhance the value of a building, he was engaged in "cleaning" under Labor Law § 240, *Vernum v Zilka*, 241 AD2d 885, 660 NYS2d 599 (3d Dept 1997); see *Nephew v Barcomb*, 260 AD2d 821, 688 NYS2d 751 (3d Dept 1999); *Douglass v Rental Properties Inc.*, 248 AD2d 863, 669 NYS2d 973 (3d Dept 1998). Power washing HVAC chillers constituted "cleaning" where it did not reoccur on a regular schedule as part of the ordinary cleaning of the premises, involved elevation risks not compara-

ble to those encountered in domestic cleaning, and required specialized equipment, *Mazzarisi v New York Society for Relief of Ruptured and Crippled, Maintaining Hospital for Special Surgery*, 205 AD3d 424, 167 NYS3d 87 (1st Dept 2022). However, “cleaning” does not include clearing hoppers of clogs caused by dust particles where the work did not entail removal of any dirt or extraneous particles and plaintiff merely unclogged the equipment by pushing the dust particles toward an auger at the bottom of the hopper, *Wicks v Trigen-Syracuse Energy Corp.*, 64 AD3d 75, 877 NYS2d 791 (4th Dept 2009). Similarly, “cleaning” under Labor Law § 240(1) does not include a factory employee engaged in cleaning a manufactured product, *Dahar v Holland Ladder & Mfg. Co.*, 18 NY3d 521, 941 NYS2d 31, 964 NE2d 402 (2012), or dusting the top of a shelf in a store, *Soto v J. Crew Inc.*, 21 NY3d 562, 976 NYS2d 421, 998 NE2d 1045 (2013). The routine cleaning of a cement truck after making a delivery is not “cleaning” within the meaning of Labor Law § 240(1), *Bish v Odell Farms Partnership*, 119 AD3d 1337, 989 NYS2d 719 (4th Dept 2014).

a. Window Cleaning Under Labor Law §§ 202 and 240(1)

Window cleaning activities may be covered under Labor Law § 240(1) even if not part of another activity enumerated in the statute and regardless of whether the cleaning takes place inside or outside of a building, *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 839 NYS2d 714, 870 NE2d 1144 (2007). Although routine household window cleaning is generally excluded, window cleaning of a commercial character is covered if the particular task creates an elevation-related risk of the kind that the safety devices listed in the statute protect against, *Swiderska v New York University*, 10 NY3d 792, 856 NYS2d 533, 886 NE2d 155 (2008); *Broggy v Rockefeller Group, Inc.*, *supra*; see *Fuhlbruck v 3170 Delaware, LLC*, 196 AD3d 1090, 151 NYS3d 306 (4th Dept 2021) (plaintiff not entitled to protection of Labor Law § 240(1) where he was engaged in bi-monthly cleaning of store’s exterior windows using squeegee, broom handle, and eight-foot ladder from which he worked at maximum elevation of five feet). Caulking is a protected activity under Labor Law § 240(1), but not Labor Law § 202, *DeJesus v 888 Seventh Ave. LLC*, 114 AD3d 587, 981 NYS2d 60 (1st Dept 2014); see *Rendino v New York*, 83 AD3d 540, 922 NYS2d 300 (1st Dept 2011).

In addition to Labor Law § 240(1), Labor Law § 202, entitled “Protection of the public and of persons engaged at window cleaning and cleaning of exterior surfaces of buildings,” imposes a duty on owners, lessees, agents, managers or superintendents of certain public buildings and contractors involved with the cleaning of windows and exterior surfaces of such buildings to provide certain physical devices for the protection of window cleaners. The statute applies to the cleaning of interior windows, *Padovano v Teddy’s Realty Associates, Ltd.*, 56 AD3d 444, 866 NYS2d 743 (2d Dept 2008); *Ferluckaj v Goldman Sachs & Co.*, 53 AD3d 422, 862 NYS2d 473 (1st Dept 2008), *rev’d on other grounds*, 12 NY3d 316, 880 NYS2d 879, 908 NE2d 869 (2009). Labor Law § 202 exempts, *inter alia*, multiple dwellings of six stories or less and non-public buildings from its scope, *Bauer v Female Academy of Sacred Heart*, 97 NY2d 445, 741 NYS2d 491, 767 NE2d 1136 (2002).

In *Bauer v Female Academy of Sacred Heart*, 97 NY2d 445, 741 NYS2d 491, 767 NE2d 1136 (2002), the Court of Appeals resolved a conflict among the various Departments by concluding that an injured window cleaner can commence claims simultaneously under Labor Law §§ 202 and 240(1). It should be noted, however, that there are differences in the scope and effect of the two statutes. For example, the requirements of Labor Law § 202 apply to owners, lessees, agents and managers, while absolute liability under Labor Law § 240(1) applies to owners and contractors only. Labor Law § 202 necessarily involves the periodic cleaning of windows at residences, albeit not at multiple residences less than six stories in height or non-public buildings. Finally, comparative negligence principles apply to a Labor Law § 202 claim, but not to a Labor Law § 240(1) claim, see *Bauer v Female Academy of the Sacred Heart*, *supra*.

7. *Painting and Wallpapering*

“Painting” includes painting the outside of a dwelling, *Rivers v Sauter*, 26 NY2d 260, 309 NYS2d 897, 258 NE2d 191 (1970), as well as painting a swimming pool, *Cahill v Westchester Towers Owners Corp.*, 295 AD2d 550, 745 NYS2d 38 (2d Dept 2002), and applying liquid containing aluminum pigment to a roof, *Cummings v Vargo*, 63 AD3d 1718, 881 NYS2d 747 (4th Dept 2009); *Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460, 869 NYS2d 172 (2d Dept 2008). Scraping undertaken in preparation for painting is protected by Labor Law § 240(1), *De Oliveira v Little John’s Moving, Inc.*, 289 AD2d 108, 734 NYS2d 165 (1st Dept 2001). Painting and scraping are protected activities even when not incidental to other activities listed in Labor Law § 240(1), *Artoglou v Gene Scappy Realty Corp.*, *supra*; *Loreto v 376 St. Johns Condominium, Inc.*, 15 AD3d 454, 790 NYS2d 190 (2d Dept 2005). In contrast, wallpapering that is not performed incidental to any other enumerated activity in Labor Law § 240(1) does not constitute either “painting” or “alteration” under the statute, *La Fontaine v Albany Management Inc.*, 257 AD2d 319, 691 NYS2d 640 (3d Dept 1999); see *Ortega v 669 Meeker Avenue, LLC*, 191 AD3d 686, 140 NYS3d 271 (2d Dept 2021) (question of fact raised as to whether using plaster and compound to cover holes in interior wall an enumerated activity or routine maintenance).

8. *Repairing*

In determining whether a particular activity constitutes “repairing” within the meaning of Labor Law § 240(1), the courts are careful to distinguish between repairs and routine maintenance, which is not within the statute’s protection, *Abbatiello v Lancaster Studio Associates*, 3 NY3d 46, 781 NYS2d 477, 814 NE2d 784 (2004); *Esposito v New York City Indus. Development Agency*, 1 NY3d 526, 770 NYS2d 682, 802 NE2d 1080 (2003); *Smith v Shell Oil Co.*, 85 NY2d 1000, 630 NYS2d 962, 654 NE2d 1210 (1995); see *Prats v Port Authority of New York and New Jersey*, 100 NY2d 878, 768 NYS2d 178, 800 NE2d 351 (2003); *Barbarito v Tompkins*, 22 AD3d 937, 803 NYS2d 208 (3d Dept 2005). Distinguishing between routine maintenance and repairs is frequently

a fact-driven inquiry, *Dos Santos v Consolidated Edison of New York, Inc.*, 104 AD3d 606, 963 NYS2d 12 (1st Dept 2013); *Pakenham v Westmere Realty, LLC*, 58 AD3d 986, 871 NYS2d 456 (3d Dept 2009). Where there is a dispute as to whether plaintiff was repairing a building or structure or simply providing maintenance, the paramount issues are (1) whether the item being worked on was inoperable or malfunctioning prior to the commencement of the work, *Leathers v Zaepfel Development Co., Inc.*, 121 AD3d 1500, 993 NYS2d 817 (4th Dept 2014) (removing clog in drain of corrosion chamber); *Ozimek v Holiday Valley, Inc.*, 83 AD3d 1414, 920 NYS2d 528 (4th Dept 2011) (plaintiff “troubleshooting” uncommon freezer malfunction); *Pieri v B & B Welch Associates*, 74 AD3d 1727, 904 NYS2d 595 (4th Dept 2010) (plaintiff was “troubleshooting” malfunctioning lift station, which processed sewage at apartment complex); *Craft v Clark Trading Corp.*, 257 AD2d 886, 684 NYS2d 48 (3d Dept 1999) (plaintiff was “repairing” refrigeration unit); see *Alexander v Hart*, 64 AD3d 940, 884 NYS2d 181 (3d Dept 2009) (plaintiff injured while attempting to restore long-malfunctioning HVAC system to working order); *Short v Durez Division-Hooker Chemicals & Plastic Corp.*, 280 AD2d 972, 721 NYS2d 218 (4th Dept 2001) (efforts by plaintiff undertaken in investigating loose or broken piece of machinery in air system protected under Labor Law § 240(1)); *Russ v State*, 267 AD2d 833, 699 NYS2d 822 (3d Dept 1999) (where plaintiff did not allege that smoke detectors were inoperable or had failed to function, his claim did not state Labor Law § 240(1) cause of action), and (2) whether the work involves only the replacement of components that require replacement in the course of normal wear and tear, see *Abbatiello v Lancaster Studio Associates*, supra; *Esposito v New York City Indus. Development Agency*, supra; *Markou v Sano-Rubin Construction Co., Inc.*, 182 AD3d 674, 122 NYS3d 386 (3d Dept 2020); *Barbarito v Tompkins*, 22 AD3d 937, 803 NYS2d 208 (3d Dept 2005); *Robertson v Little Rapids Corp.*, 277 AD2d 560, 715 NYS2d 482 (3d Dept 2000) (abrogated on other grounds by, *Goad v Southern Elec. Intern., Inc.*, 304 AD2d 887, 758 NYS2d 184 (3d Dept 2003)). Another factor to be considered in determining whether a particular activity constitutes “repairing” rather than “routine maintenance” is whether the activity is an isolated event rather than a task that is to be repeated, *Eherts v Shoprite Supermarkets, Inc.*, 199 AD3d 1270, 158 NYS3d 343 (3d Dept 2021) (plumber responding to water pressure issue caused by municipal water main break was responding to isolated and unexpected event, which was not routine scheduled maintenance); *Soriano v St. Mary’s Indian Orthodox Church of Rockland, Inc.*, 118 AD3d 524, 988 NYS2d 58 (1st Dept 2014) (plaintiff replacing cracked glass panes in church steeple skylight engaged in repair rather than routine maintenance where plaintiff, an experienced glazier, averred that such panes do not crack or wear out over time and are not expected to be regularly replaced); *Dos Santos v Consolidated Edison of New York, Inc.*, supra; *Davidson v Ambrozewicz*, 12 AD3d 902, 785 NYS2d 149 (3d Dept 2004). Where a question of fact existed as to whether plaintiff was engaged in a “repair” at the time of the accident, it was not error to charge that “repairing” can include “inspection of an integral part of the structure in furtherance of repairing an apparent malfunction,” *Pieri v B & B Welch Associates*, supra (citing PJI).

Repairing includes an attempt to fix an electric sign attached a building, *Izrailev v Ficarra Furniture of Long Island, Inc.*, 70 NY2d 813, 523 NYS2d 432, 517 NE2d 1318 (1987); see *Quinn v Fisher Development, Inc.*, 272 AD2d 106, 708 NYS2d 68 (1st Dept 2000) (removing 200- to 300-pound sign constituted “alteration” or “repair” of building or structure resulting in “a significant physical change” thereto and bore requisite relation to overall renovation), attempting to fix a broken garage door so that a building could be secured, *Russo v Van Dale Properties, LLC*, 200 AD3d 1470, 159 NYS3d 226 (3d Dept 2021), making building modifications to prevent bats’ re-entry, *Davidson v Ambrozewicz*, 12 AD3d 902, 785 NYS2d 149 (3d Dept 2004), the installation of tubing over an exposed beam as part of the replacement of the fire alarm system, *Tate v Clancy-Cullen Storage Co., Inc.*, 171 AD2d 292, 575 NYS2d 832 (1st Dept 1991), replacement of a burner in a boiler, *Vessio v Ador Converting & Biasing, Inc.*, 215 AD2d 648, 628 NYS2d 305 (2d Dept 1995), removal of a broken motor from a blower unit of a ventilation system located on the roof of a building for the purpose of repairing it, *Holka v Mt. Mercy Academy*, 221 AD2d 949, 634 NYS2d 310 (4th Dept 1995), repairing a crane, *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 796 NYS2d 684 (2d Dept 2005), and repairing an elevator that is not working, *Spiteri v Chatwal Hotels*, 247 AD2d 297, 669 NYS2d 282 (1st Dept 1998). The removal of a portion of a drain pipe leading to a building’s main sewer line for the purpose of unclogging and repairing it constitutes the repair of the structure within the meaning of Labor Law § 240(1), rather than routine maintenance, *Benfanti v Tri-Main Development, L.P.*, 231 AD2d 855, 647 NYS2d 616 (4th Dept 1996); see *Leathers v Zaepfel Development Co., Inc.*, 121 AD3d 1500, 993 NYS2d 817 (4th Dept 2014) (removing clog in drain of corrosion chamber more akin to clearing gutters of debris, which does not constitute repairing, than *Benefanti* plaintiff’s task of unclogging and repairing drain pipe). Repairing also includes pumping water out of a flooded manhole following a severe rainstorm, *Dos Santos v Consolidated Edison of New York, Inc.*, 104 AD3d 606, 963 NYS2d 12 (1st Dept 2013). Replacing the ballast and sockets of a fluorescent light fixture and disconnecting, stripping, and reconnecting the wires constitutes “repairing” within the meaning of Labor Law § 240(1), *Piccione v 1165 Park Ave., Inc.*, 258 AD2d 357, 685 NYS2d 242 (1st Dept 1999); see *Markou v Sano-Rubin Construction Co., Inc.*, 182 AD3d 674, 122 NYS3d 386 (3d Dept 2020) (troubleshooting nonfunctioning overhead lighting system constituted repairing), but merely replacing a ballast is only routine maintenance, *Monaghan v 540 Inv. Land Co. LLC*, 66 AD3d 605, 888 NYS2d 24 (1st Dept 2009). The removal for repair of a twenty-pound lighting fixture specifically installed on the property to facilitate a 24-hour construction project is an activity within the scope of Labor Law § 240(1), *Clemente v Grow Tunneling Corp.*, 235 AD2d 331, 653 NYS2d 922 (1st Dept 1997). Inspection of an integral part of a building in furtherance of repairing an apparent malfunction is within the scope of the activities covered by Labor Law § 240(1), *Caraciolo v 800 Second Ave. Condominium*, 294 AD2d 200, 743 NYS2d 8 (1st Dept 2002); see *Mendoza v Highpoint Associates, IX, LLC*, 83 AD3d 1, 919 NYS2d 129 (1st Dept 2011); *Short v Durez Division-Hooker Chemicals*

& Plastic Corp., 280 AD2d 972, 721 NYS2d 218 (4th Dept 2001). Railroad track replacement work constitutes “repair” or “alteration” work within the meaning of Labor Law § 240(1), Wallin v New York, 232 AD2d 548, 649 NYS2d 159 (2d Dept 1996). Fixing a refrigeration unit at a refrigerated warehouse constituted “repairing” where the work was done on an emergency basis, involved rewiring and replacing several parts and took 29½ hours to complete, Juchniewicz v Merex Food Corp., 46 AD3d 623, 848 NYS2d 255 (2d Dept 2007); see Pakenham v Westmere Realty, LLC, 58 AD3d 986, 871 NYS2d 456 (3d Dept 2009) (question of fact existed as to whether work was “repair” or “routine maintenance” where worker climbed to building roof in response to after-hours emergency call to investigate and fix malfunctioning heating system).

“Repairing” does not include replacing a fan condenser motor that requires regular replacement, Stockton v H & E Biffer Enterprises No. 2, LLC, 196 AD3d 709, 148 NYS3d 708 (2d Dept 2021), remedying clog in drain of corrosion chamber, Leathers v Zaepfel Development Co., Inc., 121 AD3d 1500, 993 NYS2d 817 (4th Dept 2014), replacement of a defective safety valve on a boiler in a residential building, Wein v Amato Properties, LLC, 30 AD3d 506, 816 NYS2d 370 (2d Dept 2006), post-repair inspection and retrieval of serial and model numbers, Beehner v Eckerd Corp., 3 NY3d 751, 788 NYS2d 637, 821 NE2d 941 (2004), replacing a torn window screen, Chizh v Hillside Campus Meadows Associates, LLC., 3 NY3d 664, 784 NYS2d 2, 817 NE2d 819 (2004), fixing a “loader” at a landfill, Phillips v New York, 228 AD2d 570, 644 NYS2d 764 (2d Dept 1996) (abrogated by, Misicki v Caradonna, 12 NY3d 511, 882 NYS2d 375, 909 NE2d 1213 (2009)), the replacement of a light bulb in an illuminated sign or a parking lot lamppost, Smith v Shell Oil Co., 85 NY2d 1000, 630 NYS2d 962, 654 NE2d 1210 (1995); Yun Kai Li v Pho Viet Huong Restaurant, 291 AD2d 280, 737 NYS2d 288 (1st Dept 2002); Manente v Ropost, Inc., 136 AD2d 681, 524 NYS2d 96 (2d Dept 1988), the installation of a steam safety valve in the course of a regular maintenance program, Goad v Southern Elec. Intern. Inc., 263 AD2d 654, 693 NYS2d 301 (3d Dept 1999), the replacement of a plastic advertising sign in a sign holder attached to a steel support beam, Cook v Parish Land Co., Inc., 239 AD2d 956, 659 NYS2d 601 (4th Dept 1997), or the changing of an elevator cable, in the absence of evidence that the elevator was inoperable, Scaglione v Riverbay Corp., 279 AD2d 254, 719 NYS2d 37 (1st Dept 2001). Plaintiff’s work, which included standing on an elevated portion of a tractor-trailer while checking oil and water levels of refrigeration units and jump-starting refrigeration units, did not constitute a “repair” within the meaning of Labor Law § 240(1), Coates v Kraft Foods Inc., 263 AD2d 734, 693 NYS2d 711 (3d Dept 1999). Placing a piece of tape over an electric eye to disable it does not constitute “repairing” or “altering” of a “building or structure,” Howe v 1660 Grand Island Blvd., Inc., 209 AD2d 934, 619 NYS2d 227 (4th Dept 1994). Similarly, engaging exclusively in maintenance functions such as seeing to the heating and cooling of a building, taking utility meter readings, assembling tools for the maintenance and operation of the building and arranging a stockroom does not constitute “repair-

ing” or “altering” of a “building or structure,” *Agli v Turner Const. Co., Inc.*, 246 AD2d 16, 676 NYS2d 54 (1st Dept 1998).

Even where the item being worked on is inoperable or malfunctioning, the replacement of parts that wear out periodically is routine maintenance outside the purview of Labor Law § 240(1), *Esposito v New York City Indus. Development Agency*, 1 NY3d 526, 770 NYS2d 682, 802 NE2d 1080 (2003); *Stockton v H & E Biffer Enterprises No. 2, LLC*, 196 AD3d 709, 148 NYS3d 708 (2d Dept 2021); *Jehle v Adams Hotel Associates*, 264 AD2d 354, 695 NYS2d 22 (1st Dept 1999). Similarly, a cable technician was performing routine maintenance work when he investigated the cause of a defective signal and discovered that the problem was water in the tap, a common difficulty resulting from accumulation of rain water that was easily remedied by loosening screws and draining the water or replacing the tap, *Abbatiello v Lancaster Studio Associates*, 3 NY3d 46, 781 NYS2d 477, 814 NE2d 784 (2004). The amount of work or danger does not alone bring a case within the confines of the term “repair” for purposes of determining liability under Labor Law § 240, *Barbarito v Tompkins*, 22 AD3d 937, 803 NYS2d 208 (3d Dept 2005) (removal of links from loose chain on overhead garage door constituted routine maintenance); *Robertson v Little Rapids Corp.*, 277 AD2d 560, 715 NYS2d 482 (3d Dept 2000) (abrogated on other grounds by, *Goad v Southern Elec. Intern., Inc.*, 304 AD2d 887, 758 NYS2d 184 (3d Dept 2003)) (contemplated replacement of component with limited useful life constitutes nothing more than routine maintenance not covered under Labor Law § 240(1)).

9. *Other Activities*

Labor Law § 240(1) does not apply to a person inspecting an overhead basketball backboard affixed to a gymnasium ceiling that would not swing down to its proper position, *Chapman v IBM Corp.*, 233 AD2d 585, 649 NYS2d 228 (3d Dept 1996). Likewise, Labor Law 240(1) does not apply to a person injured while performing an inspection of bridge pursuant to contract providing for periodic bridge inspections to determine any necessary future repairs, *Astrakan v New York*, 184 AD3d 444, 125 NYS3d 709 (1st Dept 2020). A person measuring heating ducts in order to help prepare an estimate of the cost of repairing the heating system of a building is not engaged in any of the activities enumerated in Labor Law § 240(1), *Karaktin v Gordon Hillside Corp.*, 143 AD2d 637, 532 NYS2d 891 (2d Dept 1988). A person decorating a room for a party by hanging streamers is not engaged in alterations of a building or structure for purposes of the Labor Law, *Brice v Lafayette Country Club, Inc.*, 177 AD2d 957, 578 NYS2d 311 (4th Dept 1991); see *Stanislawczyk v 2 East 61st Street Corp.*, 1 AD3d 155, 767 NYS2d 30 (1st Dept 2003) (Labor Law §§ 240(1) and 241(6) not applicable to worker taking down decorated wooden disk suspended for use as ceremonial wedding canopy); *Luthi v Long Island Resource Corp.*, 251 AD2d 554, 674 NYS2d 747 (2d Dept 1998) (Labor Law § 240(1) does not apply to plaintiff injured while running borrowed microphone cable through drop ceiling of nightclub for special event where cable was not

attached or affixed to structure and was to be eventually returned); *Tanzer v A. Terzi Productions*, 244 AD2d 224, 664 NYS2d 44 (1st Dept 1997) (Labor Law § 240(1) does not apply to plaintiff injured while temporarily decorating building by attaching scenery and other objects to change its appearance for brief duration where building was used as set for making television film); *Perchinsky v State*, 232 AD2d 34, 660 NYS2d 177 (3d Dept 1997). Labor Law § 240(1) protection is not available to a plaintiff who was injured when he fell from office desk while searching for source of ceiling leak, *Greenwood v Shearson, Lehman & Hutton*, 238 AD2d 311, 656 NYS2d 295 (2d Dept 1997).

However, Labor Law § 240(1) does apply to a worker operating a scaffold for caulkers who could not have safely performed their duties without him, *DeJesus v 888 Seventh Ave. LLC*, 114 AD3d 587, 981 NYS2d 60 (1st Dept 2014).

B. Devices to Which Labor Law § 240(1) Applies

1. Stairs and Fire Escapes

In addition to the devices specifically named in Labor Law § 240(1), the statutory duty applies to any “other devices” that are functionally equivalent or related to the devices named in the statute. Thus, “other devices” includes an old concrete stairway unearthed during excavation of the site and thereafter left in place to be used by the workers to gain access from the bottom of the fourteen-foot deep excavation to street level, but subsequently demolished after the work was performed, *Foufana v New York*, 211 AD2d 550, 621 NYS2d 572 (1st Dept 1995), a sidewalk bridge that provided workers with access to supplies stored on the scaffolding, *Jablonski v Everest Const. and Trade Corp.*, 264 AD2d 381, 693 NYS2d 229 (2d Dept 1999), a temporary stairway between floors of a building under construction used as the equivalent of a ladder, *McGarry v CVP 1 LLC*, 55 AD3d 441, 866 NYS2d 76 (1st Dept 2008); *Wescott v Shear*, 161 AD2d 925, 557 NYS2d 493 (3d Dept 1990), steps leading to a scaffold, *Medina v MSDW 140 Broadway Property, L.L.C.*, 13 AD3d 67, 786 NYS2d 152 (1st Dept 2004), a retractable fire escape ladder used as a means of access to work station, *Acosta v Kent Bentley Apartments, Inc.*, 298 AD2d 124, 747 NYS2d 507 (1st Dept 2002), metal decking serving as an intermediate platform between the second and third floor worksite, *Beharry v Public Storage, Inc.*, 36 AD3d 574, 828 NYS2d 458 (2d Dept 2007), and a fire escape that was being used to protect a worker from elevation-related risks, *De Jara v 44-14 Newtown Road Apartment Corp.*, 307 AD2d 948, 763 NYS2d 654 (2d Dept 2003). The statutory duty also applies to bleachers that were being used as a temporary stairway or the functional equivalent of a ladder, *Keefe v E & D Specialty Stands, Inc.*, 259 AD2d 994, 688 NYS2d 865 (4th Dept 1999).

The Appellate Divisions are split on the question whether an accident involving a permanent stairway is within the reach of Labor Law § 240(1), *Jones v 414 Equities LLC*, 57 AD3d 65, 866 NYS2d 165 (1st

Dept 2008). The First Department has held that the fact that a stairway with no guardrails was a permanent structure did not affect the applicability of Labor Law § 240(1), where the stairway provided the sole means of access to the building's floors during demolition and was an elevated surface on which plaintiff was required to work as he completed his task of breaking up the marble pieces covering each step, *Gory v Neighborhood Partnership Housing Development Fund Co., Inc.*, 113 AD3d 550, 979 NYS2d 314 (1st Dept 2014); see *Jones v 414 Equities LLC*, *supra* (collapse of permanent floor; court noted different approaches among Departments and held that crucial consideration is not permanency of structure but whether particular task creates elevation-related risk that enumerated safety devices would protect against). Although earlier cases held otherwise, *Norton v Park Plaza Owners Corp.*, 263 AD2d 531, 694 NYS2d 411 (2d Dept 1999), the Second Department has more recently held that the permanency of a stairway or similar structure does not preclude application of Labor Law § 240(1), *De Jara v 44-14 Newtown Road Apartment Corp.*, 307 AD2d 948, 763 NYS2d 654 (2d Dept 2003) (permanent fire escape); *Storno v Restoration Roofing Co.*, 268 AD2d 786, 701 NYS2d 511 (3d Dept 2000); *Ciraolo v Melville Court Associates*, 221 AD2d 582, 634 NYS2d 205 (2d Dept 1995) (permanent ladder); see *Beharry v Public Storage, Inc.*, 36 AD3d 574, 828 NYS2d 458 (2d Dept 2007) (fact that decking through which plaintiff fell was to become permanent landing irrelevant where decking served as functional equivalent of ladder). In contrast, the Third and Fourth Departments have held that an accident occurring on a permanent staircase is not within the scope of Labor Law § 240(1), *Milanese v Kellerman*, 41 AD3d 1058, 838 NYS2d 256 (3d Dept 2007); *Sponholz v Benderson Property Development, Inc.*, 266 AD2d 815, 697 NYS2d 432 (4th Dept 1999); *Williams v Albany*, 245 AD2d 916, 666 NYS2d 800 (3d Dept 1997); *Dombrowski v Schwartz*, 217 AD2d 914, 629 NYS2d 924 (4th Dept 1995); *Pennacchio v Tednick Corp.*, 200 AD2d 809, 606 NYS2d 448 (3d Dept 1994); *Monroe v New York State Elec. & Gas Corp.*, 186 AD2d 1019, 588 NYS2d 483 (4th Dept 1992); *Cliquennoi v Michaels Group*, 178 AD2d 839, 577 NYS2d 550 (3d Dept 1991); see *Wescott v Shear*, 161 AD2d 925, 557 NYS2d 493 (3d Dept 1990); but see *McDonald v UICC Holding, LLC*, 79 AD3d 1220, 912 NYS2d 710 (3d Dept 2010) (Labor Law § 240(1) applicable where portion of staircase had already been removed and therefore could no longer be considered permanent passageway; stair case was functioning as scaffold not as passageway to gain access to other parts of building).

Where a permanent means of access was designed to protect a worker from elevation-related hazards and to permit normal maintenance and repairs, Labor Law § 240(1) will apply, *Brennan v RCP Associates*, 257 AD2d 389, 683 NYS2d 69 (1st Dept 1999); see *Santamaria v 1125 Park Ave. Corp.*, 249 AD2d 16, 670 NYS2d 844 (1st Dept 1998) (plaintiff entitled to recovery under § 240(1) where tools he needed for job were being stored on roof and access to roof could only be obtained by using permanently affixed ladder); *Spiteri v Chatwal Hotels*, 247 AD2d 297, 669 NYS2d 282 (1st Dept 1998) (plaintiff entitled to recovery under § 240(1), even though ladder from which he fell was permanently

affixed to building, where ladder constituted only means of access to work site); *Kirchner v BRC Human Services Corp.*, 224 AD2d 270, 638 NYS2d 20 (1st Dept 1996) (since permanently affixed fire escape ladder was only way to enter and exit building whose interior being demolished and foreman directed the plaintiff to use it, it was effectively furnished and operated by defendants within the meaning of § 240 (1)); *Holka v Mt. Mercy Academy*, 221 AD2d 949, 634 NYS2d 310 (4th Dept 1995); *Szopinski v MJ Mechanical Services, Inc.*, 217 AD2d 906, 629 NYS2d 926 (4th Dept 1995) (where plaintiff, in order to install wiring for a boiler, was required to climb an extension ladder as well as a permanently affixed ladder and fell from permanently affixed ladder, plaintiff's accident came within § 240(1)). However, a permanent appurtenance to a building does not normally constitute the functional equivalent of a scaffold or other safety device within the meaning of Labor Law § 240(1), *Yost v Quartararo*, 64 AD3d 1073, 883 NYS2d 630 (3d Dept 2009) (balcony used as means to access the building's roof).

Labor Law § 240(1) is applicable where a worker, who was not provided with safety devices to prevent or break his fall, falls through an open, unfinished stairwell in a house under construction, *Perkins v Ken Loewentheil & Daughters, Inc.*, 282 AD2d 510, 723 NYS2d 503 (2d Dept 2001); *Canka v Coalition for the Homeless, Inc.*, 240 AD2d 355, 657 NYS2d 779 (2d Dept 1997); *Schneider v Hanover East Estates, Inc.*, 237 AD2d 274, 654 NYS2d 789 (2d Dept 1997). Labor Law § 241-a requires placement of "sound planking" for employees "working in or at . . . stairwells." Earlier cases holding that Labor Law §§ 241(6) and 241-a constitute the sole basis for recovery in these situations, *Marcelino v Nigro*, 149 AD2d 775, 539 NYS2d 820 (3d Dept 1989); *Spinelli v St. John Nepomucene Roman Catholic Church*, 140 AD2d 427, 528 NYS2d 128 (2d Dept 1988); see also *Serpe v Eyris Productions, Inc.*, 243 AD2d 375, 663 NYS2d 542 (1st Dept 1997), are no longer good law, *Schneider v Hanover East Estates, Inc.*, *supra*.

2. Scaffolds

As to what constitutes a "scaffold," see *Davies v Simon Property Group, Inc.*, 174 AD3d 850, 107 NYS3d 341 (2d Dept 2019) (where plywood across which plaintiff was pushing cart flexed, causing plaintiff to fall into adjacent trench, issue of fact as to whether plywood was functional equivalent of scaffold); *Ramirez v Metropolitan Transp. Authority*, 106 AD3d 799, 965 NYS2d 156 (2d Dept 2013) (catwalk used during work on elevated subway tracks was functional equivalent of scaffold, not mere passageway); *Beard v State*, 25 AD3d 989, 808 NYS2d 802 (3d Dept 2006) (bridge on which plaintiff was working as it was being taken apart was functional equivalent of scaffold); *D'Egidio v Frontier Ins. Co.*, 270 AD2d 763, 704 NYS2d 750 (3d Dept 2000) (floor on which plaintiff was standing to perform ceiling work was permanent floor and, as such, did not function as scaffold above subfloor); *Craft v Clark Trading Corp.*, 257 AD2d 886, 684 NYS2d 48 (3d Dept 1999) (temporary flooring constitutes scaffold); *Miller v C.O. Falter Const. Corp.*, 226 AD2d 1110, 642 NYS2d 137 (4th Dept 1996); *Melber v 6333 Main Street, Inc.*, 224 AD2d 995, 637 NYS2d 554 (4th Dept 1996), *rev'd*

on other grounds, 91 NY2d 759, 676 NYS2d 104, 698 NE2d 933 (1998) (stilts worn by plaintiff while working on dry wall were equivalent of scaffolding); *Becerra v New York*, 261 AD2d 188, 690 NYS2d 52 (1st Dept 1999) (unsecured plywood boards supporting plaintiff four stories above ground level constitute scaffold); *Ciancio v Woodlawn Cemetery Ass'n*, 249 AD2d 86, 671 NYS2d 466 (1st Dept 1998) (plank placed across burial vault opening constitutes scaffolding); *Laterra v Rockville Centre Union Free School Dist.*, 186 AD2d 789, 589 NYS2d 87 (2d Dept 1992); *Clute v Ellis Hosp.*, 184 AD2d 942, 585 NYS2d 140 (3d Dept 1992); *Dick v John M. Gates Const. Corp.*, 146 AD2d 953, 537 NYS2d 82 (3d Dept 1989); *Barnes v Park Congregational Church*, 145 AD2d 889, 536 NYS2d 224 (3d Dept 1988); *McGurk v Turner Const. Co.*, 127 AD2d 526, 512 NYS2d 71 (1st Dept 1987); *Ryan v Morse Diesel, Inc.*, 98 AD2d 615, 469 NYS2d 354 (1st Dept 1983). Labor Law § 240(1) applies even in those situations where the scaffold that is alleged to have failed was in the process of being dismantled or constructed, *Kyle v New York*, 268 AD2d 192, 707 NYS2d 445 (1st Dept 2000).

3. Braces

In *Misseritti v Mark IV Const. Co., Inc.*, 86 NY2d 487, 634 NYS2d 35, 657 NE2d 1318 (1995), the Court of Appeals ruled that “braces” as referred to in Labor Law § 240(1) means those used to support elevated work sites, and not braces designed to shore up or lend support to a completed structure. Thus, Labor Law § 240(1) does not permit recovery on behalf of a mason who was injured by the collapse of a completed concrete-block fire wall that was allegedly not properly braced. *Misseritti* casts serious doubt on the holdings in *Clute v Ellis Hosp.*, 184 AD2d 942, 585 NYS2d 140 (3d Dept 1992), *Dick v John M. Gates Const. Corp.*, 146 AD2d 953, 537 NYS2d 82 (3d Dept 1989), *John v Baharestani*, 281 AD2d 114, 721 NYS2d 625 (1st Dept 2001), and *Richardson v Matarese*, 206 AD2d 353, 614 NYS2d 424 (2d Dept 1994).

Applying *Misseritti*, the court held in *Amato v State*, 241 AD2d 400, 660 NYS2d 576 (1st Dept 1997), that the protection of Labor Law § 240(1) was not available to a worker who was struck by a falling brace that was an integral part of the structure which he was in the process of demolishing. Similarly, in *Piccinich v New York Stock Exchange, Inc.*, 257 AD2d 438, 683 NYS2d 517 (1st Dept 1999), the court held that an allegedly defective support beam that fell through the bottom of the air conditioning unit that plaintiff was dismantling was not a “brace” within the meaning of Labor Law § 240(1). In *Meis v ELO Organization, LLC.*, 282 AD2d 211, 723 NYS2d 164 (1st Dept 2001), a plaintiff injured when a portion of a pipe secured by a rusty brace fell on him was not permitted recovery under Labor Law § 240(1) because the accident was not attributable to the extraordinary risk of working at an elevated site but rather to a structural infirmity of a sort routinely encountered during construction work.

4. Hoists

A platform created by a pallet on an elevated forklift constitutes a

“hoist” under Labor Law § 240(1), *Prekulaj v Terano Realty, Inc.*, 235 AD2d 201, 652 NYS2d 10 (1st Dept 1997). In *D’Avila v New York*, 205 AD2d 729, 613 NYS2d 435 (2d Dept 1994), an employee was killed when a subway train crashed into a crane that he was operating on subway tracks. Although the crane was a “hoist,” the court held that any improper placement of the crane only risked a collision with an oncoming train, and therefore the statute was inapplicable.

5. *Planking and Ramps*

In general, Labor Law § 240(1) does not apply to accidents involving falls from planks being used as passageways or stairways, since such accidents ordinarily do not entail elevation-related risks, *Paul v Ryan Homes, Inc.*, 5 AD3d 58, 774 NYS2d 225 (4th Dept 2004); see *DeStefano v Amtad New York, Inc.*, 269 AD2d 229, 703 NYS2d 34 (1st Dept 2000) (ramp positioned at building entrance that rose to height of only 12 inches); *Straight v McCarthy Bros. Co.*, 222 AD2d 775, 634 NYS2d 272 (3d Dept 1995) (plank being used as passageway for transporting materials and debris at work site); *DePuy v Sibley, Lindsay & Curr Co., Inc.*, 225 AD2d 1069, 639 NYS2d 207 (4th Dept 1996) (ramp extending from truck bed to ground). In contrast, the statute is applicable when the plank or ramp that caused the accident was serving as the functional equivalent of a scaffold, ladder or other enumerated device, *Davies v Simon Property Group, Inc.*, 174 AD3d 850, 107 NYS3d 341 (2d Dept 2019); *Ramirez v Metropolitan Transp. Authority*, 106 AD3d 799, 965 NYS2d 156 (2d Dept 2013) (catwalk used during work on elevated subway tracks was functional equivalent of scaffold, not mere passageway); *Arrasti v HRH Const. LLC*, 60 AD3d 582, 876 NYS2d 373 (1st Dept 2009); *Paul v Ryan Homes, Inc.*, *supra*; see *Missico v Tops Markets, Inc.*, 305 AD2d 1052, 758 NYS2d 890 (4th Dept 2003); *Reisch v Amadori Const. Co., Inc.*, 273 AD2d 855, 709 NYS2d 726 (4th Dept 2000); *Frierson v Concourse Plaza Associates*, 189 AD2d 609, 592 NYS2d 309 (1st Dept 1993); *Farrell v New York*, 162 AD2d 655, 557 NYS2d 101 (2d Dept 1990).

Labor Law § 241-a requires that “sound planking at least two inches thick” be provided to protect employees who “work in or at elevator shaftways, hatchways and stairwells of buildings in the course of construction or demolition.” The statute was intended to provide additional protection to that provided by Labor Law §§ 240(1) and 241(6). Earlier cases holding otherwise, such as *Marcellino v Nigro*, 149 AD2d 775, 539 NYS2d 820 (3d Dept 1989); *Spinelli v St. John Nepomucene Roman Catholic Church*, 140 AD2d 427, 528 NYS2d 128 (2d Dept 1988); see also *Serpe v Eyriss Productions, Inc.*, 243 AD2d 375, 663 NYS2d 542 (1st Dept 1997), are no longer good law, *Schneider v Hanover East Estates, Inc.*, 237 AD2d 274, 654 NYS2d 789 (2d Dept 1997). Labor Law § 241-a requires that the prescribed planking be “laid across the opening at levels not more than two stories above and not more than one story below” the area in which the employee is working. Thus, where the absence of planking is a proximate cause of the accident, recovery under Labor Law § 241-a may be had for injuries resulting from debris falling on the worker from above, *Doucoure v Atlantic Development*

Group, LLC, 18 AD3d 337, 796 NYS2d 48 (1st Dept 2005); but see *Desena v North Shore Hebrew Academy*, 119 AD3d 631, 989 NYS2d 505 (2d Dept 2014) (Labor Law § 241-a inapplicable to injuries caused by heavy block falling onto plaintiff's foot from unsecured pile on pallet located in open area at worksite).

6. *Miscellaneous Devices*

The “other devices” referred to in Labor Law § 240(1) include an old concrete stairway unearthed during excavation of the site and thereafter left in place to be used by the workers to gain access from the bottom of the fourteen-foot deep excavation to street level, but subsequently demolished after the work was performed, *Foufana v New York*, 211 AD2d 550, 621 NYS2d 572 (1st Dept 1995), a sidewalk bridge that provided workers with access to supplies stored on the scaffolding, *Jablonski v Everest Const. and Trade Corp.*, 264 AD2d 381, 693 NYS2d 229 (2d Dept 1999), temporary flooring, *Craft v Clark Trading Corp.*, 257 AD2d 886, 684 NYS2d 48 (3d Dept 1999), a bucket truck, *Clemente v Grow Tunneling Corp.*, 235 AD2d 331, 653 NYS2d 922 (1st Dept 1997), a bucket hoist, *Drew v Correct Mfg. Corp. (Hughes-Keenan Div.)*, 149 AD2d 893, 540 NYS2d 575 (3d Dept 1989), a “come along” used to tighten rigging cables for a scaffold, *Koumianos v State*, 141 AD2d 189, 534 NYS2d 512 (3d Dept 1988), an elevated joist upon which plaintiffs were standing to unhook it from a crane, *Borland v Sampson Steel Fabricators, Inc.*, 298 AD2d 831, 747 NYS2d 634 (4th Dept 2002), an overturned bucket used to gain access to a three- to four-foot-deep crawlspace, *Wilson v Niagara University*, 43 AD3d 1292, 842 NYS2d 819 (4th Dept 2007), a metal bar, which was part of hoisting mechanism, on which plaintiff was standing in order to raise the scaffold, *Mann v Meridian Centre Associates, LLC*, 17 AD3d 1143, 794 NYS2d 272 (4th Dept 2005), and vertical netting installed to catch falling debris, *Sarata v Metropolitan Transp. Authority*, 134 AD3d 1089, 23 NYS3d 281 (2d Dept 2015). The statutory duty imposed by Labor Law § 240(1) also applies to bleachers that were being used as a temporary stairway or the functional equivalent of a ladder, *Keefe v E & D Specialty Stands, Inc.*, 259 AD2d 994, 688 NYS2d 865 (4th Dept 1999).

The term “device” does not include a sun deck railing on a private house, *Smith v Wisch*, 77 AD2d 619, 430 NYS2d 115 (2d Dept 1980). Similarly, a “perimeter warning system,” which consisted of mobile stanchions connected by rope adorned with flags, that was placed around the perimeter of a roof and designed to alert a worker when he or she was within six feet of the edge of the roof, did not constitute a safety device, *Cruz v Cablevision Systems Corp.*, 120 AD3d 744, 992 NYS2d 281 (2d Dept 2014).

V. Defenses to Labor Law § 240(1) Claims

A. Sole Proximate Cause Doctrine

The New York courts have long taken the position that comparative fault principles have no application in an action governed by Labor Law

§ 240, *Barreto v Metropolitan Transp. Authority*, 25 NY3d 426, 13 NYS3d 305, 34 NE3d 815 (2015); *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 771 NYS2d 484, 803 NE2d 757 (2003); *Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880, 488 NE2d 810 (1985); *Sinchi v HWA 1290 III LLC*, 184 AD3d 408, 125 NYS3d 415 (1st Dept 2020); *Escobar Camacho v Ironclad Artists Inc.*, 174 AD3d 426, 101 NYS3d 845 (1st Dept 2019); *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 493 NYS2d 102, 482 NE2d 898 (1985); see also *Doucoure v Atlantic Development Group, LLC*, 18 AD3d 337, 796 NYS2d 48 (1st Dept 2005) (comparative fault inapplicable to Labor Law § 241-a claim). Examples are: *Salinas v 64 Jefferson Apartments, LLC*, 170 AD3d 1216, 97 NYS3d 136 (2d Dept 2019) (plaintiff's alleged comparative negligence in placing defective ladder on drop cloth is not defense to cause of action under Labor Law); *Escobar Camacho v Ironclad Artists Inc.*, *supra* (plaintiff's failure to unlock wheels on scaffold unequipped with safety device does not preclude recovery under Labor Law § 240 (1)); *Hernandez v Bethel United Methodist Church of New York*, 49 AD3d 251, 853 NYS2d 305 (1st Dept 2008) (worker who fell from ladder that became unsteady as he used nail gun entitled to recover under Labor Law § 240(1) even though worker could have repositioned ladder or asked a coworker to hold ladder while he worked); *Pearl v Sam Greco Const., Inc.*, 31 AD3d 996, 819 NYS2d 193 (3d Dept 2006) (plaintiff injured while trying to gain access to safety equipment stored along peak of icy roof entitled to summary judgment even though it may have been his decisions as supervisor to use unsafe methods to store and to reach equipment); *Samuel v Simone Dev. Co.*, 13 AD3d 112, 786 NYS2d 163 (1st Dept 2004) (plaintiff who was given wobbly ladder and no other safety devices entitled to summary judgment under Labor Law § 240(1), since his alleged drug use could not have been sole proximate cause of accident); *Ernish v New York*, 2 AD3d 256, 768 NYS2d 325 (1st Dept 2003) (where no adequate safety equipment was provided, plaintiff's faulty rigging of makeshift scaffold did not preclude summary judgment for plaintiff under § 240(1)); *Haulotte v Prudential Ins. Co. of America*, 266 AD2d 38, 698 NYS2d 24 (1st Dept 1999) (§ 240(1) applies despite plaintiff's alleged intoxication, which was not sole proximate cause of accident); *Garcia v 1122 East 180th Street Corp.*, 250 AD2d 550, 675 NYS2d 2 (1st Dept 1998) (§ 240(1) applies regardless of plaintiff's negligence in use of scaffold); *Van Alstyne v New York State Thruway Authority*, 244 AD2d 978, 665 NYS2d 220 (4th Dept 1997) (plaintiff's failure to tie off lanyard on available static lines while working on elevated girder does not bar recovery); *Haystrand v Ontario*, 207 AD2d 978, 617 NYS2d 249 (4th Dept 1994) (plaintiff's failure to use locking device on his own scaffold no defense).

Although comparative negligence is not applicable, there can be no liability under Labor Law § 240(1) if the worker's own actions were the sole proximate cause of the accident, *Barreto v Metropolitan Transp. Authority*, 25 NY3d 426, 13 NYS3d 305, 34 NE3d 815 (2015); *Robinson v East Medical Center, LP*, 6 NY3d 550, 814 NYS2d 589, 847 NE2d 1162 (2006); *Montgomery v Federal Express Corp.*, 4 NY3d 805, 795

NYS2d 490, 828 NE2d 592 (2005); *Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 790 NYS2d 74, 823 NE2d 439 (2004); *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 771 NYS2d 484, 803 NE2d 757 (2003); *Maloney v J.W. Pfeil & Co., Inc.*, 84 AD3d 1632, 924 NYS2d 586 (3d Dept 2011); *Weingarten v Windsor Owners Corp.*, 5 AD3d 674, 774 NYS2d 537 (2d Dept 2004); *George v State*, 251 AD2d 541, 674 NYS2d 742 (2d Dept 1998); see *Weininger v Hagedorn & Co.*, 91 NY2d 958, 672 NYS2d 840, 695 NE2d 709 (1998); see also *Doucoure v Atlantic Development Group, LLC*, 18 AD3d 337, 796 NYS2d 48 (1st Dept 2005) (Labor Law § 241-a claim). That principle follows from the premise that “if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation,” *Blake v Neighborhood Housing Services of New York City, Inc.*, *supra*. On the other hand, if the jury concludes that the lack or failure of a safety device is a proximate cause of the injury, plaintiff’s comparative negligence is no defense, *Samuel v Simone Dev. Co.*, 13 AD3d 112, 786 NYS2d 163 (1st Dept 2004); see *Ferluckaj v Goldman Sachs & Co.*, 53 AD3d 422, 862 NYS2d 473 (1st Dept 2008), *rev’d on other grounds*, 12 NY3d 316, 880 NYS2d 879, 908 NE2d 869 (2009). A line of cases preceding *Blake* denied recovery to so-called “recalcitrant workers” who ignored specific instructions to use readily available safety equipment, *Jastrzebski v North Shore School Dist.*, 88 NY2d 946, 647 NYS2d 708, 670 NE2d 1339 (1996); see *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 606 NYS2d 127, 626 NE2d 912 (1993); *Stolt v General Foods Corp.*, 81 NY2d 918, 597 NYS2d 650, 613 NE2d 556 (1993); *Lozada v State*, 267 AD2d 215, 700 NYS2d 38 (2d Dept 1999). In *Cahill v Triborough Bridge and Tunnel Authority*, *supra*, however, the Court of Appeals stated that “[t]he controlling question is not whether plaintiff was ‘recalcitrant,’ but whether a jury could have found that his own conduct, rather than any violation of Labor Law § 240(1), was the sole proximate cause of the accident.” It thus appears that what has been termed the “recalcitrant worker defense” is, in actuality, a category of the “sole proximate cause” principle; see *Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 18 NYS3d 251 (4th Dept 2015); *Beamon v Agar Truck Sales, Inc.*, 24 AD3d 481, 808 NYS2d 232 (2d Dept 2005) (sole proximate cause defense unavailable where defendants showed that scaffold available but did not show that plaintiff had been instructed to use or to avoid using ladder from which he fell). The “recalcitrant worker defense” is discussed in detail, *infra*.

The precise manner of plaintiff’s fall is immaterial and summary judgment should be granted, if there is no question that plaintiff’s injuries are at least partially attributable to defendant’s failure to provide guardrails, safety netting or other proper protection, *Griffin v AVA Realty Ithaca, LLC*, 150 AD3d 1462, 54 NYS3d 747 (3d Dept 2017); *Nephew v Klewin Bldg. Co., Inc.*, 21 AD3d 1419, 804 NYS2d 157 (4th Dept 2005); *Cammon v New York*, 21 AD3d 196, 799 NYS2d 455 (1st Dept 2005); *Torres v Monroe College*, 12 AD3d 261, 785 NYS2d 57 (1st Dept 2004); *Laquidara v HRH Const. Corp.*, 283 AD2d 169, 724 NYS2d 53 (1st Dept 2001); see *Wu v 34 17th Street Project LLC*, 200 AD3d 508, 155 NYS3d 85 (1st Dept 2021) (where plaintiff fell from ladder into

uncovered garbage chute, his placement of ladder next to chute was not sole proximate cause of accident); *Barreto v Metropolitan Transp. Authority*, 25 NY3d 426, 13 NYS3d 305, 34 NE3d 815 (2015) (walking over open manhole not sole proximate cause of fall where it took multiple people to move manhole cover); *Holly v Chautauqua*, 13 NY3d 931, 895 NYS2d 308, 922 NE2d 897 (2010) (if scaffolding failed to provide proper protection, notation in plaintiff's hospital record indicating that he had jumped from scaffold would not give rise to question of fact as to whether plaintiff's actions were sole proximate cause of injuries); *Rooney v D.P. Consulting Corp.*, 204 AD3d 428, 166 NYS3d 155 (1st Dept 2022) (plaintiff's conduct in tripping and falling or leaning against wooden barricade not sole proximate cause of accident); *Piccone v Metropolitan Transit Authority*, 205 AD3d 628, 169 NYS3d 290 (1st Dept 2022) (plaintiff's conduct in stepping over open manhole he was attempting to cover not sole proximate cause of accident; plaintiff fell through opening, which lacked a protective railing, when he was bumped by coworker); *Quiroz v Memorial Hospital for Cancer and Allied Diseases*, 202 AD3d 601, 163 NYS3d 60 (1st Dept 2022) (plaintiff's alleged failure to install safety railings on scaffold as instructed by supervisor not sole proximate cause of accident because unlevel, uneven, and unsecured planks on scaffold initially caused him to lose balance); *Mayorquin v Carriage House Owner's Corp.*, 202 AD3d 541, 163 NYS3d 51 (1st Dept 2022) (even if plaintiff was not authorized to work on canopy where he was struck by falling brick, his decision to get on top of canopy not sole proximate cause of accident); *Mejia v 69 Mamaroneck Road Corp.*, 203 AD3d 815, 164 NYS3d 207 (2d Dept 2022) (where plaintiff fell through uncovered and unguarded opening in roof that was concealed by ice and water shield, his act of untying his safety harness to reach area where coworker needed assistance not sole proximate cause of accident); *McEachern v Extell Development Company*, 199 AD3d 464, 154 NYS3d 222 (1st Dept 2021) (where no safety devices available, plaintiff's attempt to step on oil barrel to descend into fuel tank room not sole proximate cause of accident); *Sinchi v HWA 1290 III LLC*, 184 AD3d 408, 125 NYS3d 415 (1st Dept 2020) (plaintiff's alleged comparative negligence in causing roof collapse by pulling on ceiling with hook while attempting to remove sprinkler head not defense to Labor Law 240(1)); *Smith v State*, 180 AD3d 1270, 117 NYS3d 777 (3d Dept 2020) (where platform caved in, causing decedent to fall, failure to avail himself of certain available safety devices not sole proximate cause); *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 802 NYS2d 41 (1st Dept 2005) (plaintiff's conduct in sitting on parapet wall during lunch break not misuse of parapet). Thus, in *Pichardo v Aurora Contractors, Inc.*, 29 AD3d 879, 815 NYS2d 263 (2d Dept 2006), the court rejected a claim that plaintiff's and his co-worker's actions in disassembling an extension ladder and using the two halves separately to do their work was the sole proximate cause of the accident, where plaintiff was given no other safety equipment, the disassembly was conducted pursuant to directions from his supervisor, the work could not be performed without disassembling the ladder, plaintiff had previously performed his work in the same manner, and there was nothing extraordinary or unanticipated in plaintiff's conduct, see *Mullins v*

Center Line Studios, Inc., 199 AD3d 526, 154 NYS3d 432 (1st Dept 2021) (plaintiff's use of ladder attached to theater set's wall, which resulted in injury when top rung detached, not sole proximate cause of accident as there was no evidence he was instructed to use only A-frame ladders which were on site and which his co-workers were already using); *Bennett v Savage*, 192 AD3d 1243, 143 NYS3d 152 (3d Dept 2021) (whether plaintiff failed to maintain three-point safety stance on ladder presents issue of potential comparative fault and is insufficient to raise issue of fact as to whether plaintiff was sole proximate cause of accident); *Debennedetto v Chetrit*, 190 AD3d 933, 140 NYS3d 569 (2d Dept 2021) (fact that plaintiff participated with another worker in assembling scaffold that later collapsed insufficient to raise triable issue of fact as to whether plaintiff was sole proximate cause of accident); *Jarzabek v Schafer Mews Housing Development Fund Corporation*, 160 AD3d 412, 73 NYS3d 173 (1st Dept 2018) (plaintiff's decisions to use makeshift ladder instead of A-frame ladder and to descend backwards with his boots untied was not sole proximate cause of accident where plaintiff's uncontradicted testimony was that he could not use A-frame ladder to perform task because of the presence of dirt, debris, and rocks, and he was never instructed not to use makeshift ladder); *Martin v Niagara Falls Bridge Commission*, 162 AD3d 1604, 78 NYS3d 584 (4th Dept 2018) (issue of fact where plaintiff testified that six-foot safety lanyard was too short to permit him to perform work); *Noor v New York*, 130 AD3d 536, 15 NYS3d 13 (1st Dept 2015) (plaintiff's decision to lean A-frame ladder against object he was welding, rather than properly opening it with the rungs perpendicular to the object, so that he could avoid awkwardly twisting while working was not sole proximate cause of accident); *Przyborowski v A & M Cook, LLC*, 120 AD3d 651, 992 NYS2d 56 (2d Dept 2014) (plaintiff's exercise of discretion in connection with whether to use unsecured, closed A-frame ladder or staircase to access lower level of work site not sole proximate cause of his injuries); *Kuhn v Camelot Ass'n, Inc.*, 82 AD3d 1704, 919 NYS2d 684 (4th Dept 2011) (plaintiff's decision to use forklift rather than ladder to descend from roof was not sole proximate cause of accident; defendant adduced no evidence that plaintiff had been instructed to use ladder or knew or should have known to use ladder, and forklift was furnished by employer and its use as an alternative safety device for transporting personnel was approved by supervisors); *Rice v West 37th Group, LLC*, 78 AD3d 492, 913 NYS2d 13 (1st Dept 2010) (summary judgment appropriate for plaintiff where lone safety device, a baker's scaffold, was in use and no evidence that another scaffold could have been made available to plaintiff, upon his request, "in a relatively short period of time" or "in short order"); *Rookwood v Hyde Park Owners Corp.*, 48 AD3d 779, 853 NYS2d 127 (2d Dept 2008) (defendant not entitled to summary judgment under sole proximate cause doctrine where plaintiff claimed that he had no choice as to manner in which he performed work); *Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 823 NYS2d 416 (2d Dept 2006) (worker's actions not sole proximate cause of accident where worker followed supervisor's instructions and no adequate safety devices provided); *Arey v M. Dunn, Inc.*, 29 AD3d 1137, 816 NYS2d 197 (3d Dept 2006) (where no safety devices provided,

plaintiff-subcontractor's failure to bring own safety harness to worksite not sole proximate cause of accident); *Moniuszko v Chatham Green, Inc.*, 24 AD3d 638, 808 NYS2d 696 (2d Dept 2005) (plaintiff's temporary removal of safety harness not sole proximate cause of injuries where scaffold fell because of broken hook). Likewise, the fact that plaintiff's fall was precipitated by his actions in reaching for a falling bucket to prevent harm to a coworker below does not preclude his recovery under the sole proximate cause doctrine, *Lopez v Boston Properties Inc.*, 41 AD3d 259, 838 NYS2d 527 (1st Dept 2007). The risk that an elevated worker might become injured while trying to protect a coworker below is not so unforeseeable as to constitute a superseding cause of the accident, *id.* Similarly, a worker's use of single rather than double planking to walk across a trench was not the "sole proximate cause" of the accident where the double planking that he was instructed to use would not have protected him from injury, *Miraglia v H & L Holding Corp.*, 36 AD3d 456, 828 NYS2d 329 (1st Dept 2007); see *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 917 NYS2d 130 (1st Dept 2011). In *Pearl v Sam Greco Const., Inc.*, 31 AD3d 996, 819 NYS2d 193 (3d Dept 2006), the court held that a plaintiff who slipped off an icy roof while trying to gain access to improperly stored safety equipment was entitled to summary judgment under Labor Law § 240(1), even though it may have been his decisions as supervisor to use unsafe methods to store and to reach the equipment. Where plaintiff was specifically told not to use an available scaffold that would have enabled him to perform his work safely, questions about the adequacy of the ladder plaintiff chose and the care with which he used it were not sufficient to raise a question of fact as to whether plaintiff's conduct was the "sole proximate cause" of the accident, *DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 986 NYS2d 127 (1st Dept 2014). Where the plaintiff was following the directions of his foreman at time of accident, he could not be the sole proximate cause of the accident, *Hayek v Metropolitan Transportation Authority*, 195 AD3d 568, 146 NYS3d 479 (1st Dept 2021). Adaptations in work that a worker is forced to make cannot be used as a defense to a Labor Law § 240(1) claim where the worker's actions are a consequence of the defendant's failure to provide proper safety devices in the first instance, *Vitucci v Durst Pyramid LLC*, 205 AD3d 441, 168 NYS3d 45 (1st Dept 2022) (where plaintiff fell from edge of bathtub while installing shower curtain rod he was not sole proximate cause of accident; A-frame ladder provided for job could not be opened in bathroom due to lack of sufficient floor space).

In contrast, where a jury could conclude that the plaintiff's actions were the sole proximate cause of the injuries, summary judgment for the plaintiff is not appropriate, *Valente v Lend Lease (US) Constr. LMB, Inc.*, 29 NY3d 1104, 60 NYS3d 107, 82 NE3d 448 (2017); *Thome v Benchmark Main Transit Associates, LLC*, 86 AD3d 938, 927 NYS2d 260 (4th Dept 2011); *Georgia v Urbanski*, 84 AD3d 1569, 923 NYS2d 274 (3d Dept 2011); *Ozimek v Holiday Valley, Inc.*, 83 AD3d 1414, 920 NYS2d 528 (4th Dept 2011); see *Szymkowiak v New York Power Authority*, 203 AD3d 1618, 166 NYS3d 759 (4th Dept 2022) (issues of fact as to whether ladder adequate for task, readily available and whether

plaintiff “chose for no good reason” to instead perform work from elevated surface); *Wood v Baker Brothers Excavating*, 205 AD3d 1113, 168 NYS3d 158 (3d Dept 2022) (issues of fact as to task plaintiff assigned to perform, what safety equipment was required, and availability of adequate safety devices); *Videan v NRG Energy, Inc.*, 149 AD3d 1533, 53 NYS3d 436 (4th Dept 2017) (question of fact where plaintiff claimed supervisor instructed him to get work done despite inadequacy of scaffold); *Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 18 NYS3d 251 (4th Dept 2015); *Quinones v Olmstead Properties, Inc.*, 133 AD3d 87, 18 NYS3d 17 (1st Dept 2015) (triable issues of fact whether plaintiff was provided with adequate safety devices to paint billboard and whether his decision to stand on stack of concrete blocks instead of using one or more of those devices was sole proximate cause of his injuries); *Daley v 250 Park Ave., LLC*, 126 AD3d 747, 5 NYS3d 267 (2d Dept 2015) (triable issues of fact whether ladder from which plaintiff fell was mispositioned by plaintiff, and, if so, whether his conduct was sole proximate cause of ladder’s tipping over); *Silvia v Bow Tie Partners, LLC*, 77 AD3d 1143, 909 NYS2d 202 (3d Dept 2010) (triable issue of fact as to whether plaintiff’s decision to use particular planking on scaffold was sole proximate cause of his injuries); *Berenson v Jericho Water Dist.*, 33 AD3d 574, 822 NYS2d 145 (2d Dept 2006) (question of fact as to whether sole proximate cause of accident was alleged action of plaintiff or laborers under his supervision in placing inadequate wooden plank on scaffold causing it to collapse); *Canino v Electronic Technologies Co.*, 28 AD3d 932, 813 NYS2d 557 (3d Dept 2006) (fact issue whether accident caused by plaintiff’s improper placement of ladder and “ill advised application of lateral force” or instead by inadequacy of ladder for particular task); *Tronolone v Praxair, Inc.*, 22 AD3d 1031, 804 NYS2d 520 (4th Dept 2005) (fact issue whether worker’s disregarding safety instructions and stepping on guardrail were sole proximate cause of accident); *Makaj v Metropolitan Transp. Authority*, 18 AD3d 625, 796 NYS2d 621 (2d Dept 2005) (question of fact as to proximate cause where employee fell from staircase handrail while reaching for ladder but there was evidence that there may have been other, more accessible ladders at work site); *Danton v Van Valkenburg*, 13 AD3d 931, 787 NYS2d 431 (3d Dept 2004) (alleged admission by plaintiff that ladder fell because he was leaning too far to the side rather than because ladder leg bent under his weight); *Meade v Rock-McGraw, Inc.*, 307 AD2d 156, 760 NYS2d 39 (1st Dept 2003) (fact issue whether plaintiff’s improper use of ladder, which plaintiff found and used at supervisor’s instruction, was sole proximate cause of injuries); *Manning v Walter S. Johnson Building Co., Inc.*, 303 AD2d 929, 757 NYS2d 168 (4th Dept 2003) (fact issue whether plaintiff’s actions were sole proximate cause of accident where there was evidence that scaffold was not defective and plaintiff admitted he had walked off end of platform); *Vouzianas v Bonasera*, 262 AD2d 553, 693 NYS2d 59 (2d Dept 1999) (question of fact existed as to whether injured plaintiff’s conduct in disassembling extension ladder, and in using only top half, which lacked non-skid pads, constituted superseding cause of accident); *Ossorio v Forest Hills South Owners, Inc.*, 251 AD2d 475, 675 NYS2d 360 (2d Dept 1998) (although scaffold upon which plaintiff was standing

collapsed, question of fact existed as to whether injured plaintiff's fall was result of his own actions in cutting rope supporting scaffold); *Vencebi v Waldorf Astoria Hotel*, 143 AD2d 1004, 533 NYS2d 616 (2d Dept 1988) (jury question whether accident occurred because scaffold moved or because of plaintiff's method of climbing onto scaffold), see also *York v St. Mary's R.C. Church at Manhasset*, 22 AD3d 484, 802 NYS2d 183 (2d Dept 2005) (having found that that Labor Law § 240(1) violation occurred, court erred in charging that jurors should find for defendants if they determine plaintiff's actions were only substantial factor giving rise to accident).

A worker's failure to use safety devices that are readily available on the premises may be deemed the sole proximate cause of the worker's accident in some circumstances, *Gallagher v New York Post*, 14 NY3d 83, 896 NYS2d 732, 923 NE2d 1120 (2010); see *Martin v Niagara Falls Bridge Commission*, 162 AD3d 1604, 78 NYS3d 584 (4th Dept 2018) (where plaintiff fell after removing his safety lanyard to perform task that was out of reach, there was issue of fact as to whether other adequate safety devices were readily available where plaintiff claimed he was hurried by supervisor and plaintiff testified workers generally disregarded instruction to be tied off 100 percent of time); *Videan v NRG Energy, Inc.*, 149 AD3d 1533, 53 NYS3d 436 (4th Dept 2017) (question of fact on issue of whether safety device was readily available as there was conflicting evidence as to whether plaintiff was instructed to wait for scaffold to be modified); *Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 18 NYS3d 251 (4th Dept 2015) (triable issue of fact whether plaintiff's conduct in using ladder positioned on snow and ice was sole proximate cause of his injuries; owner of premises testified that he warned plaintiff that ladder was not placed in safe position, that owner offered to retrieve safety equipment that would stabilize ladder, and that owner offered to hold ladder, but that plaintiff chose to use ladder as it was positioned without assistance).

A defendant has no liability under Labor Law § 240(1) when plaintiffs: (1) had adequate safety devices available, (2) knew both that the safety devices were available and that they were expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had they not made that choice, *Biaca-Neto v Boston Road II Housing Development Fund Corporation*, 34 NY3d 1166, 121 NYS3d 753, 144 NE3d 363 (2020); *Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 790 NYS2d 74, 823 NE2d 439 (2004); *DeGraff v Colantonio*, 202 AD3d 1297, 163 NYS3d 673 (3d Dept 2022); see *Piotrowski v McGuire Manor, Inc.*, 117 AD3d 1390, 986 NYS2d 718 (4th Dept 2014). If all of these elements are established, the worker may be precluded from recovering under Labor Law § 240(1), regardless of whether the needed safety devices were in the immediate vicinity of the accident, *Gallagher v New York Post*, *supra*. The First Department has concluded that, to avail itself of a sole proximate cause defense, a defendant must establish that plaintiff knew exactly where the device was located and that, based on a job-site practice, plaintiff was to obtain the safety device him or herself because it was easy to do so, *Auriemma*

v Biltmore Theatre, LLC, 82 AD3d 1, 917 NYS2d 130 (1st Dept 2011); *Cherry v Time Warner, Inc.*, 66 AD3d 233, 885 NYS2d 28 (1st Dept 2009); but see *Maloney v J.W. Pfeil & Co., Inc.*, 84 AD3d 1632, 924 NYS2d 586 (3d Dept 2011) (tacitly rejecting principle that defendant can only rely on sole proximate cause defense if plaintiff knew exactly where safety device was located), or that an adequate safety device would have been supplied to plaintiff, upon his request, “in a relatively short period of time” or “in short order,” see *Rice v West 37th Group, LLC*, 78 AD3d 492, 913 NYS2d 13 (1st Dept 2010). Where plaintiff, who required a Spanish interpreter at his deposition, may not have understood a foreman’s purported instruction to install railings on a scaffold platform before proceeding with his work, an issue of fact existed as to whether the plaintiff was the sole proximate cause of the accident, *Battle v NY Developers & Management, Inc.*, 193 AD3d 562, 146 NYS3d 624 (1st Dept 2021). A plaintiff was not the sole proximate cause of his accident where there was no evidence that the employer’s policy not to use equipment belonging to other trades was ever communicated to him, *Mazzarisi v New York Society for Relief of Ruptured and Crippled, Maintaining Hospital for Special Surgery*, 205 AD3d 424, 167 NYS3d 87 (1st Dept 2022).

In *Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 790 NYS2d 74, 823 NE2d 439 (2004), for example, the Court of Appeals held that summary judgment in plaintiff’s favor was not appropriate because a jury could find that plaintiff’s choice not to use an available safety device despite his supervisor’s prior instruction to do so was the sole proximate cause of his accident. Similarly, in *Montgomery v Federal Express Corp.*, 4 NY3d 805, 795 NYS2d 490, 828 NE2d 592 (2005), the Court held that, where a ladder was available at the work site, albeit not in the worker’s immediate vicinity, the worker’s decision to use an overturned bucket rather than a ladder to reach a motor room above a roof was the sole proximate cause of his injuries. The same principle was applied to deny Labor Law § 240(1) recovery to a worker who had chosen to use a six-foot ladder even though he knew that he needed an eight-foot ladder, knew where such ladders were stored at the work site and had routinely helped himself to tools in the past, *Robinson v East Medical Center, LP*, 6 NY3d 550, 814 NYS2d 589, 847 NE2d 1162 (2006); see *Gonzalez v DOLP 205 Properties II, LLC*, 206 AD3d 468, 171 NYS3d 61 (1st Dept 2022) (where worker injured when using allegedly defective stilts, issue of fact as to whether plaintiff was sole proximate cause of accident because, upon feeling that stilts were unstable, his normal and logical response should have been to request another pair); *Reyes v Astoria 31st Street Developers, LLC*, 190 AD3d 872, 139 NYS3d 352 (2d Dept 2021) (plaintiff’s attempt to assist coworkers pass long piece of rebar through excavation site, an activity he was not authorized or instructed to engage in, was sole proximate cause of his injuries); *Tukshaitov v Young Men’s and Women’s Hebrew Association*, 180 AD3d 1101, 120 NYS3d 66 (2d Dept 2020) (defendants entitled to summary judgment where plaintiff performed task inconsistently with his employer’s procedure and he testified at deposition that he knew his supervisor would not have approved); *Guaman v New York*, 158 AD3d 492, 71 NYS3d 29 (1st Dept 2018) (defendant was entitled to summary judgment

ment where decedent was provided with harness and safety rope system, was instructed to remain tied off while on roof, and fell through skylight he could not have reached if tied off); *Eddy v John Hummel Custom Builders, Inc.*, 147 AD3d 16, 43 NYS3d 507 (2d Dept 2016) (where plaintiff chose to ride in bed of pickup truck rather than in cab, defendant entitled to summary judgment); *Nalepa v South Hill Business Campus, LLC*, 123 AD3d 1190, 998 NYS2d 245 (3d Dept 2014) (defendant granted summary judgment where plaintiff misused A-frame ladder in closed position by leaning it against wall; ladder was otherwise safe and an adequate safety device for plaintiff's task); *Maloney v J.W. Pfeil & Co., Inc.*, 84 AD3d 1632, 924 NYS2d 586 (3d Dept 2011) (plaintiff used inappropriate ladder when appropriate safety devices were available on job site and plaintiff knew that such devices were available); *Torres v Mazzone Administrative Group, Inc.*, 46 AD3d 1040, 848 NYS2d 381 (3d Dept 2007) (summary judgment granted to defendant where, although plaintiff's supervisor provided adequate ladder, plaintiff chose to use smaller ladder for "convenience"); see also *Miller v Spall Development Corp.*, 45 AD3d 1297, 846 NYS2d 496 (4th Dept 2007) (unnecessarily standing on top cap of stepladder constitutes misuse); but see *Cherry v Time Warner, Inc.*, 66 AD3d 233, 885 NYS2d 28 (1st Dept 2009).

On the other hand, summary judgment dismissing the Labor Law § 240(1) cause of action was not warranted where plaintiff knew he could request delivery of any needed equipment but the evidence was unclear as to how easily a ladder or other adequate safety device could have been obtained, *Masullo v 1199 Housing Corp.*, 63 AD3d 430, 881 NYS2d 47 (1st Dept 2009); see *Roman v Zapco 1500 Investment, L.P.*, 206 AD3d 439, 167 NYS3d 785 (1st Dept 2022) (no evidence scaffold was geographically accessible); *Latteri v Port of Authority of New York and New Jersey*, 205 AD3d 546, 166 NYS3d 529 (1st Dept 2022) (plaintiff's failure to wear safety harness insufficient to raise issue of fact where no evidence tie off locations were available where he was working); *Begeal v Jackson*, 197 AD3d 1418, 153 NYS3d 681 (3d Dept 2021) (where plaintiff fell when extension ladder slipped, evidence that plaintiff failed to use alternative safety device, failed to ask for assistance, and failed to clear snow upon which ladder feet rested was insufficient to raise an issue of fact); *DeGraff v Colantonio*, 202 AD3d 1297, 163 NYS3d 673 (3d Dept 2022) (where plaintiff fell from makeshift scaffold platform, evidence that plaintiff had brought extension ladders and scaffolding with him to job site and that defendant had provided some ladders insufficient to raise triable issue of fact absent evidence that he knew he was expected to use ladder for work); *Schutt v Bookhagen*, 186 AD3d 1027, 130 NYS3d 153 (4th Dept 2020) (testimony that safety harnesses were available somewhere on work site, that plaintiff was instructed to use one, and was instructed on how to wear was it insufficient to raise triable issue of fact); *Von Hegel v Brixmor Sunshine Square, LLC*, 180 AD3d 727, 115 NYS3d 712 (2d Dept 2020) (defendants, who claimed that adequate ladders and safety devices were available to plaintiff through his off-site employer, failed to demonstrate that appropriate safety devices were "readily available" to plaintiff); *Harris v New York*, 83 AD3d 104, 923 NYS2d 2 (1st Dept 2011) (worker's actions

not sole proximate cause of injuries where worker followed foreman's instructions); *Rice v West 37th Group, LLC*, 78 AD3d 492, 913 NYS2d 13 (1st Dept 2010) (summary judgment awarded to plaintiff, who was injured while performing task with ladder, which was inadequate for plaintiff's task, instead of baker's scaffold; lone baker's scaffold on site was in use and no evidence that another scaffold could have been made available to plaintiff, upon his request, "in a relatively short period of time" or "in short order").

Since safety goggles are not a protective device within the meaning of Labor Law § 240(1), a plaintiff's failure to wear them, even if they would have prevented his eye injury caused by falling debris, cannot be the sole proximate cause of his accident, *Peters v Structure Tone, Inc.*, 204 AD3d 522, 166 NYS3d 632 (1st Dept 2022).

In *Biaca-Neto v Boston Road II Housing Development Fund Corporation*, 34 NY3d 1166, 121 NYS3d 753, 144 NE3d 363 (2020), the Court of Appeals held that, despite an employer's standing order, which may or may not have been communicated to the plaintiff, to use specific available safety devices, the employer's acquiescence to workers disregarding the use of those safety devices created a question of fact as to whether the plaintiff's conduct was the sole proximate cause of his injuries. The Court reasoned that the accepted practice of disregarding the use of the safety devices could have negated the normal and logical inclination to use them, *id.* In contrast, where there was no standing order precluding workers from stepping onto a hoist tower and doing so had become an accepted practice, the plaintiff's conduct in stepping on to the tower to remove a screw could not be the sole proximate cause of his accident, *Lopez v Halletts Astoria LLC*, 205 AD3d 573, 169 NYS3d 282 (1st Dept 2022).

A related issue is the extent to which the worker's failure to use the adequate safety devices that were provided will preclude recovery under Labor Law § 240(1) where a redundant safety device that might have prevented the injury was inoperable or not provided. As to this issue, see *Albert v Williams Lubricants, Inc.*, 35 AD3d 1115, 828 NYS2d 593 (3d Dept 2006); see also *Grove v Cornell University*, 75 AD3d 718, 904 NYS2d 559 (3d Dept 2010), *aff'd as modified*, 17 NY3d 875, 933 NYS2d 635, 957 NE2d 1137 (2011).

A similar question is presented in cases where the accident resulted from the worker's failure to follow instructions about the safe use of the provided equipment. Thus a question of fact existed as to whether the worker's conduct was the sole proximate cause of her injuries where the worker disobeyed instructions not to use a ladder unless someone steadied it for her, *Andrews v Ryan Homes, Inc.*, 27 AD3d 1197, 812 NYS2d 729 (4th Dept 2006); *Thome v Benchmark Main Transit Associates, LLC*, 86 AD3d 938, 927 NYS2d 260 (4th Dept 2011); but see *McCarthy v Turner Const., Inc.*, 52 AD3d 333, 859 NYS2d 648 (1st Dept 2008) (worker's disobeying instruction to have apprentice hold ladder steady does not absolve defendant of liability for failing to provide adequate

safety device), where the worker's employer allegedly provided functional ladders and forbade its employees from using ladders provided by any other entity, *Garcia v Emerick Gross Real Estate, L.P.*, 196 AD3d 676, 152 NYS3d 462 (2d Dept 2021), and where a worker fell and was injured as he attempted to back out of a window onto a stepladder, *Trippi v Main-Huron, LLC*, 28 AD3d 1069, 814 NYS2d 444 (4th Dept 2006). There was an issue of fact as to whether a worker's conduct in disregarding his supervisor's instructions not to move sheetrock stacked against a wall was the sole proximate cause of his accident, *Padilla v Touro College University System*, 204 AD3d 415, 166 NYS3d 152 (1st Dept 2022). Likewise, a worker's conduct may be the sole proximate cause of an accident where the worker handles a scaffold in such a manner as to create the very condition that caused it to collapse, *Berenson v Jericho Water Dist.*, 33 AD3d 574, 822 NYS2d 145 (2d Dept 2006); see *Bermejo v New York City Health and Hospitals Corp.*, 119 AD3d 500, 989 NYS2d 490 (2d Dept 2014). In contrast, where plaintiff's Labor Law § 240(1) claim was based on the failure to provide a secure platform over a stairwell that he was constructing, defendant could not defeat the claim by relying on its instructions for the platform's safe construction, *Cody v State*, 52 AD3d 930, 859 NYS2d 316 (3d Dept 2008); see *Gutierrez v Turner Towers Tenants Corp.*, 202 AD3d 437, 163 NYS3d 6 (1st Dept 2022) (that plaintiff received instruction regarding use of harness at entirely different project insufficient to raise triable issue of fact as to sole proximate cause defense). Where there was no evidence that a plaintiff was instructed not to stand on the top of a ladder, warning language posted on the ladder in English, which the plaintiff was unable to read, was insufficient to raise a triable issue of fact as to the defense of sole proximate cause, *Hoxhaj v West 30th HL LLC*, 195 AD3d 503, 145 NYS3d 351 (1st Dept 2021). Where a plaintiff fell from a ladder after losing his balance and the ladder was not defective or inadequate for the task, he was the sole proximate cause of the accident, *Singh v 180 Varick, LLC*, 203 AD3d 1194, 163 NYS3d 455 (2d Dept 2022).

A worker cannot be expected to refuse or ignore an instruction to use an inadequate safety device or no safety device at all, or to demand a safer method for completing the work, *Finocchi v Live Nation Inc.*, 204 AD3d 1432, 167 NYS3d 280 (4th Dept 2022); *DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 986 NYS2d 127 (1st Dept 2014). Labor Law § 240(1) is specifically intended to protect those workers who would be understandably reticent to object to unsafe work practices for fear of jeopardizing their employment or their livelihood, *DeRose v Bloomingdale's Inc.*, *supra*; see *Finocchi v Live Nation Inc.*, *supra* (regardless of whether stage manager was plaintiff's actual supervisor, to expect him to refuse stage manager's demands overlooks realities of construction work).

A pre-existing injury, disability or illness that contributed to a worker's accident is not generally the "sole proximate cause" of the worker's injury where adequate safety devices were not provided, *Gallagher v New York Post*, 14 NY3d 83, 896 NYS2d 732, 923 NE2d

1120 (2010). Thus, where the weakness in the worker's hand from a prior injury may have, at most, contributed to his loss of balance, the worker's condition cannot have been the sole proximate cause of his injuries, *id.* In *Lajqi v New York City Transit Authority*, 23 AD3d 159, 805 NYS2d 5 (1st Dept 2005), the court concluded that, where plaintiff was not provided with any protective devices, that breach of Labor Law § 240(1) was a proximate cause of his fall and, consequently, defendants would not be absolved of liability even if plaintiff's medical condition caused him to faint or become dizzy.

Where there is a question of fact as to whether plaintiff's own negligence was the sole proximate cause of his or her injuries, the following charge should be given, see *Piotrowski v McGuire Manor, Inc.*, 117 AD3d 1390, 986 NYS2d 718 (4th Dept 2014):

PJI 2:217.2

As you have heard, CD claims that it should not be held liable to AB because adequate (scaffolding, hoists, ladders, etc.) (was, were) available to AB and it was solely, that is only, AB's conduct in [state basis for defendant's "sole proximate cause" claim] that was the cause of (his, her) injury.

CD is not liable to AB if AB's conduct was the sole cause of (his, her) (accident, injury). A worker's conduct is the sole cause of an (accident, injury) when the worker had adequate safety devices available, the worker knew that such devices were available, the worker knew that (he, she) was expected to use the devices but, for no good reason, the worker chose instead to use an unsafe (method, tool) to perform (his, her) work and, finally, that the (accident, injury) would not have occurred if the worker had not made that choice.

CD is not liable to AB if you find all of the following: (1) that adequate (scaffolding, hoists, ladders, etc.) (was, were) available, (2) that AB knew that adequate (scaffolding, hoists, ladder, etc.) (was, were) available, (3) that AB knew that (he, she) was expected to use the adequate (scaffolding, hoists, ladder, etc.), (4) that AB chose instead to [state basis for defendant's "sole proximate cause" claim], (5) that the (method, tool) AB used was unsafe, (6) that AB had no good reason for

choosing to [state basis for defendant's "sole proximate cause" claim] and (7) that AB's (accident, injury) would not occurred if (he, she) had not made that choice.

Caveat: The Third Department has stated that where PJI 2:217.2 is charged, it is reversible error to omit PJI 2:217, which contains the substantive law of a Labor Law § 240(1) cause of action, *DeGraff v Colantonio*, 202 AD3d 1297, 163 NYS3d 673 (3d Dept 2022) (citing PJI).

B. Recalcitrant Worker Doctrine

Prior to *Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 790 NYS2d 74, 823 NE2d 439 (2004), courts interpreted Labor Law § 240(1) to provide defendants with a discrete "recalcitrant worker" defense, *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 606 NYS2d 127, 626 NE2d 912 (1993); *Jastrzebski v North Shore School Dist.*, 223 AD2d 677, 637 NYS2d 439 (2d Dept 1996), *aff'd*, 88 NY2d 946, 647 NYS2d 708, 670 NE2d 1339 (1996); *Lozada v State*, 267 AD2d 215, 700 NYS2d 38 (2d Dept 1999); *Hickey v C.D. Perry & Sons, Inc.*, 223 AD2d 799, 636 NYS2d 153 (3d Dept 1996). The doctrine required a showing that adequate and safe equipment was provided but that the injured worker refused to use it, *Gordon v Eastern Ry. Supply, Inc.*, *supra*; *Stolt v General Foods Corp.*, 81 NY2d 918, 597 NYS2d 650, 613 NE2d 556 (1993); *Lozada v State*, *supra*. For example, in *Jastrzebski v North Shore School Dist.*, *supra*, the recalcitrant worker defense was held available where the worker used a ladder to perform his task even though he had just been instructed that the use of the ladder was not permitted and that instead he should use the scaffold in place at the site, see also *Cannata v One Estate, Inc.*, 127 AD2d 811, 512 NYS2d 211 (2d Dept 1987).

The recalcitrant worker defense did not apply where no adequate safety devices were provided, *Hagins v State*, 81 NY2d 921, 597 NYS2d 651, 613 NE2d 557 (1993); *Ortega v Catamount Const. Corp.*, 264 AD2d 323, 694 NYS2d 367 (1st Dept 1999) (abrogated on other grounds by, *McCarthy v Turner Const., Inc.*, 17 NY3d 369, 929 NYS2d 556, 953 NE2d 794 (2011)), and plaintiff was not a recalcitrant worker solely for failing to use one safety device when another safety device failed, *Kouros v State*, 288 AD2d 566, 732 NYS2d 277 (3d Dept 2001). Giving general safety instructions by an employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not itself a "safety device," *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 606 NYS2d 127, 626 NE2d 912 (1993); *Stolt v General Foods Corp.*, 81 NY2d 918, 597 NYS2d 650, 613 NE2d 556 (1993); *Hagins v State*, *supra*; *Garcia v 1122 East 180th Street Corp.*, 250 AD2d 550, 675 NYS2d 2 (1st Dept 1998); *Tennant v Curcio*, 237 AD2d 733, 655 NYS2d 118 (3d Dept 1997); see *Thompson v Sithe/Independence, LLC*, 107 AD3d 1385, 967 NYS2d 279 (4th Dept 2013).

Pre-Cahill cases held that the recalcitrant worker defense requires

a showing that the safety device in question was both available and visibly in place at the immediate work site of the injured employee who deliberately refused to use it, *Stolt v General Foods Corp.*, 81 NY2d 918, 597 NYS2d 650, 613 NE2d 556 (1993); *DePalma v Metropolitan Transp. Authority*, 304 AD2d 461, 759 NYS2d 37 (1st Dept 2003); *Powers v Lino Del Zotto and Son Builders Inc.*, 266 AD2d 668, 698 NYS2d 74 (3d Dept 1999); *Kanney v Goodyear Tire & Rubber Co.*, 245 AD2d 1034, 667 NYS2d 163 (4th Dept 1997); *Neville v Deters*, 175 AD2d 597, 572 NYS2d 256 (4th Dept 1991); *Koumianos v State*, 141 AD2d 189, 534 NYS2d 512 (3d Dept 1988); see *Lozada v State*, 267 AD2d 215, 700 NYS2d 38 (2d Dept 1999); *Ortega v Catamount Const. Corp.*, 264 AD2d 323, 694 NYS2d 367 (1st Dept 1999) (abrogated on other grounds by, *McCarthy v Turner Const., Inc.*, 17 NY3d 369, 929 NYS2d 556, 953 NE2d 794 (2011)); *Kaffke v New York State Elec. & Gas Corp.*, 257 AD2d 840, 685 NYS2d 305 (3d Dept 1999); *Garcia v 1122 East 180th Street Corp.*, 250 AD2d 550, 675 NYS2d 2 (1st Dept 1998); *Tennant v Curcio*, 237 AD2d 733, 655 NYS2d 118 (3d Dept 1997). The cases also indicated that the “recalcitrant worker” defense fails in the absence of evidence that the worker was specifically instructed to use the device under the circumstances extant at the time of the injury, see *Van Alstyne v New York State Thruway Authority*, 244 AD2d 978, 665 NYS2d 220 (4th Dept 1997); *Laurie v Niagara Candy, Inc.*, 188 AD2d 1075, 592 NYS2d 181 (4th Dept 1992); *Koumianos v State*, *supra*.

However, these holdings and the specific elements of the “recalcitrant worker” defense would appear to have diminished significance in light of *Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 790 NYS2d 74, 823 NE2d 439 (2004), in which the Court of Appeals held that a defense based on the injured worker’s failure to follow instructions regarding the use of an available safety device was not undermined because there was a lapse of weeks between the instruction and the worker’s disobedience. In so ruling, the Court stated: “The controlling question is not whether plaintiff was ‘recalcitrant,’ but whether a jury could have found that his own conduct, rather than any violation of Labor Law § 240(1), was the sole proximate cause of the accident.” The sole-proximate-cause analysis was subsequently applied in *Montgomery v Federal Express Corp.*, 4 NY3d 805, 795 NYS2d 490, 828 NE2d 592 (2005), in which a worker’s choice not to use a ladder that was “available at the job site” but was not located in the worker’s “immediate vicinity” was deemed the “sole proximate cause” of his accident and therefore precluded his recovery under Labor Law § 240(1). Nevertheless, the “recalcitrant worker” defense may have continuing vitality where no adequate safety devices were provided, see *Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 18 NYS3d 251 (4th Dept 2015); *Guaman v New Sprout Presbyterian Church of New York*, 33 AD3d 758, 822 NYS2d 635 (2d Dept 2006).

To the extent that the “recalcitrant worker defense” is still viable, its applicability may present a question of fact, *Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 790 NYS2d 74, 823 NE2d 439 (2004); see *Garcia v Emerick Gross Real Estate, L.P.*, 196 AD3d 676,

152 NYS3d 462 (2d Dept 2021) (issue of fact where plaintiff fell from ladder provided by site owner but his employer allegedly provided him with functional ladder and forbade employees from using ladders provided by any other entity); *Albino v 221-223 West 82 Owners Corp.*, 142 AD3d 799, 37 NYS3d 113 (1st Dept 2016) (issue of fact as to whether worker, in working on roof without wearing attached safety harness, recalcitrantly failed to use available equipment he had been directed to use); *Baun v Project Orange Associates, L.P.*, 26 AD3d 831, 809 NYS2d 703 (4th Dept 2006) (question of fact whether worker instructed to use lanyard when stationary); *Palacios v Lake Carmel Fire Dept., Inc.*, 15 AD3d 461, 790 NYS2d 185 (2d Dept 2005) (evidence that plaintiff was instructed to use scaffold rather than ladder, that plaintiff had used scaffold on previous work day and that scaffold was located within building); *Miraglia v H & L Holding Corp.*, 306 AD2d 58, 759 NYS2d 678 (1st Dept 2003) (employer testified that plaintiff was repeatedly instructed to use ladder instead of plank, which broke under his weight); *Santangelo v Fluor Constructors Intern., Inc.*, 266 AD2d 893, 697 NYS2d 881 (4th Dept 1999) (issue of fact presented as to whether decedent properly using safety harness and lanyard at time of accident and thus a recalcitrant worker because he allegedly refused to tie off); *Mills v Niagara Mohawk Power Corp.*, 262 AD2d 901, 692 NYS2d 493 (3d Dept 1999) (plaintiff admitted that he was supplied with materials and safety equipment but opted not to use safety belt for several reasons); *Harrington v State*, 255 AD2d 819, 681 NYS2d 122 (3d Dept 1998) (factual issue raised as to whether employee was provided with proper safety equipment at work site that he “declined to use” and, therefore, a recalcitrant worker); *Job v 1133 Bldg. Corp.*, 251 AD2d 459, 674 NYS2d 710 (2d Dept 1998) (plaintiff’s motion for partial summary judgment properly denied where conflicting evidence as to whether safety device was provided to plaintiff and whether plaintiff refused to use it); *Watso v Metropolitan Life Ins. Co.*, 228 AD2d 883, 644 NYS2d 399 (3d Dept 1996) (defendant’s evidence tended to demonstrate that plaintiff, rather than being unable to tie off to static line, purposefully did not do so); *Vona v St. Peter’s Hosp. of City of Albany*, 223 AD2d 903, 636 NYS2d 218 (3d Dept 1996) (plaintiff’s foreman testified that he instructed plaintiff to obtain ladder); see also *Mayancela v Almat Realty Development, LLC*, 303 AD2d 207, 756 NYS2d 548 (1st Dept 2003) (summary judgment dismissing § 240(1) claim properly granted; plaintiff admittedly misused ladder from which he fell despite specific, repeated and recent instructions regarding ladder’s proper and improper use). In cases where such a question of fact exists, the following instruction, which is based on *Cahill v Triborough Bridge and Tunnel Authority*, supra, should be given:

PJI 2:217.2a

One issue for you to decide in this case is whether the plaintiff, at the time of the accident, was a recalcitrant worker. Recalcitrant means that the worker deliberately and unreasonably failed or refused to use an available and adequate safety

device. “Deliberately” means intentionally. It does not mean negligently or carelessly. In order to establish that the plaintiff was a recalcitrant worker, the defendant has the burden of proving that: (1) the (*specify device such as:*) scaffolding, hoist, stay, ladder, sling, hanger, block, pulley, brace, iron, rope, other device) provided to the plaintiff was adequate and safe, (2) plaintiff knew both that the (*specify device*) was available and that (he/she) was expected to use it, (3) (he/she) chose for no good reason not to do so and (4) had (he/she) not made that choice, (he/she) would not have been injured.

VI. Procedural Considerations

Because defendant’s negligence is not a material issue in Labor Law § 240(1) cases, plaintiffs often look to the procedural device of summary judgment as an expeditious way of resolving the question of defendant’s liability. Where plaintiff gives varying versions of the accident and not all would give rise to liability, summary judgment is not appropriate, *Groves v Land’s End Housing Co., Inc.*, 80 NY2d 978, 592 NYS2d 643, 607 NE2d 790 (1992); *Toalongo v Almarwa Center, Inc.*, 202 AD3d 1128, 164 NYS3d 162 (2d Dept 2022); *Potter v NYC Partnership Housing Development Fund Co., Inc.*, 13 AD3d 83, 786 NYS2d 438 (1st Dept 2004); *Delmar v TerraStruct Corp.*, 249 AD2d 259, 670 NYS2d 915 (2d Dept 1998); *Cook v Presbyterian Homes of Western New York, Inc.*, 234 AD2d 906, 655 NYS2d 701 (4th Dept 1996); *Muhammad v George Hyman Const.*, 216 AD2d 206, 628 NYS2d 681 (1st Dept 1995). Summary judgment is also inappropriate where a safety device was in place at the time of the accident and a factual issue exists whether the safety device satisfied the requirements of the statute and, if not, whether its deficiency was the proximate cause of the injuries, *Manning v Walter S. Johnson Building Co., Inc.*, 303 AD2d 929, 757 NYS2d 168 (4th Dept 2003); *Romano v Hotel Carlyle Owners Corp.*, 226 AD2d 441, 641 NYS2d 50 (2d Dept 1996); *Liverio v Clover Leaf 82 Associates*, 186 AD2d 308, 587 NYS2d 450 (3d Dept 1992); see *Fuller v Catalfamo*, 223 AD2d 850, 636 NYS2d 467 (3d Dept 1996). However, where there are inconsistencies in the evidence with respect to the exact manner in which an accident occurred, summary judgment for the plaintiff may still be appropriate if it is undisputed that no necessary safety devices were provided to the plaintiff, *Turisse v Dominick Milone, Inc.*, 262 AD2d 305, 691 NYS2d 94 (2d Dept 1999).

To successfully plead and prove a right to recovery under Labor Law § 240(1), plaintiff must establish that the proper erection, construction, placement, or operation of the devices of the type listed in the statute would have prevented injury, see *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 577 NYS2d 219, 583 NE2d 932 (1991). Once the plaintiff establishes a *prima facie* case, the defendant must raise a tri-

able issue of fact relating to the prima facie case or to the plaintiff's credibility to defeat the motion for summary judgment, *Klein v New York*, 89 NY2d 833, 652 NYS2d 723, 675 NE2d 458 (1996); see *Panek v Albany*, 99 NY2d 452, 758 NYS2d 267, 788 NE2d 616 (2003); *Franklin v Dormitory Authority*, 291 AD2d 854, 736 NYS2d 816 (4th Dept 2002). A defendant raises a triable issue with respect to the plaintiff's prima facie case when it demonstrates a plausible view of the evidence that there was no statutory violation, leading to the conclusion that the plaintiff's own acts or omissions were the sole cause of the accident, *Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 790 NYS2d 74, 823 NE2d 439 (2004); *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 771 NYS2d 484, 803 NE2d 757 (2003).

Even where the accident is unwitnessed, once the plaintiff establishes an injury under circumstances covered by Labor Law § 240(1), if the defendant does not contest the plaintiff's account of the accident or there is no substantiated challenge to plaintiff's credibility, summary judgment may be appropriate, see *Mannino v J.A. Jones Const. Group, LLC*, 16 AD3d 235, 792 NYS2d 32 (1st Dept 2005); *Pabon v Alexander Building Corp.*, 273 AD2d 130, 709 NYS2d 550 (1st Dept 2000); *Kirkpatrick v Diversified Sports, Inc.*, 216 AD2d 891, 629 NYS2d 151 (4th Dept 1995); *Desouter v HRH Const. Corp.*, 216 AD2d 249, 628 NYS2d 691 (1st Dept 1995), see also *Perrone v Tishman Speyer Properties, L.P.*, 13 AD3d 146, 787 NYS2d 230 (that plaintiff was sole witness to accident does not preclude summary judgment where defendant did not present plausible view of evidence refuting plaintiff's claim). Summary judgment was also held appropriate where, in a case involving an unwitnessed accident that plaintiff was unable to recall, plaintiff established by medical records and his attending physician's affidavit that his injuries could not have been sustained in any manner other than a fall from a height, *Greer v Hayner Hoyt Corp.*, 16 AD3d 1036, 791 NYS2d 794 (4th Dept 2005). However, a defendant was entitled to summary judgment dismissing a Labor Law § 240(1) cause of action where the decedent's fall was unwitnessed and there was no direct or circumstantial evidence as to how the accident happened, since any determination by the trier of fact would be based upon speculation, *Public Administrator of Queens County v 124 Ridge LLC*, 203 AD3d 493, 165 NYS3d 36 (1st Dept 2022).

**PJI 2:218. Injured Employee—Compensation Cases—
Injury in Course of Employment**

When an employee is (injured, killed) by another employee of the same employer while both are working for the same employer, (he, she, they) may only recover benefits under the Workers' Compensation Law and may not sue for damages. The question for you to decide will be whether plaintiff and AB were working for the same em-

ployer at the time of the accident, and whether plaintiff and AB were acting in the course and scope of their employment at that time.

An act is considered in the scope of employment if it is performed while the employee is engaged generally in the performance of (his, her) assigned duties or if the act is reasonably necessary or incidental to the employment.

Plaintiff has the burden of proving that (he, she) and AB were not employed by the same employer or that either (he, she) or AB were not acting in the course and scope of their employment.

In deciding whether Plaintiff and AB were acting in the course and scope of the same employment at the time of the accident, you may take into consideration *([Insert as appropriate:] where the accident happened; whether the accident happened during their working hours; whether the nature and purpose of their activities when the accident happened were normally part of their activities for their employer; whether ((plaintiff, decedent)) or AB was using a facility provided by the employer even though ((he, she)) was not actually at work at the time of the accident and all of the other facts and circumstances existing at the time and place of the accident.)*

If you find that (plaintiff, decedent) and AB were working for the same employer and that (plaintiff's, decedent's) injuries happened while plaintiff and AB were acting in the course of and within the scope of their common employment, you will make that finding on the verdict sheet and proceed no further. If, however, you find that when (plaintiff's, decedent's) injuries happened, (plaintiff, decedent) and defendant were not working for the same employer or either one or both were acting outside the course and scope of their employment, you will make that finding on the verdict sheet and you will proceed to consider the rest of the questions in the case.

Comment

Based on *Moon v Finkle*, 6 NY2d 831, 188 NYS2d 217, 159 NE2d 701 (1959); *Ramsden v Shaker Ridge Country Club*, 23 AD2d 857, 259 NYS2d 280 (2d Dept 1965), *aff'd*, 18 NY2d 886, 276 NYS2d 625, 223 NE2d 35 (1966); *Lambiase v Schechter*, 22 AD2d 648, 253 NYS2d 16 (1st Dept 1964), *aff'd*, 17 NY2d 496, 267 NYS2d 215, 214 NE2d 377 (1966); *Kunze v Jones*, 6 AD2d 888, 177 NYS2d 579 (2d Dept 1958), *aff'd*, 8 NY2d 1152, 209 NYS2d 833, 171 NE2d 906 (1960); *Smithline v Ghessi*, 25 AD2d 841, 270 NYS2d 103 (1st Dept 1966); *Duck v D'Angelo*, 15 AD2d 813, 225 NYS2d 484 (2d Dept 1962); *Hendrix v Bennett*, 14 AD2d 944, 221 NYS2d 372 (3d Dept 1961); see *Wanamaker v Springstead*, 274 App Div 1008, 85 NYS2d 27 (2d Dept 1948). The definition of scope of employment is based in part on PJI 2:235 and cases cited there.

The pattern charge is meant to be used in a case such as *Shine v Duncan Petroleum Transport, Inc.*, 60 NY2d 22, 466 NYS2d 672, 453 NE2d 1089 (1983), and *Murray v New York*, 43 NY2d 400, 401 NYS2d 773, 372 NE2d 560 (1977), in which it is appropriate to submit the Workers' Compensation Law issue to the jury. The *Shine* and *Murray* cases are discussed in the Introductory Statement preceding PJI 2:215. A verdict sheet designed for use in conjunction with the pattern charge follows at the end of this Comment.

The pattern charge illustrates the "co-employee" situation and must be modified in a Section 11 case in which no co-employee is involved.

Plaintiff is barred from suit by workers' compensation where the injury was received while plaintiff was doing the duty he or she was employed to perform and as a natural incident of the work, *Malacarne v City of Yonkers Parking Authority*, 41 NY2d 189, 391 NYS2d 402, 359 NE2d 992 (1976); *Patterson v Salvation Army*, 203 AD2d 87, 610 NYS2d 42 (1st Dept 1994); *Hendrix v Bennett*, 14 AD2d 944, 221 NYS2d 372 (3d Dept 1961); *Tyler v Gilbert*, 29 AD2d 591, 285 NYS2d 452 (3d Dept 1967); see *Slater v Pilch*, 17 AD2d 340, 234 NYS2d 513 (3d Dept 1962). The workers' compensation defense is available to employers of undocumented workers, *New York Hosp. Medical Center of Queens v Microtech Contracting Corp.*, 22 NY3d 501, 982 NYS2d 830, 5 NE3d 993 (2014) (citing *Balbuena v IDR Realty LLC*, 6 NY3d 338, 812 NYS2d 416, 845 NE2d 1246 (2006)).

The defendant has the burden of establishing the defense of workers' compensation by a preponderance of the credible evidence, *Smith v Roman Catholic Diocese of Syracuse*, 252 AD2d 805, 677 NYS2d 183 (3d Dept 1998). Except under limited circumstances, employees are not deemed to be within the scope of their employment while traveling to and from work, *Geiss v Mitchell*, 251 AD2d 1067, 674 NYS2d 220 (4th Dept 1998); see *Greene v City of New York Dept. of Social Services*, 44 NY2d 322, 405 NYS2d 645, 376 NE2d 1291 (1978). However, an injury received on premises controlled by the employer while the employee is on the way to work or on the way home arises out of the employment,

Doyle v Jennings, 32 AD2d 608, 299 NYS2d 480 (4th Dept 1969), *aff'd*, 26 NY2d 957, 310 NYS2d 512, 258 NE2d 924 (1970); Sicktish v Vulcan Industries of Buffalo, Inc., 33 AD2d 975, 307 NYS2d 385 (4th Dept 1970); Sciaruto v Scovell, 32 AD2d 702, 299 NYS2d 876 (3d Dept 1969); see Lawton v Eastman Kodak Co., 206 AD2d 813, 616 NYS2d 412 (3d Dept 1994).

Duck v D'Angelo, 15 AD2d 813, 225 NYS2d 484 (2d Dept 1962), holds that in determining whether the accident occurred in the course of employment for purposes of allowing a common law negligence action to proceed, the presumption created by WCL § 21(1) that a claim arose in the course of employment has no application and may not be invoked.

For purposes of the Workers' Compensation Law, a mental injury is generally compensable to the same extent as a physical injury, *DePaoli v Great A & P Tea Co.*, 94 NY2d 377, 704 NYS2d 527, 725 NE2d 1089 (2000). In 1990, however, the legislature made a number of changes to the Workers' Compensation Law, including an amendment excluding claims based solely on mental injuries that are caused by work related stress and "a direct consequence of a lawful personnel decision involving a disciplinary action, work evaluation, job transfer, demotion, or termination taken in good faith by the employer," Workers' Compensation Law § 2(7). The phrase "direct consequence" clarifies that the exclusionary language of Workers' Compensation Law § 2(7) applies only when the personnel decision at issue is aimed at the claimant, *DePaoli v Great A & P Tea Co.*, *supra*; see *Dockum v Syroco Inc.*, 260 AD2d 688, 687 NYS2d 759 (3d Dept 1999). In *DePaoli*, claimant was not the subject of a "personnel decision" and the personnel decisions made by the employer regarding the store's co-managers and night crew contributed only indirectly to claimant's injury by forcing him to work longer hours, take on more responsibility and manage a store that was not performing well. Therefore, claimant's suit for Workers' Compensation benefits was not barred by Workers' Compensation Law § 2(7).

Where medical services are made available by the employer to its employees, the services are not available generally to members of the public and the plaintiff receives medical treatment, not as a member of the public, but only as a consequence of his or her employment, the alleged medical malpractice falls within the scope of the Workers' Compensation Law, WCL § 29(6); see *Garcia v Iserson*, 33 NY2d 421, 353 NYS2d 955, 309 NE2d 420 (1974); *Walsh v Pisano*, 190 AD3d 535, 135 NYS3d 840 (1st Dept 2021); *McKay v Ciani*, 280 AD2d 808, 720 NYS2d 601 (3d Dept 2001); *Marange v Slivinski*, 257 AD2d 427, 684 NYS2d 199 (1st Dept 1999); *Cronin v Perry*, 244 AD2d 448, 664 NYS2d 123 (2d Dept 1997); *Woods v Dador*, 187 AD2d 648, 590 NYS2d 240 (2d Dept 1992). However, where the employer provided periodic breast examinations as part of a breast cancer screening program, such routine examinations were held not to be either treatment or examination for a work-related injury or condition, *Malavenda v New York Telephone Co.*, 188 AD2d 962, 591 NYS2d 894 (3d Dept 1992), and would not preclude a malpractice suit against the employer and members of its

medical staff, see *Litwak v Our Lady of Victory Hosp. of Lackawanna*, 238 AD2d 879, 660 NYS2d 912 (4th Dept 1997). Likewise, WCL § 29(6) would not preclude a suit on behalf of a hospital employee for the employer-hospital staff's negligent failure to diagnose a pulmonary embolism where the hospital's professional services had been paid for by the employee rather than the hospital-employer, the employee had been treated in an emergency room that was available to the general public and the services provided to the employee were identical to those available to the general public, *Hollingshed v Levine*, 307 AD2d 850, 763 NYS2d 595 (1st Dept 2003). *Hollingshed* should be compared with *Crosson v Jamaica Hosp. Medical Center*, 14 AD3d 587, 789 NYS2d 216 (2d Dept 2005), where the court determined that WCL § 29(6) precluded an action brought by a hospital employee against the employer-hospital for alleged negligence in drawing blood. The treatment, while occurring in a facility open to the public, was rendered as a result of a work-related incident and was arranged by plaintiff's supervisor in accordance with the hospital's protocol for injured employees. The fellow-employee rule is not applicable to a suit against a pharmacist whose services are available to all persons working in a building, and not just those employed by plaintiff's employer, *Ruiz v Chase Manhattan Bank*, 211 AD2d 539, 621 NYS2d 345 (1st Dept 1995).

In *Garcia v Iseron*, 33 NY2d 421, 353 NYS2d 955, 309 NE2d 420 (1974), the Court left open the question whether [workers'] compensation would be the exclusive remedy if an employee were injured while availing himself of services or facilities furnished by his employer to the general public, see *Sivertsen v State*, 19 NY2d 698, 278 NYS2d 886, 225 NE2d 572 (1967), if the employee's access to such services or facilities was a benefit regularly furnished by the employer in consequence of a union contract, an individual agreement, or otherwise; see *Hickey v Travelers Ins. Co.*, 158 AD2d 112, 558 NYS2d 554 (2d Dept 1990). Note that in *Golini v Nachtigall*, 38 NY2d 745, 381 NYS2d 45, 343 NE2d 762 (1975), the court said that the fact that some of the treatment performed by the defendant doctor was not at the employer's premises did not take the case out of the rule of *Garcia v Iseron*, *supra*; see also *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 432 NYS2d 879, 412 NE2d 934 (1980) (rejecting so-called "dual capacity" doctrine as violative of policy underlying exclusivity of workers' compensation); *Sormani v Orange County Community College*, 240 AD2d 724, 659 NYS2d 507 (2d Dept 1997); *Firestein v Kingsbrook Jewish Medical Center*, 137 AD2d 34, 528 NYS2d 85 (2d Dept 1988). In any event, the question left open in *Garcia v Iseron*, *supra*, falls within the primary jurisdiction of the Workers' Compensation Board, *Botwinick v Ogden*, 59 NY2d 909, 466 NYS2d 291, 453 NE2d 520 (1983); see also *Introductory Statement*.

A defendant may invoke Workers' Compensation Law §§ 11 and 29(6) if it can demonstrate that it is the alter ego of the entity that employs the injured worker, *Fuller v KFG Land I, LLC*, 189 AD3d 666, 139 NYS3d 166 (1st Dept 2020); *Gerardi v I.J. Litwak Realty Limited Partnership*, 177 AD3d 679, 113 NYS3d 254 (2d Dept 2019); *Landaverde v Lin-Ann Enterprises, Inc.*, 177 AD3d 864, 110 NYS3d 579 (2d Dept 2019); *Salinas v 64 Jefferson Apartments, LLC*, 170 AD3d 1216,

97 NYS3d 136 (2d Dept 2019); *Samuel v Fourth Avenue Associates, LLC*, 75 AD3d 594, 906 NYS2d 67 (2d Dept 2010); *Cappella v Suresky at Hatfield Lane, LLC*, 55 AD3d 522, 864 NYS2d 316 (2d Dept 2008); *Hageman v B & G Bldg. Services, LLC*, 33 AD3d 860, 823 NYS2d 211 (2d Dept 2006). It is not necessary for an employer to be the direct, “paper” employer of an injured worker to benefit from the protection of the Workers’ Compensation Law, *Fuller v KFG Land I, LLC*, *supra*. Defendant may establish its status as alter ego of plaintiff’s employer by showing that one of the entities controls the other or that the two operate as a single integrated entity, *Fuller v KFG Land I, LLC*, *supra*; *Landaverde v Lin-Ann Enterprises, Inc.*, *supra*; *Salinas v 64 Jefferson Apartments, LLC*, *supra*; *Samuel v Fourth Avenue Associates, LLC*, *supra*; *Cappella v Suresky at Hatfield Lane, LLC*, *supra*; *Ortega v Noxxen Realty Corp.*, 26 AD3d 361, 809 NYS2d 546 (2d Dept 2006). However, a showing that the entities are related is insufficient where defendant cannot demonstrate that one controls the day to day operations of the other, *Landaverde v Lin-Ann Enterprises, Inc.*, *supra*; *Samuel v Fourth Avenue Associates, LLC*, *supra*, or that the two entities operate as a single integrated unit, *Landaverde v Lin-Ann Enterprises, Inc.*, *supra*; *Salinas v 64 Jefferson Apartments, LLC*, *supra*. Thus, a parent corporation may be deemed to be the employer of an employee of a subsidiary corporation for workers’ compensation purposes if the subsidiary functions merely as the alter ego of the parent, but only if the parent exercises complete domination and control of the subsidiary’s everyday operations, *Smith v Roman Catholic Diocese of Syracuse*, 252 AD2d 805, 677 NYS2d 183 (3d Dept 1998).

There may be factual issues as to the identity of the plaintiff’s employer, *Gerardi v I.J. Litwak Realty Limited Partnership*, 177 AD3d 679, 113 NYS3d 254 (2d Dept 2019). There may also be factual issues as to whether the subsidiary is the alter ego of the parent, see *Cruceta v Funnel Equities, Inc.*, 286 AD2d 747, 730 NYS2d 531 (2d Dept 2001). An affiliated corporation is not an employee of its parent corporation and therefore is not a co-employee of the parent’s employees, *Daisernia v Co-Operative G. L. F. Holding Corp.*, 26 AD2d 594, 270 NYS2d 542 (3d Dept 1966). However, a joint venture is an employer within the meaning of the Workers’ Compensation Law, and, therefore, when such a venture obtains compensation coverage, compensation is the exclusive remedy of an employee of the venture injured in the course of employment, *Fallone v Misericordia Hospital*, 23 AD2d 222, 259 NYS2d 947 (1st Dept 1965), *aff’d*, 17 NY2d 648, 269 NYS2d 431, 216 NE2d 594 (1966); see *Fuller v KFG Land I, LLC*, 189 AD3d 666, 139 NYS3d 166 (1st Dept 2020) (three entities formed to acquire, develop, and operate skilled nursing facility, which shared space, had the same principal, and held themselves out to the public as integrated institution, constituted a joint venture, and were entitled Workers’ Compensation bar); *Kudelski v 450 Lexington Venture*, 198 AD2d 157, 603 NYS2d 483 (1st Dept 1993). The joint venture rule applies whether the relationship between the entities involved is that of joint venturers, parent and subsidiary, or corporate affiliates, *Levine v Lee’s Pontiac*, 203 AD2d 259, 609 NYS2d 918 (2d Dept 1994). However, once a worker files a workers’

compensation claim and the Workers' Compensation Board determines that a particular entity is the employer, the worker is thereafter estopped from asserting in a civil action that he was employed by a different entity, *Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 (1st Dept 2003); *Zabava v 178 East 78, Inc.*, 212 AD2d 406, 622 NYS2d 42 (1st Dept 1995).

When the operator of a vehicle is a co-employee of plaintiff, the action that plaintiff would otherwise have under VTL § 388 is barred by WCL § 29(6), *Naso v Lafata*, 4 NY2d 585, 176 NYS2d 622, 152 NE2d 59 (1958); *Rauch v Jones*, 4 NY2d 592, 176 NYS2d 628, 152 NE2d 63 (1958); *Jaglall v Supreme Petroleum Co. of New Jersey, Inc.*, 185 AD2d 971, 587 NYS2d 413 (2d Dept 1992); *Ulysse v Nelsk Taxi, Inc.*, 135 AD2d 528, 522 NYS2d 162 (2d Dept 1987); *Rozelle v Robertson*, 29 AD2d 589, 285 NYS2d 449 (3d Dept 1967); see *Sikora v Keillor*, 13 NY2d 610, 240 NYS2d 601, 191 NE2d 88 (1963); *Mansour v Paddock Chevrolet, Inc.*, 198 AD3d 1280, 154 NYS3d 189 (4th Dept 2021); *Christiansen v Silver Lake Contracting Corp.*, 188 AD2d 507, 591 NYS2d 189 (2d Dept 1992), as is an action for contribution brought by a third-party tortfeasor, *Isabella v Hallock*, 22 NY3d 788, 987 NYS2d 293, 10 NE3d 673 (2014). Where plaintiff's suit is barred by WCL § 29(6), plaintiff's employer may not be held vicariously liable for the defendant co-employee's negligence, *Levine v Lee's Pontiac*, 203 AD2d 259, 609 NYS2d 918 (2d Dept 1994); *Christiansen v Silver Lake Contracting Corp.*, *supra*, but the section does not proscribe an action against a third person whose negligence was concurrent with the negligence of plaintiff's co-employee, *Caulfield v Elmhurst Contracting Co.*, 268 App Div 661, 53 NYS2d 25 (2d Dept 1945), *aff'd*, 294 NY 803, 62 NE2d 237 (1945); *Christiansen v Silver Lake Contracting Corp.*, *supra*. A common law action may also be maintained against a co-employee where neither plaintiff nor defendant was acting within the scope of employment at the time of injury, *Root v Sanger*, 133 AD2d 896, 520 NYS2d 252 (3d Dept 1987); *Manzoni v Hoffarth*, 134 AD2d 838, 522 NYS2d 40 (4th Dept 1987). Section 19 of the Volunteer Firefighter's Benefit Law may, under certain conditions, bar a common law action, see *Pollini v Fuller Road Fire Dept*, 34 NY2d 744, 357 NYS2d 502, 313 NE2d 793 (1974); *Theodoreu v Chester Fire Dist.*, 12 AD3d 499, 785 NYS2d 91 (2d Dept 2004); *Lima v Rockland*, 133 AD2d 740, 520 NYS2d 161 (2d Dept 1987), but not if injury-causing acts of fellow firefighters are acts outside the scope of their employment, *Maines v Cronomer Valley Fire Dept., Inc.*, 50 NY2d 535, 429 NYS2d 622, 407 NE2d 466 (1980).

When an employer and the owner of the premises where a plaintiff is injured are distinct legal entities, there is no basis to dismiss an action against a landowner based on the exclusivity provisions of the Workers' Compensation Law, *Richardson v Benoit's Elec., Inc.*, 254 AD2d 798, 677 NYS2d 855 (4th Dept 1998); see *Salinas v 64 Jefferson Apartments, LLC*, 170 AD3d 1216, 97 NYS3d 136 (2d Dept 2019); *Mertz v Seibel Realty, Inc.*, 265 AD2d 925, 696 NYS2d 598 (4th Dept 1999), even where the claim against a premises owner is predicated on its vicarious liability for the tortious conduct of an individual who is

employed by both corporations and is therefore a co-employee of plaintiff, *Laudisio v Diamond "D" Const. Corp.*, 309 AD2d 1178, 765 NYS2d 720 (4th Dept 2003). However, having identified the building owner as the employer and accepted workers' compensation benefits on that basis, an injured employee may not thereafter argue that the building manager was his employer, *Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 (1st Dept 2003).

A special employee is one who is transferred for a limited duration to the service of another, *Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 850 NYS2d 359, 880 NE2d 845 (2007); *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 578 NYS2d 106, 585 NE2d 355 (1991); *Chiloyan v Chiloyan*, 197 AD3d 612, 152 NYS3d 717 (2d Dept 2021); *Salinas v 64 Jefferson Apartments, LLC*, 170 AD3d 1216, 97 NYS3d 136 (2d Dept 2019); *Ribeiro v Dynamic Painting Corp.*, 23 AD3d 795, 803 NYS2d 754 (3d Dept 2005); *Goss v State University Const. Fund*, 261 AD2d 860, 690 NYS2d 811 (4th Dept 1999). A worker may be in the general employ of one master and the special employ of another, *Murray v Union Ry. Co. of New York City*, 229 NY 110, 127 NE 907 (1920); *Samuel v Fourth Avenue Associates, LLC*, 75 AD3d 594, 906 NYS2d 67 (2d Dept 2010). General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer, *Thompson v Grumman Aerospace Corp.*, *supra*; *Goss v State University Const. Fund*, *supra*. Although no one factor is determinative, a significant and weighty factor in deciding whether a special employment relationship exists is who controls and directs the manner, details and ultimate result of the employee's work, *Fung v Japan Airlines Co.*, *supra*; *Samuel v Fourth Avenue Associates, LLC*, *supra*; *Chiloyan v Chiloyan*, *supra*; *Salinas v 64 Jefferson Apartments, LLC*, *supra* (additional factors to be considered are who is responsible for payment of wages and the furnishing of equipment, who has the right to discharge employee, and whether work is being performed was in furtherance of special employer's or general employer's business); see *Winkler v Halmar International, LLC*, 199 AD3d 598, 159 NYS3d 20 (1st Dept 2021). Generally, whether a person can be categorized as a special employee is a question of fact, *Hintze v Brookhaven Nat. Laboratory*, 278 AD2d 456, 718 NYS2d 406 (2d Dept 2000); see *VeRost v Mitsubishi Caterpillar Forklift America, Inc.*, 124 AD3d 1219, 1 NYS3d 589 (4th Dept 2015); *Pato v Sweeney Steel Service Corp.*, 117 AD2d 984, 499 NYS2d 286 (4th Dept 1986). However, the issue may be decided by the court as a matter of law where the particular undisputed critical facts compel that conclusion and present no triable issue of fact, *Thompson v Grumman Aerospace Corp.*, *supra*; *Graziano v 110 Sand Co.*, 50 AD3d 635, 855 NYS2d 203 (2d Dept 2008); *Hintze v Brookhaven Nat. Laboratory*, *supra*; see *Salinas v 64 Jefferson Apartments, LLC*, *supra*; *Short v Durez Division-Hooker Chemicals & Plastic Corp.*, 280 AD2d 972, 721 NYS2d 218 (4th Dept 2001); *Rothenberg v Erie Metal Stamping Co., Inc.*, 204 AD2d 249, 612 NYS2d 149 (1st Dept 1994); *Levine v Lee's Pontiac*, 203 AD2d 259, 609 NYS2d 918 (2d Dept 1994); *Degruchy v Xerox Corp.*, 188 AD2d 1003, 591 NYS2d 661 (4th Dept 1992).

An ad hoc or special employee injured through the negligence of another employee of his or her ad hoc or special employer may not maintain a negligence action against the ad hoc employer or the other employee, *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 578 NYS2d 106, 585 NE2d 355 (1991); *Gardner v 1111 Corp.*, 286 App Div 110, 141 NYS2d 552 (1st Dept 1955), *aff'd*, 1 NY2d 758, 152 NYS2d 303, 135 NE2d 55 (1956), see *Zabava v 178 East 78, Inc.*, 212 AD2d 406, 622 NYS2d 42 (1st Dept 1995); *Rothenberg v Erie Metal Stamping Co., Inc.*, 204 AD2d 249, 612 NYS2d 149 (1st Dept 1994); *Degruchy v Xerox Corp.*, 188 AD2d 1003, 591 NYS2d 661 (4th Dept 1992); *Fending v Carborundum Co.*, 101 AD2d 1010, 476 NYS2d 685 (4th Dept 1984). Similarly, when an employee elects to receive workers' compensation benefits from his general employer, a special employer is shielded from any action at law commenced by the employee, *Salinas v 64 Jefferson Apartments, LLC*, 170 AD3d 1216, 97 NYS3d 136 (2d Dept 2019); *Hintze v Brookhaven Nat. Laboratory*, 278 AD2d 456, 718 NYS2d 406 (2d Dept 2000). The special employment relationship is not defeated merely by the fact that plaintiff's general employer was responsible for paying plaintiff's wages and maintaining workers' compensation and insurance for the plaintiff, *Adams v North-Star Const. Co., Inc.*, 249 AD2d 1001, 672 NYS2d 166 (4th Dept 1998) (fact that temporary employment agency placed plaintiff with defendant, paid plaintiff's wages and plaintiff received workers' compensation benefits from agency's insurance carrier is not dispositive); *Burdette v Niagara County Indus. Development Agency*, 227 AD2d 979, 643 NYS2d 831 (4th Dept 1996); *Olsen v We'll Manage, Inc.*, 214 AD2d 715, 625 NYS2d 301 (2d Dept 1995). For a further discussion of ad hoc employees, see PJI 2:238.

On September 10, 1996, the Workers' Compensation Reform Bill became effective to restore the force of the exclusive remedy provisions of the Workers' Compensation Law by protecting employers from suits other than some that are contract based. The law substantially curtails the rights of a third person tortfeasor, who is sued by an employee, to commence a third-party action against the plaintiff's employer as illustrated in *Dole v Dow Chemical Co.*, 30 NY2d 143, 331 NYS2d 382, 282 NE2d 288 (1972) and codified in CPLR Art. 14. Employers may be held responsible, however, for contribution and indemnity arising from an employee's "grave injury." A "grave injury" is defined to "mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability." The relevant provisions of the new amendments restricting the right to bring a third-party action do not apply to actions pending on the effective date of the amendments, September 10, 1996, *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 673 NYS2d 966, 696 NE2d 978 (1998). The amendments are to be applied prospectively to actions filed on or after September 10, 1996, irrespective of the date of the accident, *id*; *Hilbert v Sahlen Packing Co.*,

267 AD2d 939, 701 NYS2d 564 (4th Dept 1999). For a comprehensive discussion of the "grave injury" requirement, see Comment to PJI 2:275.1.

The use of a loan agreement approved in *Feldman v New York City Health & Hospitals Corporation*, 56 NY2d 1011, 453 NYS2d 683, 439 NE2d 398 (1982), is not permissible in a case where a third party defendant is the original plaintiff's employer because such arrangement conflicts with the public policy considerations of the exclusivity of the Workers' Compensation remedy, *Reich v Manhattan Boiler & Equipment Corp.*, 91 NY2d 772, 676 NYS2d 110, 698 NE2d 939 (1998).

Temporary employment in New York may be insufficient to make the New York Workers' Compensation Law applicable; in such case its exclusivity provision would have no bearing. As to when employment in New York of an out-of-state resident is covered by the Workers' Compensation Law, see *Proper v Polley*, 233 App Div 621, 253 NYS 530 (3d Dept 1931), *aff'd*, 259 NY 516, 182 NE 161 (1932) (9 to 10 days work in New York held not covered); *Bauss v Consolidated Chimney Co.*, 270 App Div 70, 58 NYS2d 717 (3d Dept 1945) (erection of industrial chimney in New York under supervision of a foreman on the job, held covered); and see *Cameron v Ellis Const. Co.*, 252 NY 394, 169 NE 622 (1930). Employment covered by federal employment law (e.g., FELA, Jones Act) is not governed by the New York compensation law unless claimant, employer and carrier waive such rights, WCL § 113; *Allman v Great Lakes Dredge & Dock Co.*, 29 AD2d 605, 285 NYS2d 630 (3d Dept 1967). The fact that plaintiff has received workers' compensation in another state does not necessarily preclude a defense founded upon the New York Workers' Compensation Law if plaintiff resides, was injured, treated and hospitalized here, *Gonzalez v Queensboro Leasing, Inc.*, 38 AD2d 823, 329 NYS2d 283 (1st Dept 1972).

Special Verdict Form PJI 2:218 SV. Compensation Cases— Injury in Course of Employment

1. Was plaintiff [decedent] working for [Employer] at the time of the occurrence?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

[Insert signature lines]

If your answer is "Yes," proceed to Question "2."

If your answer is "No," do not answer Questions "2" through "5" and proceed to the next series of questions.

2. Was plaintiff [decedent] acting in the course and scope of employment at the time of the occurrence?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

[Insert signature lines]

If your answer is "Yes," proceed to Question "3."

If your answer is "No," do not answer Questions "3" through "5" and proceed to the next series of questions.

3. Was AB working for [Employer] at the time of the occurrence?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

[Insert signature lines]

If your answer is "Yes," proceed to Question "4."

If your answer is "No," do not answer Questions "4" and "5" and proceed to the next series of questions.

4. Was AB acting in the course and scope of employment at the time of the occurrence?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

[Insert signature lines]

If your answer is "Yes," proceed no further and report to the Court.

If your answer is "No," proceed to the next series of questions.

**PJI 2:219. Injured Employee—Compensation Cases—
Assignment of Cause of Action to
Compensation Carrier**

If you find that (plaintiff, decedent's dependents) received compensation under the Workers' Compensation Law and did not commence this action (before *[state date]*, within thirty days after the compensation carrier notified (plaintiff, plaintiff's dependents) in writing by (personal service, registered mail) that failure to start an action within thirty days thereafter would operate as an assignment of the action to the insurance carrier), plaintiff is not entitled to maintain this action. Compensation under the Workers' Compensation Law is received whenever payment of compensation is made pursuant to the law.

[Where action was commenced by filing, state:] This action was started on *[state date]* which was the date (the summons was, summons and complaint were) filed with the Court.

[Where action was commenced by service, state:] This action was started on the date that you find the (summons was, summons and complaint were) served on the defendant.

The thirty day period within which to commence the action is to be computed from the day after the date on which you find that the insurance carrier's notice was (personally served, mailed) except that if the last day of that period falls on a Saturday, Sunday or public holiday, starting the action on the day after such Saturday, Sunday or public holiday is sufficient.

Comment

Based on WCL § 29(1) and (2); *Nelson v Buffalo Niagara Elec. Corp.*, 264 App Div 941, 36 NYS2d 205 (4th Dept 1942), *aff'd*, 292 NY 600, 55 NE2d 371 (1944); *Hatch v Cherry-Burrell Corp.*, 274 App Div 234, 82 NYS2d 322 (4th Dept 1948). The time computation in the last sentence is based on General Construction Law §§ 20 and 25-a.

Under the statutory framework, where compensation benefits have

been paid, the failure on the part of the injured employee or representative to bring an action against tortfeasors other than the employer or co-employee will cause the action to be assigned to the State Insurance Fund (if compensation was payable therefrom) or to the carrier liable for the payment of compensation, provided that notice was given that failure to bring the action within thirty days would result in an assignment, WCL § 29(1), (2).

When it is undisputed that the carrier gave notice more than thirty days prior to the time limited by WCL § 29(1) for commencement of the action, a date will be used in the first sentence, and the portions of the first and last sentence concerning calculation of the carrier's thirty-day notice period will be deleted. That time is not later than six months after the awarding of compensation or nine months after enactment of a law creating a new remedy and, in any event, not later than one year from the date the cause of action accrued. The exact date to be used must be ascertained by applying that rule to the facts of the case.

WCL § 29(2) provides that the action on behalf of the employee or deceased employee's representative will not be assigned unless the insurance carrier gave written notice, by personal service or by certified or registered mail, that failure to bring the action within thirty days would operate as an assignment. The statute requires, to avoid the assignment, that the action must be commenced within "thirty days after the mailing of such notice." There is an obvious omission in the statute since notice may be given by personal service. Where service of notice was by mail, the words "after the mailing of the notice" should be substituted for the word "thereafter" in the first sentence of the pattern charge.

An award is not necessary if compensation was paid, *Hatch v Cherry-Burrell Corp.*, 274 App Div 234, 237, 82 NYS2d 322 (4th Dept 1948), but if an award is made but never paid, assignment does not occur, *Juba v General Builders Supply Corp.*, 7 NY2d 48, 194 NYS2d 503, 163 NE2d 328 (1959); *American Mut. Liability Ins. Co. v Niagara Mohawk Power Corp.*, 28 AD2d 1199, 284 NYS2d 738 (3d Dept 1967), *aff'd*, 23 NY2d 861, 298 NYS2d 70, 245 NE2d 803 (1969).

A medical malpractice claim against the treating physician is within WCL § 29 and the employer is subrogated if the employee takes compensation that includes the injury caused by the physician's negligence, but not if the employee does not, *Parchefsky v Kroll Bros.*, 267 NY 410, 196 NE 308 (1935); *Schreckinger v York Distributors, Inc.*, 9 AD2d 333, 194 NYS2d 67 (3d Dept 1959). If, without the consent of the insurer, the employee discontinues a malpractice suit against the physician, the employee is foreclosed from recovering compensation benefits only to the extent that the benefits are attributable to the malpractice, *Roach v Hastings Plastics Corp.*, 57 NY2d 293, 456 NYS2d 675, 442 NE2d 1186 (1982); see also *Noker v International Paper Co.*, 90 AD2d 939, 457 NYS2d 909 (3d Dept 1982) (same result if employee's malpractice action dismissed for neglect to prosecute).

A carrier may be held to have waived statutory assignment, *Hansen v Caldwell-Wingate Co.*, 3 AD2d 757, 160 NYS2d 257 (2d Dept 1957).

In a death action where there are next of kin who are not dependents, the pattern charge should not be used, for in such case decedent's personal representative must bring the action as the statutory trustee of all beneficiaries including the compensation carrier, *De Clara v Barber S. S. Lines*, 309 NY 620, 132 NE2d 871 (1956).

8. ANIMALS

PJI 2:220. Animals

You will first decide whether the defendant CD's (dog, horse, etc.) (bit, kicked) the plaintiff AB. If you find that it did not, your verdict will be for CD. If you find that it did, your verdict may be for AB only if you further find (1) that the (dog, horse) had vicious propensities and (2) that CD knew or should have known about those vicious propensities. In such case CD will be liable even though (he, she, it) was not negligent in the manner of keeping the animal, and whether or not the incident occurred on CD's property.

On the issue of vicious propensity, which means a natural inclination or usual habit to act in a way that endangers people or property, you may consider the attack on AB, the results of that attack, the animal's attitude or disposition when people approached it, and whether it had previously attacked any other person. To find a vicious propensity, it is not necessary to find that the (dog, horse) had previously (bitten, jumped at, kicked or injured) someone. On the other hand, mere barking or an isolated (straining at a leash, kicking) would not demonstrate vicious propensities. You may find that the (dog, horse) had vicious propensities only if the nature and frequency of its acts furnished reasonable ground to believe that it might cause an injury by (biting, jumping, kicking, etc.). If you find that the animal did not have vicious propensities, your verdict will be for CD. If you find that it did have vicious propensities, you will then proceed to the question of whether CD knew or should have known about the dog's vicious propensities. On that question, an owner is entitled to assume that (his, her, its) (dog, horse) will not injure anyone, unless the (dog's, horse's) previous behavior gave evidence of vicious propensities. *[If pertinent use the following:—You may consider in this respect the fact that the dog was kept on a chain or rope, (or that the horse was muzzled) but you*

are not required from that fact alone to conclude that the defendant had knowledge.]

It is not necessary to find that CD actually knew of the vicious propensities. If the vicious propensities of the animal had existed for such a period of time that a reasonably prudent person should have known about them, you will find that CD knew about them. In deciding this you may consider the nature and frequency of the animal's acts as well as the length of time over which they had continued. If you find that CD did not know or should not have known of the (dog's, horse's) vicious propensities, your verdict will be for CD.

If you find that CD's animal injured AB and that the (dog, horse) had vicious propensities and that CD knew or should have known of such propensities, your verdict will be for AB.

Comment

Caveat 1: This charge should not be used for injuries caused by wild animals. The only issue in such cases will be whether the injury occurred and whether the defendant harbored the animal.

Caveat 2: The pattern charge covers a cause of action for strict liability, the sole claim that a plaintiff can assert against an owner to recover for harm caused by a domestic animal where the harm involved aggressive or threatening behavior by the animal, see this Comment, *infra*. No cause of action for negligence lies against an owner, *Hewitt v Palmer Veterinary Clinic, PC*, 35 NY3d 541, 134 NYS3d 312, 159 NE3d 228 (2020), for such harm, this Comment, *infra*. In the exceptional case where a negligence claim may be asserted based on harm caused by a farm animal, e.g., owner breaches duty to prevent farm animal from wandering unsupervised off a farm, see *id*, the court must craft a negligence charge.

Caveat 3: In *Hewitt v Palmer Veterinary Clinic, PC*, 35 NY3d 541, 134 NYS3d 312, 159 NE3d 228 (2020), the Court of Appeals held that a plaintiff may maintain a common-law negligence cause of action against a veterinary clinic. For such a case, the court must craft an appropriate negligence charge, see PJI 2:15.

Based on the theory of strict liability set forth in *Petrone v Fernandez*, 12 NY3d 546, 883 NYS2d 164, 910 NE2d 993 (2009); *Bernstein ex rel. Bernstein v Penny Whistle Toys, Inc.*, 10 NY3d 787, 856 NYS2d 532, 886 NE2d 154 (2008); *Bard v Jahnke*, 6 NY3d 592, 599, 815 NYS2d

16, 848 NE2d 463 (2006); *Collier v Zambito*, 1 NY3d 444, 775 NYS2d 205, 807 NE2d 254 (2004); *Arbegast v Board of Educ. of South New Berlin Cent. School*, 65 NY2d 161, 490 NYS2d 751, 480 NE2d 365 (1985); *People v Sandgren*, 302 NY 331, 98 NE2d 460 (1951) (upholding manslaughter conviction for violating Penal Law § 1052 relating to negligent keeping of “mischievous animals”); *Brice v Bauer*, 108 NY 428, 15 NE 695 (1888); *Muller v McKesson*, 73 NY 195 (1878); *Rider v White*, 65 NY 54 (1875); *Dickson v McCoy*, 39 NY 400 (1868); *Appel v Charles Heinsohn, Inc.*, 91 AD2d 1029, 458 NYS2d 619 (2d Dept 1983), *aff’d*, 59 NY2d 741, 463 NYS2d 441, 450 NE2d 247 (1983) (citing PJI); *Kennet v Sossnitz*, 260 App Div 759, 23 NYS2d 961 (1st Dept 1940), *aff’d*, 286 NY 623, 36 NE2d 459 (1941); *Gordon v Davidson*, 87 AD3d 769, 927 NYS2d 734 (3d Dept 2011); *Gannon ex rel. Gannon v Conti*, 86 AD3d 704, 926 NYS2d 739 (3d Dept 2011); *Rockwood v LaBate*, 83 AD3d 1530, 923 NYS2d 809 (4th Dept 2011); *Curbelo v Walker*, 81 AD3d 772, 916 NYS2d 645 (2d Dept 2011); *Smith v New York*, 68 AD3d 445, 889 NYS2d 187 (1st Dept 2009); *Papadopoulos v Gardner’s Village, Inc.*, 198 AD2d 216, 604 NYS2d 570 (2d Dept 1993) (goat, citing PJI); *Lynch by Lynch v Nacewicz*, 126 AD2d 708, 511 NYS2d 121 (2d Dept 1987); *Brophy v Columbia County Agr. Soc.*, 116 AD2d 873, 498 NYS2d 193 (3d Dept 1986) (citing PJI); *Fontecchio v Esposito*, 108 AD2d 780, 485 NYS2d 113 (2d Dept 1985); *Russell v Lepre*, 99 AD2d 489, 470 NYS2d 430 (2d Dept 1984); *Wheaton v Guthrie*, 89 AD2d 809, 453 NYS2d 480 (4th Dept 1982); *Morales v Quinones*, 72 AD2d 519, 420 NYS2d 899 (1st Dept 1979); *DiGrazia v Castronova*, 48 AD2d 249, 368 NYS2d 898 (4th Dept 1975) (citing PJI); *Lagoda v Dorr*, 28 AD2d 208, 284 NYS2d 130 (3d Dept 1967); *Perrotta v Picciano*, 186 App Div 781, 175 NYS 16 (1st Dept 1919), and other cases cited in this Comment.

The pattern charge is but one example of liability with respect to animals. Most lawsuits concerning domestic animals involve dogs or horses, and the case law with respect to both is reviewed in the comment that follows. Where ferocious animals, whether wild or domestic, are kept with the owner’s knowledge of their ferocious propensities no distinction is to be made between the two classes of animals and the liability which attaches for any injury is absolute, *Arbegast v Board of Educ. of South New Berlin Cent. School*, 65 NY2d 161, 490 NYS2d 751, 480 NE2d 365 (1985); *Molloy v Starin*, 191 NY 21, 83 NE 588 (1908). The Restatement, Second, Torts has treated them similarly in a number of respects (e.g. §§ 511, 512, 515, 517). For purposes of charging a jury, however, the distinction is important. In the case of wild animals the court may take judicial notice of vicious propensities and the pattern charge must be substantially modified. The comment that follows primarily involves injury by a domestic animal, but is followed by a discussion of injury by a wild animal.

In its provisions protecting dogs, the Agriculture and Markets Law defines domestic animals as including “domesticated sheep, horse, cattle, fallow deer, red deer, sika deer, whitetail deer which is raised under license . . . llama, goat, swine, fowl, duck, goose, swan, turkey, confined domestic hare or rabbit, pheasant or other bird which is raised in

confinement under license . . . before release from captivity, except . . . varieties of fowl commonly used for cock fights . . .”, AML § 108. A breeding bull is also a domestic animal, *Bard v Jahnke*, 6 NY3d 592, 815 NYS2d 16, 848 NE2d 463 (2006), citing AML § 108(7); see *Catalano v Heiden Valley Farms*, 158 AD3d 1200, 70 NYS3d 277 (4th Dept 2018) (black angus bull). Finally, AML § 370 excludes “a dog or cat or other domestic animal” from that section’s definition of a “wild animal.” Whether a rhesus monkey is a wild animal has been held a question for the trier of fact, *Abrevaya v Palace Theatre & Realty Co.*, 25 Misc2d 600, 197 NYS2d 27 (Sup 1960), but judicial notice has been taken of the wild nature of a chimpanzee, *Garelli v Sterling-Alaska Fur & Game Farms, Inc.*, 25 Misc2d 1032, 206 NYS2d 130 (Sup 1960).

Injury by a Domestic Animal

The owner of a domestic animal who knows or has reason to know that the animal has a vicious disposition, or vicious propensity, is strictly liable for injury caused by the animal, *Petrone v Fernandez*, 12 NY3d 546, 883 NYS2d 164, 910 NE2d 993 (2009); *Bernstein ex rel. Bernstein v Penny Whistle Toys, Inc.*, 10 NY3d 787, 856 NYS2d 532, 886 NE2d 154 (2008); *Bard v Jahnke*, 6 NY3d 592, 599, 815 NYS2d 16, 848 NE2d 463 (2006); *Collier v Zambito*, 1 NY3d 444, 775 NYS2d 205, 807 NE2d 254 (2004); *Christopher P. v Kathleen M.B.*, 174 AD3d 1460, 105 NYS3d 750 (4th Dept 2019) (citing PJI 2:220); *Matthew H. v County of Nassau*, 131 AD3d 135, 14 NYS3d 38 (2d Dept 2015); *Craft v Whittmarsh*, 83 AD3d 1271, 920 NYS2d 821 (3d Dept 2011); see *Mirabella v Thiem*, 306 NY 650, 116 NE2d 492 (1953) (horse, tendency to kick); *Hosmer v Carney*, 228 NY 73, 126 NE 650 (1920) (horse, tendency to kick); *Muller v McKesson*, 73 NY 195 (1878) (dog, tendency to bite); *Rider v White*, 65 NY 54 (1875) (dog, tendency to bite); *Burra v Greater New York Ass’n, Inc.*, 11 AD2d 1015, 206 NYS2d 469 (1st Dept 1960), *aff’d*, 9 NY2d 974, 218 NYS2d 59, 176 NE2d 510 (1961) (horse, tendency to rear); *Brown v Willard*, 278 App Div 728, 103 NYS2d 58 (3d Dept 1951), *aff’d*, 303 NY 727, 103 NE2d 343 (1951) (horse, tendency to run away); *Kennet v Sossnitz*, 260 App Div 759, 23 NYS2d 961 (1st Dept 1940), *aff’d*, 286 NY 623, 36 NE2d 459 (1941); *Modafferi v DiMatteo*, 177 AD3d 1413, 110 NYS3d 478 (4th Dept 2019) (dogs, tendency to attack smaller dogs); *Olsen v Campbell*, 150 AD3d 1460, 54 NYS3d 456 (3d Dept 2017) (guard dog on chain that previously broke chain, grabbed hold of person’s pant leg, and children warned to avoid dog); *Rosenbaum v Rauer*, 80 AD3d 686, 915 NYS2d 136 (2d Dept 2011) (dog, tendency to thrust head under fence, growl, show teeth, and snap); *Anderson v Carduner*, 279 AD2d 369, 720 NYS2d 18 (1st Dept 2001) (dog, tendency to rise up and greet people); *Moriano by Moriano v Schmidt*, 133 AD2d 72, 518 NYS2d 416 (2d Dept 1987) (dog, growling and pulling at chain); *Brophy v Columbia County Agr. Soc.*, 116 AD2d 873, 498 NYS2d 193 (3d Dept 1986) (horse, tendency to bite and push); *Fontecchio v Esposito*, 108 AD2d 780, 485 NYS2d 113 (2d Dept 1985) (dog, tendency to break away, bite, snap, bark, and bare teeth); *Lagoda v Dorr*, 28 AD2d 208, 284 NYS2d 130 (3d Dept 1967) (dog, tendency to jump up on people); see also *Provorse v Curtis*, 288 AD2d 832, 732 NYS2d 310 (4th

Dept 2001) (dog, tendency to touch people with open mouth while following them). Such strict liability is the sole theory by which a plaintiff can recover against the owner for harm caused by the domestic animal, and no cause of action for negligence lies against the owner for such harm, *Petrone v Fernandez*, supra; *Bernstein ex rel. Bernstein v Penny Whistle Toys, Inc.*, 10 NY3d 787, 856 NYS2d 532, 886 NE2d 154 (2008); *Bard v Jahnke*, supra; *Collier v Zambito*, supra; *Gordon v Davidson*, 87 AD3d 769, 927 NYS2d 734 (3d Dept 2011); *Gannon ex rel. Gannon v Conti*, 86 AD3d 704, 926 NYS2d 739 (3d Dept 2011); *Krieger v Cogar*, 83 AD3d 1552, 921 NYS2d 767 (4th Dept 2011); *Rockwood v LaBate*, 83 AD3d 1530, 923 NYS2d 809 (4th Dept 2011); *Curbelo v Walker*, 81 AD3d 772, 916 NYS2d 645 (2d Dept 2011); *Rosenbaum v Rauer*, 80 AD3d 686, 915 NYS2d 136 (2d Dept 2011); *Vichot v Day*, 80 AD3d 851, 913 NYS2d 838 (3d Dept 2011); *Wright v Fiore*, 77 AD3d 821, 908 NYS2d 882 (2d Dept 2010); *Egan v Hom*, 74 AD3d 1133, 905 NYS2d 624 (2d Dept 2010); *Smith v New York*, 68 AD3d 445, 889 NYS2d 187 (1st Dept 2009); *Lista v Newton*, 41 AD3d 1280, 838 NYS2d 299 (4th Dept 2007); see *Vikki-Lynn A. v Zewin*, 198 AD3d 1342, 155 NYS3d 663 (4th Dept 2021) (cases involving injuries inflicted by domestic animals may only proceed under strict liability, not common-law negligence); *Doerr v Goldsmith*, 25 NY3d 1114, 14 NYS3d 726, 35 NE3d 796 (2015).

The same rule applies to one who, although not the owner, harbors or keeps the animal with knowledge of its propensity, *Quilty v Battie*, 135 NY 201, 32 NE 47 (1892); *Matthew H. v County of Nassau*, 131 AD3d 135, 14 NYS3d 38 (2d Dept 2015); *Dufour v Brown*, 66 AD3d 1217, 888 NYS2d 219 (3d Dept 2009); *Zwinge v Love*, 37 AD2d 874, 325 NYS2d 107 (3d Dept 1971); see *Mercado v Ovalle*, 110 AD3d 539, 973 NYS2d 171 (1st Dept 2013) (evidence that defendant once walked dogs that were kept on adjacent lot, that he fed them at an unidentified frequency, that his relatives were involved in dogs' care and that men from defendant's grocery store accessed lot insufficient to establish "harboring"). In *Matthew H. v Nassau*, supra, the Court held that co-tenants can be held liable for a vicious attack by dogs owned solely by another co-tenant if they harbored the dogs, i.e., allowed the dogs to become part of the household and participated in their care.

In distinction, in *Hewitt v Palmer Veterinary Clinic, PC*, 35 NY3d 541, 134 NYS3d 312, 159 NE3d 228 (2020), the Court of Appeals concluded that the exclusive strict liability standard for the liability of the owner of a domestic animal did not apply in an action against a veterinary clinic. In that case, a dog that had allegedly just undergone a medical procedure was brought into the clinic's waiting room, where it injured the plaintiff, who was in the waiting room with her cat for an appointment. The Court held that veterinary clinics have specialized knowledge and experience to anticipate and guard against the risks of aggressive animal behavior that may occur on their premises, an environment over which they have substantial control to design to mitigate such risks. Thus, the clinic was not entitled to the protection afforded by the vicious propensity notice requirement, and the plaintiff could maintain a common-law negligence action against it, *id.*

There can be no recovery against a defendant who neither owned nor exercised dominion and control over the animal, and did not permit it to be on his or her premises, *Rodriguez by Rodriguez v Messenger*, 108 AD2d 1085, 485 NYS2d 655 (3d Dept 1985); see also *Nidzyn v Stevens*, 148 AD2d 592, 539 NYS2d 57 (2d Dept 1989). Liability may exist whether or not the incident occurred on defendant's property; see *Rider v White*, 65 NY 54 (1875); *Perrotta v Picciano*, 186 App Div 781, 175 NYS 16 (1st Dept 1919); Restatement, Second, Torts § 511 § 512.

The rule set forth above providing that strict liability is the sole theory that a plaintiff can assert to recover for harm caused by a domestic animal applies where the harm involved aggressive or threatening behavior by the animal, *Hastings v Sauve*, 21 NY3d 122, 967 NYS2d 658, 989 NE2d 940 (2013). That rule does not preclude a plaintiff from asserting a cause of action for negligence on the "fundamentally distinct" claim that, through the negligence of the owner of the property, the owner of the animal, or both, a farm animal was permitted to wander off the property where it was kept, *id*; see *Hain v Jamison*, 28 NY3d 524, 46 NYS3d 502, 68 NE3d 1233 (2016); *Catalano v Heiden Valley Farms*, 158 AD3d 1200, 70 NYS3d 277 (4th Dept 2018). The Court in *Hastings* observed that to apply the strict liability rule in such a case would immunize defendants who take little or no care to keep their livestock out of the roadway or off of other people's property, *Hastings v Sauve*, *supra*. With regard to the issue of proximate cause, a farm animal wandering unrestrained near a roadway presents a reasonably foreseeable danger to motorists due to the animal's potential to interfere with traffic, *Hain v Jamison*, *supra* (fact issue whether motorist's actions in exiting her vehicle and entering roadway to assist stray calf were foreseeable consequences of farm's alleged negligence in allowing calf to wander and failing to retrieve it). The *Hastings* Court expressly declined to pass on the question of whether a landowner or owner of a dog, cat or other household pet could be held liable under common law negligence principles if such an animal is negligently allowed to stray from the property on which it is kept, *id*. In *Doerr v Goldsmith*, 25 NY3d 1114, 14 NYS3d 726, 35 NE3d 796 (2015), the Court held that *Hastings* does not allow a plaintiff to recover based on a defendant's alleged negligence in the handling of his or her dog. Thus, the Court granted summary judgment to the owner of a dog who was sued for negligence in coaxing the dog to cross a road immediately in front of plaintiff's bicycle, *Doerr v Goldsmith*, *supra*.

In a case that embraces elements of both strict liability and common law negligence, a plaintiff may plead those causes of action in the alternative, *Carey v Schwab*, 122 AD3d 1142, 997 NYS2d 180 (3d Dept 2014). In such a scenario, if the animal's actions are determined by the jury to demonstrate a vicious propensity, the plaintiff will be limited to pursuing the strict liability cause of action, *id*. If, however, the jury determines that the actions do not constitute a vicious propensity, the jury would decide whether the defendant is liable on the common law negligence cause of action, *id*. Where both causes of action are submitted to the jury, the jury should be instructed to reach the issues relating

to the common law negligence cause of action only if the jury determines that the animal's actions did not demonstrate a vicious propensity, id.

Liability also extends to a landlord who, knowing that a prospective tenant has a vicious dog that will be kept on the premises, leases the premises without taking reasonable steps, as by lease provisions or otherwise, to protect from attack others who might be on the premises, *Strunk v Zoltanski*, 62 NY2d 572, 479 NYS2d 175, 468 NE2d 13 (1984); *Dixon by La Rusch v Frazini*, 188 AD2d 1054, 592 NYS2d 208 (4th Dept 1992); *Cronin v Chrosniak*, 145 AD2d 905, 536 NYS2d 287 (4th Dept 1988); see *Baisi v Gonzalez*, 97 NY2d 694, 739 NYS2d 92, 765 NE2d 295 (2002); *Rodgers ex rel. McCoy v Horizons at Monticello, LLP*, 130 AD3d 1285, 14 NYS3d 209 (3d Dept 2015); see also *Balla v Jones*, 305 AD2d 1103, 759 NYS2d 726 (4th Dept 2003) (evidence that landlord knew of dog's existence does not support inference that landlord knew of dog's vicious propensities). A landlord may also be held liable when a tenant acquires an animal after leasing the premises if the landlord had knowledge of the animal's vicious propensities and controlled the premises or had the ability to confine or remove the animal, *Smedley v Ellinwood*, 21 AD3d 676, 799 NYS2d 682 (3d Dept 2005); *Brundrige ex rel. Brundrige v Howes*, 259 AD2d 895, 686 NYS2d 530 (3d Dept 1999); see *Rodgers ex rel. McCoy v Horizons at Monticello, LLP*, supra. Liability will not, however, be imposed where the landlord has neither actual nor constructive notice of the animal's presence or its dangerous propensities at the time of the initial letting, *Smedley v Ellinwood*, supra; *Plue by Plue v Lent*, 146 AD2d 968, 537 NYS2d 90 (3d Dept 1989); *Rico by Rico v Cleary*, 126 AD2d 714, 511 NYS2d 126 (2d Dept 1987); see *Wilson v Bruce*, 198 AD2d 664, 603 NYS2d 919 (3d Dept 1993); see *Meyers v Haskins*, 140 AD2d 923, 528 NYS2d 738 (3d Dept 1988). Thus, to recover against a landlord for injuries caused by a tenant's dog on a theory of strict liability, the plaintiff must demonstrate that the landlord: (1) had notice that a dog was being harbored on the premises; (2) knew or should have known that the dog had vicious propensities, and (3) had sufficient control of the premises to allow the landlord to remove or confine the dog, *Velez v Andrejka*, 126 AD3d 685, 5 NYS3d 212 (2d Dept 2015); see *Vikki-Lynn A. v Zewin*, 198 AD3d 1342, 155 NYS3d 663 (4th Dept 2021). Moreover, landlord's duties in relation to vicious dogs kept by a tenant does not extend to individuals not on defendant's property, such as a person who was attacked by a tenant's dogs while on the public sidewalk across the street, *Walker v Gold*, 70 AD3d 1349, 894 NYS2d 809 (4th Dept 2010); *Terrio v Daggett*, 208 AD2d 1163, 617 NYS2d 585 (3d Dept 1994). Failure to give notice of change of ownership of a dog to the proper authorities does not, per se, create liability in the former owner to an individual bitten by the animal, *Bukhatetsky v Vysotski*, 296 AD2d 367, 745 NYS2d 53 (2d Dept 2002).

The damages recoverable from a strictly liable owner are not limited to those suffered as a result of direct contact with the animal, see *Pollard v United Parcel Service*, 302 AD2d 884, 754 NYS2d 473 (4th Dept 2003). Thus, a plaintiff who escaped the bite of the defendants' dog may re-

cover damages sustained as a result of being struck by a motor vehicle while attempting to evade the dog, *id.*

In *Bard v Jahnke*, 6 NY3d 592, 815 NYS2d 16, 848 NE2d 463 (2006), the Court of Appeals refused to adopt the provisions of Restatement, Second, Torts § 518 that recommend imposition of liability for an owner's negligent failure to prevent harm where the owner did not know or have reason to know of a domestic animal's abnormal dangerousness. In *Petrone v Fernandez*, 12 NY3d 546, 883 NYS2d 164, 910 NE2d 993 (2009), the Court reinforced and clarified its holding in *Bard* by stating that only strict liability and not negligence is a valid basis for imposing liability for injuries resulting from encounters with domestic animals. Specifically adopting the analysis in *Alia v Fiorina*, 39 AD3d 1068, 833 NYS2d 761 (3d Dept 2007), the *Petrone* Court held that violation of a leash law, which is merely "some evidence of negligence," is irrelevant and does not support a recovery in cases involving domestic-animal-related injuries, see *Filer v Adams*, 106 AD3d 1417, 966 NYS2d 553 (3d Dept 2013); *Roberts v Joller*, 39 AD3d 1224, 834 NYS2d 778 (4th Dept 2007); *Rose v Heaton*, 39 AD3d 937, 833 NYS2d 291 (3d Dept 2007); see also *Xin Kai Li v Miller*, 150 AD3d 1051, 54 NYS3d 652 (2d Dept 2017) (no common-law negligence action regarding injuries caused by dog); *Morse v Colombo*, 31 AD3d 916, 819 NYS2d 162 (3d Dept 2006) (error in dog-bite case to admit evidence of dog owner's negligence and to charge jury on common-law negligence). The decision in *Petrone* and its progeny, *Gordon v Davidson*, 87 AD3d 769, 927 NYS2d 734 (3d Dept 2011); *Krieger v Cogar*, 83 AD3d 1552, 921 NYS2d 767 (4th Dept 2011); *Curbelo v Walker*, 81 AD3d 772, 916 NYS2d 645 (2d Dept 2011); *Smith v New York*, 68 AD3d 445, 889 NYS2d 187 (1st Dept 2009), overrule prior cases recognizing negligence claims based on leash-law violations, such as *Arbanil v Flannery*, 31 AD3d 588, 819 NYS2d 91 (2d Dept 2006); *Faller v Schwartz*, 303 AD2d 624, 756 NYS2d 641 (2d Dept 2003); *McCullough v Maurer*, 268 AD2d 569, 702 NYS2d 622 (2d Dept 2000); *Clo v McDermott*, 239 AD2d 4, 668 NYS2d 743 (3d Dept 1998).

The rule set forth above providing that strict liability is the sole theory that a plaintiff can assert against an owner to recover for harm caused by a domestic animal applies where the harm involved aggressive or threatening behavior by the animal, *Hastings v Sauve*, 21 NY3d 122, 967 NYS2d 658, 989 NE2d 940 (2013). That rule does not preclude a plaintiff from asserting a cause of action for negligence on the "fundamentally distinct" claim that, through the negligence of the owner of the property, the owner of the animal, or both, a farm animal was permitted to wander off the property where it was kept, *id.*; see *Hain v Jamison*, 28 NY3d 524, 46 NYS3d 502, 68 NE3d 1233 (2016). The Court in *Hastings* observed that to apply the strict liability rule in such a case would immunize defendants who take little or no care to keep their livestock out of the roadway or off of other people's property, *Hastings v Sauve*, *supra*. With regard to the issue of proximate cause, a farm animal wandering unrestrained near a roadway presents a reasonably foreseeable danger to motorists due to the animal's potential to interfere

with traffic, *Hain v Jamison*, *supra* (fact issue whether motorist's actions in exiting her vehicle and entering roadway to assist stray calf were foreseeable consequences of farm's alleged negligence in allowing calf to wander and failing to retrieve it). The Hastings Court expressly declined to pass on the question of whether a landowner or owner of a dog, cat or other household pet could be held liable under common law negligence principles if such an animal is negligently allowed to stray from the property on which it is kept, *id.* In *Doerr v Goldsmith*, 25 NY3d 1114, 14 NYS3d 726, 35 NE3d 796 (2015), the Court held that Hastings does not allow a plaintiff to recover based on a defendant's alleged negligence in the handling of his or her dog. Thus, the Court granted summary judgment to the owner of a dog who was sued for negligence in coaxing the dog to cross a road immediately in front of plaintiff's bicycle, *Doerr v Goldsmith*, *supra*.

With respect to unleashed or unattended dogs on highways, an owner is not strictly liable for injuries resulting from the animal's presence absent evidence that the owner was aware of either the animal's vicious propensities or its habit of interfering with traffic, *Rigley v Utter*, 53 AD3d 755, 862 NYS2d 147 (3d Dept 2008); *Roberts v Joller*, 39 AD3d 1224, 834 NYS2d 778 (4th Dept 2007); *Staller v Westfall*, 225 AD2d 885, 639 NYS2d 147 (3d Dept 1996). Proof that a dog roamed the neighborhood or occasionally ran into the road is insufficient to support liability, although proof that the dog had a habit of chasing vehicles or otherwise interfering with traffic could support an inference of vicious propensity, *Rigley v Utter*, *supra*; see *Alia v Fiorina*, 39 AD3d 1068, 833 NYS2d 761 (3d Dept 2007). Thus, defendant dog owner was entitled to judgment where unleashed dog did not chase plaintiff's motorcycle, but merely ran across road in front of it and, apart from testimony that the dog sometimes chased a particular car when called, there was no evidence that the dog had ever interfered with traffic or ran toward moving vehicles, *Rigley v Utter*, *supra*.

The mere presence of an unrestrained dog on a highway does not give rise to a presumption of negligence on the part of the owner even where there was an ordinance prohibiting the running of dogs at large, *Young v Wyman*, 76 NY2d 1009, 565 NYS2d 752, 566 NE2d 1157 (1990); see *Akley v Clemons*, 237 AD2d 780, 655 NYS2d 149 (3d Dept 1997); *Nilsen v Johnson*, 191 AD2d 930, 594 NYS2d 913 (3d Dept 1993).

Absolute liability does not attach to common carriers that are required to accept such freight and, therefore, are held only to a duty of reasonable care, *Molloy v Starin*, 191 NY 21, 83 NE 588 (1908) (caged bears); *Restatement, Second, Torts* § 517.

Dog-walking is not an inherently dangerous activity, *Anderson v Carduner*, 279 AD2d 369, 720 NYS2d 18 (1st Dept 2001). Therefore, vicarious liability will not be imposed on the owner of a dog, under the nondelegable duty doctrine, for incidents that occur while the animal is under a dog-walker's control, *id.*; see generally *Chainani by Chainani v Board of Educ. of City of New York*, 87 NY2d 370, 639 NYS2d 971, 663 NE2d 283 (1995).

Contributory Negligence, Comparative Negligence, Assumption of Risk

Liability in vicious propensity cases is strict, *Arbegas v Board of Educ. of South New Berlin Cent. School*, 65 NY2d 161, 490 NYS2d 751, 480 NE2d 365 (1985); *People v Sandgren*, 302 NY 331, 98 NE2d 460 (1951), and negligence is no longer a basis for imposing liability where the harm caused by a domestic animal involved aggressive or threatening behavior by the animal, *Hastings v Sauve*, 21 NY3d 122, 967 NYS2d 658, 989 NE2d 940 (2013); see *Petrone v Fernandez*, 12 NY3d 546, 883 NYS2d 164, 910 NE2d 993 (2009); *Bernstein ex rel. Bernstein v Penny Whistle Toys, Inc.*, 10 NY3d 787, 856 NYS2d 532, 886 NE2d 154 (2008); *Bard v Jahnke*, 6 NY3d 592, 599, 815 NYS2d 16, 848 NE2d 463 (2006); *Collier v Zambito*, 1 NY3d 444, 775 NYS2d 205, 807 NE2d 254 (2004). Liability is not dependent upon proof of negligence in the manner of keeping the animal, *Molloy v Starin*, 191 NY 21, 83 NE 588 (1908); see *Sorel v Iacobucci*, 221 AD2d 852, 633 NYS2d 688 (3d Dept 1995). Nor will the owner be relieved of liability by showing negligence on the part of the injured person, *Lynch v McNally*, 73 NY 347 (1878); *Muller v McKesson*, 73 NY 195 (1878); *Lynch by Lynch v Naciewicz*, 126 AD2d 708, 511 NYS2d 121 (2d Dept 1987).

An owner was not liable if, when delivering an animal to another, the owner informed that person of the animal's vicious characteristics so far as known by the owner, or the person could have ascertained them by the exercise of reasonable care, or if the person learned of the vicious character of the animal before the injury occurred, *Hosmer v Carney*, 228 NY 73, 126 NE 650 (1920); *Tighe v North Shore Animal League America*, 142 AD3d 607, 36 NYS3d 500 (2d Dept 2016) (dog's displays of aggressive behavior during three and a half months plaintiff owned it and fact that dog bit plaintiff on previous occasion gave plaintiff sufficient knowledge of dog's vicious propensities). Likewise, as discussed above, one who unnecessarily and voluntarily placed himself or herself within the reach of a wild animal and was injured was not allowed to recover, *Hyde v Utica*, 259 App Div 477, 259 App Div 1057, 20 NYS2d 335 (4th Dept 1940); *Ervin v Woodruff*, 119 App Div 603, 103 NYS 1051 (4th Dept 1907); see *Guzzi v New York Zoological Soc.*, 192 App Div 263, 182 NYS 257 (1st Dept 1920), *aff'd*, 233 NY 511, 135 NE 897 (1922); *Restatement, Second, Torts*, § 484.

In *Arbegas v Board of Educ. of South New Berlin Cent. School*, 65 NY2d 161, 490 NYS2d 751, 480 NE2d 365 (1985), which involved an injury sustained by a plaintiff who was thrown from a donkey in the course of a donkey basketball game, the Court discussed the impact of comparative negligence principles upon the doctrine of assumption of risk and distinguished between "express" assumption of risk and "implied" assumption of risk.

"Express" assumption of risk involves an agreement between the parties in advance as the result of which the defendant owes no duty of reasonable care to the plaintiff and is relieved of liability. "Implied" assumption of risk is not based upon express contract but upon the

plaintiffs voluntarily encountering the risk of harm from defendant's conduct with full understanding of the possible harm. CPLR 1411 requires that comparative negligence principles be applied to a case involving "implied" assumption of risk and, thus, plaintiff's damages may be diminished, see *Coole-Mayhew v Timm*, 18 AD3d 948, 794 NYS2d 486 (3d Dept 2005); *Pisciotta v Parisi*, 155 AD2d 422, 547 NYS2d 352 (2d Dept 1989); see also *Laylon v Shaver*, 187 AD2d 983, 590 NYS2d 615 (4th Dept 1992); *Graham by Graham v Murphy*, 135 AD2d 326, 525 NYS2d 414 (3d Dept 1988). In contrast, the doctrine of primary assumption of risk, which limits the duty of an alleged tortfeasor and bars recovery where applicable, see *Turcotte v Fell*, 68 NY2d 432, 510 NYS2d 49, 502 NE2d 964 (1986), has been applied to preclude recovery by an experienced horse rider who was bitten by a horse as she approached the animal and prepared to ride it, *Tilson v Russo*, 30 AD3d 856, 818 NYS2d 311 (3d Dept 2006). The court held in *Tilson* that the rule imposing strict liability on owners of animals with known "vicious propensities", see *Collier v Zambito*, 1 NY3d 444, 775 NYS2d 205, 807 NE2d 254 (2004), is unavailable where a person engaged in a recreational or sporting activity involving animals is deemed to have assumed the risk of being injured by such animals; see also *Garcia v Paradise Guard Dogs, Inc.*, 154 AD2d 297, 546 NYS2d 590 (1st Dept 1989); (error to charge that defendant is presumed negligent and that defendant's liability for harboring dangerous dog is "fixed as a matter of law" where injured plaintiff kennel worker chose to work with potentially dangerous animals and considered work to be part of job duties). For a more detailed discussion of express, implied and primary assumption of risk, see PJI 2:55 and accompanying Comment.

If the plaintiff is an infant, the jury must be instructed to determine whether the infant's conduct was that of a reasonably prudent child of the same age, experience and intelligence, *Morales v Quinones*, 72 AD2d 519, 420 NYS2d 899 (1st Dept 1979) (eight year old). Where the child is under four, assumption of risk is not applicable as the child is incapable of being held responsible for his or her actions and plaintiff is entitled to have the jury so instructed, *Smith v Sapienza*, 115 AD2d 723, 496 NYS2d 538 (2d Dept 1985).

The burden of pleading and proving express or implied assumption of the risk or plaintiff's negligence is upon the defendant, see CPLR 1411, 3018(b); PJI 2:36 (comparative negligence) 2:55, and 2:55A (assumption of risk).

Vicious Propensity

A vicious or dangerous propensity means a natural inclination or habitual tendency to act in a manner that might endanger the person or property of others, *Bard v Jahnke*, 6 NY3d 592, 599, 815 NYS2d 16, 848 NE2d 463 (2006); *Collier v Zambito*, 1 NY3d 444, 775 NYS2d 205, 807 NE2d 254 (2004); *Dickson v McCoy*, 39 NY 400 (1868); *Wheaton v Guthrie*, 89 AD2d 809, 453 NYS2d 480 (4th Dept 1982); *Lagoda v Dorr*, 28 AD2d 208, 284 NYS2d 130 (3d Dept 1967); *Shuffian v Garfola*, 9

AD2d 910, 195 NYS2d 45 (2d Dept 1959); see *Hastings v Sauve*, 21 NY3d 122, 967 NYS2d 658, 989 NE2d 940 (2013); *Price v Sarasene*, 198 AD3d 1234, 156 NYS3d 518 (3d Dept 2021); *Matthew H. v County of Nassau*, 131 AD3d 135, 14 NYS3d 38 (2d Dept 2015) (citing PJI), whether playful or not, *Gannon ex rel. Gannon v Conti*, 86 AD3d 704, 926 NYS2d 739 (3d Dept 2011); *Marquardt v Milewski*, 288 AD2d 928, 732 NYS2d 801 (4th Dept 2001); *Provorse v Curtis*, 288 AD2d 832, 732 NYS2d 310 (4th Dept 2001). Behavior that is normal or typical for the particular type of animal in question cannot constitute a vicious propensity, *Bloomer v Shauger*, 94 AD3d 1273, 942 NYS2d 277 (3d Dept 2012), *aff'd*, 21 NY3d 917, 967 NYS2d 322, 989 NE2d 560 (2013) (horse); *Christopher P. v Kathleen M.B.*, 174 AD3d 1460, 105 NYS3d 750 (4th Dept 2019) (dog); *Hamlin v Sullivan*, 93 AD3d 1013, 939 NYS2d 770 (3d Dept 2012) (dog); see *Price v Sarasene*, 198 AD3d 1234, 156 NYS3d 518 (3d Dept 2021) (barking at passersby deemed normal canine behavior); *Brady v Contangelo*, 148 AD3d 1544, 50 NYS3d 690 (4th Dept 2017) (dogs running toward plaintiff causing collision between plaintiff and defendant dog owner constitutes normal canine behavior, not vicious propensity); *Bloom v Van Lenten*, 106 AD3d 1319, 965 NYS2d 661 (3d Dept 2013) (dog's running into plaintiff while dog was being chased by other dogs constituted normal canine activity, not vicious propensity). Evidence tending to prove that a dog has vicious propensities includes a prior attack, the dog's tendency to growl, snap or bare its teeth, the manner in which the dog was restrained, and a proclivity to act in a way that puts others at risk of harm, *Drakes v Bakshi*, 175 AD3d 465, 104 NYS3d 701 (2d Dept 2019); *Hodgson-Romain v Hunter*, 72 AD3d 741, 899 NYS2d 300 (2d Dept 2010).

It is for the jury to determine whether the animal had known vicious propensities, *Collier v Zambito*, 1 NY3d 444, 775 NYS2d 205, 807 NE2d 254 (2004); *Rider v White*, 65 NY 54 (1875); *Zboray v Fessler*, 154 AD2d 367, 545 NYS2d 844 (2d Dept 1989); *Raible v Hygienic Ice & Refrigerating Co.*, 134 App Div 705, 119 NYS 138 (3d Dept 1909) (horse), but the court may dismiss the action where there is insufficient evidence to create a triable issue as to the animal's known vicious propensities, *Althoff v Lefebvre*, 240 AD2d 604, 658 NYS2d 695 (2d Dept 1997); *Rogers by Rogers v Travis*, 229 AD2d 879, 646 NYS2d 206 (3d Dept 1996); *Bohm v Nystrum Const.*, 208 AD2d 668, 617 NYS2d 520 (2d Dept 1994); *Landes v H.E. Farms, Inc.*, 169 AD2d 446, 564 NYS2d 151 (1st Dept 1991); see *Christopher P. v Kathleen M.B.*, 174 AD3d 1460, 105 NYS3d 750 (4th Dept 2019) (plaintiff failed to produce admissible evidence of dog's vicious propensities).

A defendant seeking summary judgment has the initial burden to establish that defendant did not have actual or constructive notice of the dog's vicious propensities, *Price v Sarasene*, 198 AD3d 1234, 156 NYS3d 518 (3d Dept 2021); *Illian v Butler*, 66 AD3d 1312, 888 NYS2d 247 (3d Dept 2009); *Brooks ex rel. Brooks v Parshall*, 25 AD3d 853, 806 NYS2d 796 (3d Dept 2006); *Rogers by Rogers v Travis*, *supra*; see *Doerr v Goldsmith*, 25 NY3d 1114, 14 NYS3d 726, 35 NE3d 796 (2015). Only if the defendant meets this burden does the burden shift to the plaintiff

to raise a triable issue of fact as to whether the defendant knew or should have known of any vicious propensities, *Price v Sarasene*, supra; *Olsen v Campbell*, 150 AD3d 1460, 54 NYS3d 456 (3d Dept 2017). On the issue of the defendant's knowledge, the owner is entitled to assume that the animal will not injure anyone unless its previous behavior gave evidence of vicious propensities, *Kennet v Sossnitz*, 260 App Div 759, 23 NYS2d 961 (1st Dept 1940), aff'd, 286 NY 623, 36 NE2d 459 (1941). Thus, evidence that a dog suffered from hip dysplasia would not, without more, raise an issue of fact with respect to defendants' knowledge that their dog "habitually tended to do acts which might endanger persons," *Young v MacIsaac*, 187 AD2d 1038, 590 NYS2d 334 (4th Dept 1992). The jury may consider the nature and results of the attack on plaintiff, *Matthew H. v County of Nassau*, 131 AD3d 135, 14 NYS3d 38 (2d Dept 2015); *Lynch by Lynch v Nacewicz*, 126 AD2d 708, 511 NYS2d 121 (2d Dept 1987); *DiGrazia v Castronova*, 48 AD2d 249, 368 NYS2d 898 (4th Dept 1975) (citing PJI); *Perrotta v Picciano*, 186 App Div 781, 175 NYS 16 (1st Dept 1919), whether the animal had attacked other persons or animals, *Modafferi v DiMatteo*, 177 AD3d 1413, 110 NYS3d 478 (4th Dept 2019); *Matthew H. v Nassau*, supra; *Morse v Colombo*, 8 AD3d 808, 777 NYS2d 824 (3d Dept 2004); *Calabro v Bennett*, 291 AD2d 616, 737 NYS2d 406 (3d Dept 2002); *Lynch by Lynch v Nacewicz*, 126 AD2d 708, 511 NYS2d 121 (2d Dept 1987); *DiGrazia v Castronova*, 48 AD2d 249, 368 NYS2d 898 (4th Dept 1975) (citing PJI); *Perrota v Picciano*, supra, and the disposition of the animal toward persons or other animals coming near it, *Rider v White*, 65 NY 54 (1875); *Morse v Colombo*, supra, as well as the animal's tendency to growl, snap or bare its teeth, *Collier v Zambito*, supra; *Feit v Wehrli*, 67 AD3d 729, 888 NYS2d 214 (2d Dept 2009); *Arrington v Cohen*, 150 AD3d 1695, 53 NYS3d 450 (4th Dept 2017). Where a dog has a tendency to attack other dogs, it is foreseeable that a person could be injured while attempting to pull the dogs apart, *Modafferi v DiMatteo*, supra; *Morse v Colombo*, 31 AD3d 916, 819 NYS2d 162 (3d Dept 2006).

Even if the animal does not behave in a manner that would be considered dangerous or ferocious, the animal can be found to have vicious propensities where its behavior reflects a proclivity to act in a way that puts others at risk of the kind of harm that gave rise to the lawsuit, *Collier v Zambito*, 1 NY3d 444, 775 NYS2d 205, 807 NE2d 254 (2004); *Bloomer v Shauger*, 94 AD3d 1273, 942 NYS2d 277 (3d Dept 2012), aff'd, 21 NY3d 917, 967 NYS2d 322, 989 NE2d 560 (2013); *Clark v Heaps*, 121 AD3d 1384, 995 NYS2d 356 (3d Dept 2014); *Morse v Colombo*, 8 AD3d 808, 777 NYS2d 824 (3d Dept 2004); see *Dickinson v Uschold*, 11 AD3d 1036, 782 NYS2d 303 (4th Dept 2004). Thus, a dog's habit of chasing vehicles or otherwise interfering with traffic could constitute a vicious propensity, *Alia v Fiorina*, 39 AD3d 1068, 833 NYS2d 761 (3d Dept 2007); see *Lewis v Lustan*, 72 AD3d 1486, 899 NYS2d 767 (4th Dept 2010). To demonstrate that an animal had a vicious, i.e. dangerous, propensity based on behavior that reflects a proclivity to act in a way that puts people at risk, the plaintiff must establish that the animal had a propensity to engage in the type of behavior that caused plaintiff's injuries; evidence that the animal had a propensity to engage

in other behavior that might endanger people is insufficient, *Bloomer v Shauger*, supra; *Clark v Heaps*, supra; *Barone v Phillips*, 83 AD3d 1523, 921 NYS2d 453 (4th Dept 2011). Evidence that a dog's owner encouraged the dog to leap up, bite and hold onto the owner's protectively-sleeved arm until commanded to release is sufficient to create an issue of the fact for the jury as to whether defendants had notice of the dog's alleged propensity to bite, *Gannon ex rel. Gannon v Conti*, 86 AD3d 704, 926 NYS2d 739 (3d Dept 2011).

The jury may also consider whether the owner chose to restrain the animal and the manner in which the animal was confined or restrained, *Collier v Zambito*, 1 NY3d 444, 775 NYS2d 205, 807 NE2d 254 (2004); see *Brice v Bauer*, 108 NY 428, 15 NE 695 (1888); *Curbelo v Walker*, 81 AD3d 772, 916 NYS2d 645 (2d Dept 2011); *Kidder v Moore*, 77 AD3d 1303, 908 NYS2d 312 (4th Dept 2010); *Feit v Wehrli*, 67 AD3d 729, 888 NYS2d 214 (2d Dept 2009); *Parente v Chavez*, 17 AD3d 648, 793 NYS2d 517 (2d Dept 2005); *Morse v Colombo*, 8 AD3d 808, 777 NYS2d 824 (3d Dept 2004); *Fontecchio v Esposito*, 108 AD2d 780, 485 NYS2d 113 (2d Dept 1985); *DiGrazia v Castronova*, 48 AD2d 249, 368 NYS2d 898 (4th Dept 1975) (citing PJI); that the dog was kept as a watchdog or guard dog, *Collier v Zambito*, supra; *Brice v Bauer*, supra; *Curbelo v Walker*, supra; *Parente v Chavez*, supra; *Perrotta v Picciano*, 186 App Div 781, 175 NYS 16 (1st Dept 1919); or that "beware of the dog" signs were posted, *Kidder v Moore*, 77 AD3d 1303, 908 NYS2d 312 (4th Dept 2010); *Parente v Chavez*, supra; *Shaw v Burgess*, 303 AD2d 857, 756 NYS2d 362 (3d Dept 2003); *Arcara v Whytas*, 219 AD2d 871, 632 NYS2d 349 (4th Dept 1995); compare *Sers ex rel. Sers v Manasia*, 280 AD2d 539, 720 NYS2d 192 (2d Dept 2001). However, the fact that an animal was kept enclosed or chained is not sufficient by itself to raise a triable question of fact as to whether the animal had vicious propensities, *Collier v Zambito*, supra; *Price v Sarasene*, 198 AD3d 1234, 156 NYS3d 518 (3d Dept 2021). Likewise, the mere fact that a dog was occasionally kept in a pen on the owner's property, absent evidence that the pen was constructed in response to vicious acts by the dog, is insufficient to impose liability on the owner, *Spinosa v Beck*, 77 AD3d 1426, 909 NYS2d 850 (4th Dept 2010).

An animal owner's knowledge of vicious propensities may be established by proof of prior acts of a similar kind of which the owner had notice, *Collier v Zambito*, 1 NY3d 444, 775 NYS2d 205, 807 NE2d 254 (2004). However, the fact that the injury is the first inflicted by the animal does not shield the owner or keeper from liability, *Collier v Zambito*, supra; *Brice v Bauer*, 108 NY 428, 15 NE 695 (1888); *Rider v White*, 65 NY 54 (1875); *Kennet v Sossnitz*, 260 App Div 759, 23 NYS2d 961 (1st Dept 1940), *aff'd*, 286 NY 623, 36 NE2d 459 (1941); *Matthew H. v County of Nassau*, 131 AD3d 135, 14 NYS3d 38 (2d Dept 2015) (no "one-bite" rule in New York); *Lagoda v Dorr*, 28 AD2d 208, 284 NYS2d 130 (3d Dept 1967); see *Perrotta v Picciano*, 186 App Div 781, 175 NYS 16 (1st Dept 1919) (holding that the popular theory that every dog is entitled to one bite finds no support in the decisions of our state). Conversely, the fact that an animal may have previously responded by

biting or attacking does not automatically establish, as a matter of law, either vicious propensities or knowledge on the part of the owner, *Tessiero v Conrad*, 186 AD2d 330, 588 NYS2d 200 (3d Dept 1992). In such a case, it must appear that the nature and frequency of its acts indicated that its disposition was such as to furnish reasonable ground that it might cause an injury, *Rider v White*, *supra*; *Kennet v Sossnitz*, *supra*; *Gannon ex rel. Gannon v Conti*, 86 AD3d 704, 926 NYS2d 739 (3d Dept 2011).

A minor event cannot serve to establish a dog's vicious propensities as a matter of law nor put the defendants on notice that the dog possessed such propensities, *Gervais v Laino*, 112 AD3d 545, 978 NYS2d 34 (1st Dept 2013) (dog's growling at other dogs, one of which had bitten her, insufficient to raise question of fact as to vicious propensity); *Brooks ex rel. Brooks v Parshall*, 25 AD3d 853, 806 NYS2d 796 (3d Dept 2006) (dog's growling upon first encountering child and growling and baring teeth at one particular man at party insufficient to raise question of fact as to dog's vicious propensity); *Rogers by Rogers v Travis*, 229 AD2d 879, 646 NYS2d 206 (3d Dept 1996); *Tessiero v Conrad*, *supra*; see *Roupp v Conrad*, 287 AD2d 937, 731 NYS2d 545 (3d Dept 2001) (dog jumping on fence and barking or growling at bypassers insufficient to demonstrate that dog had vicious propensities); compare *Dykeman v Heht*, 52 AD3d 767, 861 NYS2d 732 (2d Dept 2008) (question of fact existed where evidence that dog previously growled, barked, snarled and bared teeth twice at injured child and family); *Pollard v United Parcel Service*, 302 AD2d 884, 754 NYS2d 473 (4th Dept 2003) (evidence that dog ran at pedestrians passing by owners' home and that owners tied dog to two cinder blocks, one of which was buried, sufficient to raise triable issues of fact as to vicious propensity and knowledge of owners). Similarly, that a dog was kept enclosed or chained or that a dog previously barked at people is insufficient by itself to raise a question of fact as to whether the owner had knowledge of the dog's vicious propensities, *Collier v Zambito*, 1 NY3d 444, 775 NYS2d 205, 807 NE2d 254 (2004); see *Roche v Bryant*, 81 AD3d 707, 916 NYS2d 185 (2d Dept 2011); *Spinosa v Beck*, 77 AD3d 1426, 909 NYS2d 850 (4th Dept 2010). To establish that the owner should have known of the animal's vicious propensities, plaintiff must prove that the animal's vicious tendencies existed for a sufficient period of time for a reasonable person to discover them, *Velazquez v Carns*, 244 AD2d 620, 663 NYS2d 705 (3d Dept 1997).

The breed or kind of a domestic animal, standing alone, is insufficient to establish that a particular animal has vicious propensities or that the owner had knowledge of the propensities, see *Spinosa v Beck*, 77 AD3d 1426, 909 NYS2d 850 (4th Dept 2010); *Miletich v Kopp*, 70 AD3d 1095, 895 NYS2d 557 (3d Dept 2010); *Malpezzi v Ryan*, 28 AD3d 1036, 815 NYS2d 295 (3d Dept 2006); *Loper ex rel. Loper v Dennie*, 24 AD3d 1131, 807 NYS2d 672 (3d Dept 2005); *Mulhern v Chai Management*, 309 AD2d 995, 765 NYS2d 694 (3d Dept 2003); see also *Plue by Plue v Lent*, 146 AD2d 968, 537 NYS2d 90 (3d Dept 1989); but see

Carlisle v Cassasa, 234 App Div 112, 254 NYS 221 (1st Dept 1931). In the Third Department, however, the breed or kind of a domestic animal may be considered, along with other evidence of the animal's behavior and disposition, in ascertaining whether the animal has vicious propensities and whether the owner had knowledge of the propensities, see *Miletich v Kopp*, *supra*; *Mulhern v Chai Management*, *supra*; *Loper ex rel. Loper v Dennie*, *supra*; but see *Sers ex rel. Sers v Manasia*, 280 AD2d 539, 720 NYS2d 192 (2d Dept 2001); *Bohm v Nystrum Const.*, 208 AD2d 668, 617 NYS2d 520 (2d Dept 1994). Even where the breed or kind of a domestic animal is relevant, the prevailing rule established by the Appellate Division caselaw is that a court may not take judicial notice of the viciousness or ferocity of any particular breed or kind of domestic animal, see *Bard v Jahnke*, 16 AD3d 896, 791 NYS2d 694 (3d Dept 2005), *aff'd*, 6 NY3d 592, 815 NYS2d 16, 848 NE2d 463 (2006); *Malpezzi v Ryan*, *supra*; *Roupp v Conrad*, 287 AD2d 937, 731 NYS2d 545 (3d Dept 2001); *DeVaul v Carvigo Inc.*, 138 AD2d 669, 526 NYS2d 483 (2d Dept 1988); see also *Sorel v Iacobucci*, 221 AD2d 852, 633 NYS2d 688 (3d Dept 1995); but see *Carlisle v Cassasa*, *supra*. This rule is strongly supported by the Court of Appeals' observation in *Bard v Jahnke*, 6 NY3d 592, 815 NYS2d 16, 848 NE2d 463 (2006), that the Court has never held that particular breeds or kinds of domestic animals are, as a matter of law, dangerous. Therefore, if the breed or kind of a domestic animal is relevant, it would appear that testimony regarding the viciousness or ferocity of the breed or kind would be necessary. Like the breed or kind of a domestic animal, the size of the animal, standing alone, is insufficient to establish that a particular animal has vicious propensities, *Kennet v Sossnitz*, 260 App Div 759, 23 NYS2d 961 (1st Dept 1940), *aff'd*, 286 NY 623, 36 NE2d 459 (1941).

Horses are domestic animals, and while thoroughbreds may be a faster, more energetic breed than the "typical livery stable plug," that alone does not create an inference that a particular thoroughbred had vicious tendencies, *Landes v H.E. Farms, Inc.*, 169 AD2d 446, 564 NYS2d 151 (1st Dept 1991); see *Beers v Elebash*, 186 AD2d 515, 589 NYS2d 325 (1st Dept 1992); see also *Krieger v Cogar*, 83 AD3d 1552, 921 NYS2d 767 (4th Dept 2011) (colt).

It is not necessary that plaintiff prove actual knowledge on defendant's part, *Brice v Bauer*, 108 NY 428, 15 NE 695 (1888); *Lier v Bloomingdale Bros.*, 274 App Div 918, 83 NYS2d 465 (1st Dept 1948); *Restatement, Second, Torts* § 509, Comment h. Defendant is chargeable with the knowledge of a person in whose custody the dog was left, *Brice v Bauer*, *supra*; *Stapleton v Butensky*, 188 App Div 237, 177 NYS 18 (1st Dept 1919); *Perrotta v Picciano*, 186 App Div 781, 175 NYS 16 (1st Dept 1919); *Soronen v Von Pustau*, 112 App Div 437, 98 NYS 431 (2d Dept 1906); *Niland v Geer*, 46 App Div 194, 61 NYS 696 (2d Dept 1899); *Earl v Van Alstine*, 8 Barb 630 (NY Gen Term 1850); *Boler v Sorgenfrei*, 86 NYS 180 (AppT 1904); even though that person never communicated the knowledge to the defendant, *Brice v Bauer*, *supra*; *Soronen v Von Pustau*, *supra*. Defendant is also chargeable with knowledge where the dog's vicious propensities had existed for such a period

of time that a reasonably prudent person would have discovered them, *Martin v Borden*, 123 App Div 66, 107 NYS 725 (2d Dept 1907); *Perrota v Picciano*, supra; *Carlisle v Cassasa*, 234 App Div 112, 254 NYS 221 (1st Dept 1931); *Lier v Bloomingdale Bros.*, supra; see *Tucker v Sclafani & Sons, Inc.*, 200 NYS2d 778 (Sup 1960) (Sup).

The known propensity must be for the act that caused the injury, *Collier v Zambito*, 1 NY3d 444, 775 NYS2d 205, 807 NE2d 254 (2004); Restatement, Second, Torts § 509. Thus, it is irrelevant that a dog was not muzzled as required by an ordinance, where plaintiff was knocked down by the dog's jumping on him, *Kennet v Sossnitz*, 260 App Div 759, 23 NYS2d 961 (1st Dept 1940), aff'd, 286 NY 623, 36 NE2d 459 (1941), or that a horse was on the sidewalk in violation of an ordinance, where the horse bit the plaintiff, *Cooley v Barrett*, 170 NYS 360 (AppT 1918).

Dogs

A municipality is not liable for injuries sustained by a plaintiff bitten by a loose dog for alleged negligence in failing to prevent the attack through effective animal control absent a special relationship between the municipality and the plaintiff, *Gillette v Elmira*, 285 AD2d 909, 727 NYS2d 821 (3d Dept 2001). Nor is a municipality liable for injuries sustained by a plaintiff injured by a dog at an animal shelter it operates absent a special relationship between the municipality and the plaintiff since the operation of the shelter is a governmental function performed for the benefit of the general public, *Abrahams ex rel. Reid v Mount Vernon*, 152 AD3d 632, 59 NYS3d 399 (2d Dept 2017).

As to a county's liability for damage done by dogs, see *Agriculture & Markets Law* §§ 106 et seq. and § 125.

Horses

The bailor of a horse is under a duty to warn the bailee of the animal's vicious characteristics that he or she knew of or by the exercise of reasonable care could have been ascertained, *Hosmer v Carney*, 228 NY 73, 126 NE 650 (1920). A bailor who knowingly permits a bailee to use an unsuitable horse may be liable to the bailee, *Roots v Claremont Riding Academy, Inc.*, 20 AD2d 536, 245 NYS2d 172 (1st Dept 1963), aff'd, 14 NY2d 827, 251 NYS2d 475, 200 NE2d 457 (1964) (unsuitable as jumper); *Page v Nassau Riding Academy*, 254 App Div 573, 2 NYS2d 742 (2d Dept 1938) (riding horse, propensity to stumble and fall); but see *Morrelli v Giordano*, 206 AD2d 464, 614 NYS2d 565 (2d Dept 1994) and see Annot: 6 ALR4th 358.

Liability is also imposed without regard to vicious propensity if a horse is left unattended and not properly fastened in a public street, *Norris v Kohler*, 41 NY 42 (1869); *Brown v Willard*, 278 App Div 728, 103 NYS2d 58 (3d Dept 1951), aff'd, 303 NY 727, 103 NE2d 343 (1951); *Furlong v Winne & McKain Co.*, 166 App Div 882, 152 NYS 245 (3d Dept 1915); *Dooling v New York*, 148 App Div 713, 132 NYS 1012 (2d

Dept 1912); and see Annot: 85 ALR2d 1161, though not when the horse, though unattended, is not on a public street, *Brown v Willard*, supra. Moreover, one who negligently frightens a horse causing it to run away may be liable for resulting injury, *Miller v Rochester Vulcanite Pav. Co.*, 21 NYS 651 (Sup 1893). The presence of a horse on property where small children are known to be present constitutes a particular danger to young children, warranting imposition of a further duty to provide protections beyond the duty to keep the horse corralled, *Schwartz v Armand Erpf Estate*, 255 AD2d 35, 688 NYS2d 55 (1st Dept 1999).

A prima facie case of negligence can be made against the owner of a horse appearing unattended on a road, which causes damages to plaintiff's vehicle or person, *Johnson v Waugh*, 244 AD2d 594, 663 NYS2d 928 (3d Dept 1997) because horses generally do not wander unattended on public streets in the absence of negligence, *Allis v Turner*, 259 AD2d 995, 688 NYS2d 864 (4th Dept 1999); see *Saddlemire v Hunsdon*, 202 AD3d 1233, 162 NYS3d 537 (3d Dept 2022). That presumption is rebuttable upon proof that the animal's presence on the highway was not caused by the owner's negligence, *Saddlemire v Hunsdon*, supra; *Allis v Turner*, supra. Therefore, liability for damages caused by stray horses cannot be imposed unless the owner's conduct in some way contributes to the injury, *Saddlemire v Hunsdon*, supra; *Allis v Turner*, supra. In *Allis v Turner*, supra, however, the Court held that it was reversible error to refuse to charge *res ipsa loquitur* in a case where plaintiff was injured while attempting to restrain defendant's horse, which had escaped from a fenced pasture and was unattended on a road. The Court noted that this instruction would have permitted the jury, after rejecting evidence of specific negligence, to infer negligence from the presence of the unrestrained horse on the road, *id.*

In *Hastings v Sauve*, 21 NY3d 122, 967 NYS2d 658, 989 NE2d 940 (2013), the Court concluded that a plaintiff may assert a cause of action for negligence where a farm animal was permitted to wander off the property where it was kept through the negligence of the owner of the property, the owner of the animal, or both. The Court observed that to preclude a plaintiff in such a case from asserting a negligence cause of action would immunize defendants who take little or no care to keep their livestock out of the roadway or off of other people's property, *id.* While the animal at issue in *Hastings* was a cow, the rule articulated in that case may apply to a horse, particularly one kept on a farm, see *Saddlemire v Hunsdon*, 202 AD3d 1233, 162 NYS3d 537 (3d Dept 2022).

Bifurcated Trial

Bifurcated trials of the issues of liability and damages are "encouraged" in personal injury actions, 22 NYCRR 202.42(a); Comment to PJI 1:2A, a policy that is particularly strong in the Second Department, *Matthew H. v County of Nassau*, 131 AD3d 135, 14 NYS3d 38 (2d Dept 2015). A unified trial is appropriate where the plaintiff's injuries have an important bearing on issues relating to liability, see Comment to PJI 1:2A. As discussed above, evidence of a plaintiff's injuries may be rele-

vant on the questions of whether an animal had vicious propensities and whether the defendant knew or should have known of those propensities. Thus, where a plaintiff in a strict liability action intends to offer evidence of his or her injuries in an effort to establish the defendant's liability, a unified trial is appropriate, *Matthew H. v Nassau*, supra (trial court committed reversible error in denying plaintiff's motion for unified trial where evidence of plaintiff's injuries relevant on questions of whether dog had vicious propensities and whether defendant knew or should have known about them).

Injury by a Wild Animal

The owner or keeper of a wild animal is under an absolute duty to see that the animal does not injure other persons or property, *Arbegast v Board of Educ. of South New Berlin Cent. School*, 65 NY2d 161, 490 NYS2d 751, 480 NE2d 365 (1985); *Stevens v Hulse*, 263 NY 421, 189 NE 478 (1934); *Barrett v State*, 220 NY 423, 116 NE 99 (1917); *Theobald v Grey Public Relations, Inc.*, 39 AD2d 902, 334 NYS2d 281 (1st Dept 1972); see 4 Am Jur 2d 326, Animals § 80; 3 NYJur2d 569, Animals § 40, 43; Annot: 57 ALR2d 242; 21 ALR3d 603. Exceptions exist for the common carrier, *Molloy v Starin*, 191 NY 21, 83 NE 588 (1908), or sponsor of trade show which was a mere lessor of premises, *Theobald v Grey Public Relations, Inc.*, supra, or for a municipality or society chartered by the legislature to maintain a zoo, *Guzzi v New York Zoological Soc.*, 192 App Div 263, 182 NYS 257 (1st Dept 1920), aff'd, 233 NY 511, 135 NE 897 (1922), although not when a municipality maintains a zoo as "a private undertaking" not under charter, see *Hyde v Utica*, 259 App Div 477, 259 App Div 1057, 20 NYS2d 335 (4th Dept 1940); and not for a theatre, *Stamp v Eighty-Sixth Street Amusement Co.*, 95 Misc 599, 159 NYS 683 (AppT 1916). In cases involving the exceptions, the owner or keeper is, of course, liable for failure to exercise reasonable care commensurate with the danger, *Guzzi v New York Zoological Soc.*, supra; see Annot: 92 ALR3d 832; Restatement, Second, Torts § 517.

9. MUNICIPAL LIABILITY

Introductory Statement

A municipal corporation is expressly liable by statute for the negligent operation of certain vehicles in the performance of duty by various agents and employees, GML §§ 50-a, 50-c, including volunteer firemen, GML § 205-b; *Thomas v Consolidated Fire Dist. No. 1 of Town of Niskayuna*, 50 NY2d 143, 428 NYS2d 443, 405 NE2d 1009 (1980) (fire district may be held liable for negligent acts of one of its volunteer firemen committed in course of duty while operating privately owned vehicle outside borders of fire district); *Lynch v Waters*, 82 AD3d 1719, 922 NYS2d 884 (4th Dept 2011) (unlike their volunteer firefighters, fire districts and other municipal entities not immune from liability); *Rosenberg v Fuller Road Fire Dept., Inc.*, 34 AD2d 653, 310 NYS2d 212 (2d Dept 1970), *aff'd*, 28 NY2d 816, 321 NYS2d 916, 270 NE2d 732 (1971); *Cox v Greenwich*, 33 AD2d 264, 306 NYS2d 987 (3d Dept 1970); see *Monacelli v Armstrong*, 64 AD2d 428, 409 NYS2d 899 (4th Dept 1978), *aff'd*, 49 NY2d 971, 428 NYS2d 949, 406 NE2d 804 (1980); *Miller v Morania Oil of Long Island, O.C.P., Inc.*, 194 AD2d 770, 599 NYS2d 303 (2d Dept 1993); *Cuddy v Amsterdam*, 62 AD2d 119, 403 NYS2d 590 (3d Dept 1978). An individual member of a volunteer fire company, however, may not be held liable for an act done in the performance of his or her duties “except for willful negligence or malfeasance,” GML § 205-b; *Tobacco v North Babylon Fire Dept.*, 251 AD2d 398, 674 NYS2d 125 (2d Dept 1998).

I. Liability of Governmental Entities Other Than Public Authorities**A. Waiver of State's Immunity**

Section 8 of the Court of Claims Act (originally enacted in 1929 as § 12-a) provides: “The State hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article. Nothing herein contained shall be construed to affect, alter or repeal any provision of the Workers’ Compensation Law.” In 1945, the Court of Appeals held that this statute had effected a waiver of immunity as to the State and its political subdivisions, *Bernardine v New York*, 294 NY 361, 62 NE2d 604 (1945); see *Ferreira v Binghamton*, 2022 NY Slip Op 01953 (NY 2022); *Campbell v New York*, 4 NY3d 200, 791 NYS2d 880, 825 NE2d 121 (2005); *Thomas v Consolidated Fire Dist. No. 1 of Town of Niskayuna*, 50 NY2d 143, 428 NYS2d 443, 405 NE2d 1009 (1980). Since the State’s civil subdivisions (i.e., counties, cities, towns and villages) do not have independent sovereignty and derived their exemption from liability from the State, their exemption was lost when the State relinquished its immunity from suit, *Bernardine v New York*, *supra*.

As political subdivisions, municipal corporations are subject to suit

pursuant to specific statutory provisions, including General Municipal Law (GML) §§ 50-a (municipal liability for negligent operation of vehicles), 50-b (municipal liability for negligent operation of vehicles or other modes of transportation), 50-c (municipal liability for negligent operation of certain vehicles in performance of duty by police officers and paid firefighters), 50-d (municipal liability for malpractice of certain physicians, resident physicians, interns, podiatrists and optometrists in public institutions), 50-e (notice of claim requirements), 50-i (presentations of tort claims; time for commencing actions), 50-j (liability of police officers for negligence in performance of duty), and 50-j [sic] (civil actions against correction employees). CPLR 217-a, which was adopted as part of the Uniform Notice of Claim Act, L 2012, ch 500, and is applicable to actions commenced on or after June 15, 2013, provides that the requirements of GML § 50-e are applicable to all actions for injury to real or personal property or for personal injury or wrongful death that are brought against any political subdivision of the State, any instrumentality or agency of the State or a political subdivision, any public authority or any public benefit corporation entitled to receive a notice of claim as a condition precedent to the lawsuit. CPLR 217-a also states that, with the exception of actions for wrongful death, the limitations period for all such actions is either the one-year and 90-day period provided in GML § 50-i or any longer period prescribed by a different “special provision of law.” CPLR 217-a does not affect actions governed by the Court of Claims Act. In addition to its provisions regarding the statute of limitations, the Uniform Notice of Claim Act provides that, as an alternative to other prescribed service requirements, a GML § 50-e notice of claim may be served on the Secretary of State, GML § 53.

For a list of statutes governing municipal requirements for providing advance notice of premises defects, see PJI 2:225, Comment I. Duty and Notice, *infra*. As to the rules governing public authorities, see II. “Public Authorities,” *infra*, this Introductory Statement.

The State itself may be sued in a tort action only in the Court of Claims, where there is no right to a trial by jury and there are specialized rules for the time in which the action must be commenced, NY Const, Art VI, § 9; Court of Claims Act, §§ 8, 12(3); see *Graham v Stillman*, 100 AD2d 893, 474 NYS2d 580 (2d Dept 1984). However, the Court of Claims cannot entertain tort actions against individual state employees, see *Morell v Balasubramanian*, 70 NY2d 297, 520 NYS2d 530, 514 NE2d 1101 (1987) (medical malpractice action against State-employed physicians), or the State’s political subdivisions, see *Williams v State*, 90 AD2d 861, 456 NYS2d 491 (3d Dept 1982). Rather, tort actions against political subdivisions must be brought in the other appropriate trial courts, see NY Const, Art 6, § 7. A tort action against any state officer or employee may only be brought in an appropriate trial court, even though the State may be vicariously liable for the acts of its officer or employee and may be required to defend the action and indemnify the defendant, *Morell v Balasubramanian*, *supra*; see *Ott v Barash*, 109 AD2d 254, 491 NYS2d 661 (2d Dept 1985).

B. Definitions of Municipal Governments

General Municipal Law § 2 defines “municipal corporation” for the purpose of that statute to include “only a county, town, city or village.” While General Construction Law § 66(2) (formerly General Corporation Law § 3(2)) includes “school district” as well, that definition is not controlling in cases arising under the GML, *Central School Dist. No. 1 of Towns of Colchester, Hamden, Hancock, Walton, Andes and Tompkins, Delaware County v State*, 18 AD2d 943, 237 NYS2d 682 (3d Dept 1963), *aff’d*, 13 NY2d 1031, 245 NYS2d 602, 195 NE2d 311 (1963). Other entities are also defined in General Construction Law §§ 66(1) (“public corporation”), 66(3) (“district corporation”) and 66(4) (“public benefit corporation”), see *Bender v Jamaica Hospital*, 40 NY2d 560, 388 NYS2d 269, 356 NE2d 1228 (1976) (New York City Health and Hospitals Corporation, although a public benefit corporation, is not a “municipal corporation” within the meaning of GML § 2); *Belinson v Sewer Dist. No. 16 of Town of Amherst*, 65 AD2d 912, 410 NYS2d 469 (4th Dept 1978) (sewer district not a “district corporation”).

C. Governmental Entities’ Duty to Indemnify Employees and Citizens

A municipality may be required to indemnify employees for any liability they incur in pursuit of their employment, see GML §§ 50-b, 50-c, 50-d, 50-j, 50-k, 50-l, 50-m. However, a municipality does not have a duty to indemnify an employee for his or her intentional wrongdoing, see *Radvany v Jones*, 184 AD2d 349, 585 NYS2d 343 (1st Dept 1992); GML § 50-k(3) (employees of New York City). Further, a municipality may discontinue providing a defense and indemnification for current and former employees after the employees refused to accept a reasonable settlement offer, at least where the municipality’s local law provides that the duty to defend is conditioned on the “full cooperation of the employee in the defense of [the] action,” *Lancaster v Freeport*, 22 NY3d 30, 978 NYS2d 101, 1 NE3d 302 (2013). As to the State’s obligation to defend and indemnify public officers and employees, see *Public Officers Law* § 17; *Correction Law* § 24-a; *Executive Law* §§ 257-a, 259-q, 259-mm, 501-a; *Mental Hygiene Law* §§ 7.35, 13.35; *Workers’ Compensation Law* §§ 19-c, 87-b(3).

The State, any state agency, and any political subdivision of the State must hold harmless any person who incurs liability, except for gross negligence, when such person, upon command, assists a police officer of the state, state agency, or political subdivision, provided such person, within ten days after service of process upon him or her, delivers it or a copy of it to the chief legal officer of the state, state agency, or political subdivision, *Civil Rights Law* § 79-f.

D. Vicarious Liability of Governmental Entities

A governmental entity may be liable for the negligence of its officers, employees and agents, *Florence v Goldberg*, 44 NY2d 189, 404 NYS2d 583, 375 NE2d 763 (1978); see *Murray v Watervliet City School*

Dist., 130 AD2d 830, 515 NYS2d 150 (3d Dept 1987) (school district liable for slander by teacher if committed during course of employment); *Olmstead v Britton*, 48 AD2d 536, 370 NYS2d 269 (4th Dept 1975) (citing PJI). The State is not liable for the torts of district attorneys and police officers, who are local rather than State officers, *Fisher v State*, 10 NY2d 60, 217 NYS2d 52, 176 NE2d 72 (1961) (district attorneys); *Fuller v State*, 11 AD3d 365, 783 NYS2d 370 (1st Dept 2004) (district attorneys); *Ramos v New York*, 285 AD2d 284, 729 NYS2d 678 (1st Dept 2001) (district attorneys); *Whitmore v State*, 55 AD2d 745, 389 NYS2d 443 (3d Dept 1976) (district attorneys and police officers); see Public Officers Law § 2. In contrast, the State may be held liable for the tortious conduct of county judges, who are State officers or employees, *Mullen v State*, 122 AD2d 300, 504 NYS2d 270 (3d Dept 1986). The State may also be liable for the acts and omissions of the County Clerk when that officer is performing his or her duties in connection with the judicial system, *National Westminster Bank, USA v State*, 76 NY2d 507, 561 NYS2d 541, 562 NE2d 866 (1990). Those duties include the filing of a *lis pendens* or the acceptance of a judgment for filing, *id.* However, the county rather than the State is liable for acts performed by the County Clerk in connection with his or her local duties, *id.*

With respect to liability for tortious acts of government officers and employees, a distinction is drawn between “discretionary” and “ministerial” governmental acts. There is no governmental liability for negligence in the performance of discretionary acts, regardless of the absence or presence of a special relationship between the municipality and the injured plaintiff, *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011); see *Matter of World Trade Center Bombing Litigation* [*Steering Committee v Port Authority of New York and New Jersey*], 17 NY3d 428, 933 NYS2d 164, 957 NE2d 733 (2011); *Santaiti v Ramapo*, 197 AD3d 1191, 153 NYS3d 554 (2d Dept 2021). By contrast, ministerial acts, *i.e.*, those requiring adherence to a governing rule with a compulsory result, *Shipley v New York*, 25 NY3d 645, 16 NYS3d 1, 37 NE3d 58 (2015) (right of sepulcher); *Tango v Tango v Tulevech*, 61 NY2d 34, 471 NYS2d 73, 459 NE2d 182 (1983); *Santaiti v Ramapo*, *supra*; *California Suites, Inc. v Russo Demolition Inc.*, 98 AD3d 144, 946 NYS2d 55 (1st Dept 2012), may subject a municipal employer to liability, provided that the conduct was tortious, *Lapidus v State*, 57 AD3d 83, 866 NYS2d 711 (2d Dept 2008), and involved a special relationship with the injured party, see section E(2) of this Introductory Statement; see also *McLean v New York*, 12 NY3d 194, 878 NYS2d 238, 905 NE2d 1167 (2009).

A special relationship may be formed in three separate ways: (1) a violation of a statutory duty enacted for the benefit of a particular class; (2) a voluntary assumption of a duty that generates justifiable reliance by the beneficiary; or (3) an assumption by the municipality of positive direction or control in the face of a known, blatant and dangerous safety violation, *Coleson v New York*, 24 NY3d 476, 999 NYS2d 810, 24 NE3d 1074 (2014); *Pelaez v Seide*, 2 NY3d 186, 778 NYS2d 111, 810 NE2d 393 (2004). The courts treat the existence of a special relationship as a

threshold matter that plaintiffs must establish before it is necessary to address the question whether the activity in issue was discretionary or ministerial, *Metz v State*, 20 NY3d 175, 958 NYS2d 314, 982 NE2d 76 (2012); *Flagstar Bank, FSB v State*, 114 AD3d 138, 978 NYS2d 266 (2d Dept 2013); *Matter of East 91st Street Crane Collapse Litigation*, 103 AD3d 503, 960 NYS2d 31 (1st Dept 2013); but see *DiMeo v Rotterdam Emergency Medical Services, Inc.*, 110 AD3d 1423, 974 NYS2d 178 (3d Dept 2013) (although existence of special relationship must be established first, the question is irrelevant if government action discretionary).

1. *Vicarious Liability for Operation of Vehicles*

A municipal corporation is expressly liable by statute for the negligent operation of certain vehicles in the performance of duty by various agents and employees, GML §§ 50-a, 50-c, including volunteer firefighters, GML § 205-b; *Thomas v Consolidated Fire Dist. No. 1 of Town of Niskayuna*, 50 NY2d 143, 428 NYS2d 443, 405 NE2d 1009 (1980) (fire district may be held liable for negligent acts of one of its volunteer firefighters committed in course of duty while operating privately owned vehicle outside borders of fire district); *Rosenberg v Fuller Road Fire Dept., Inc.*, 34 AD2d 653, 310 NYS2d 212 (2d Dept 1970), *aff'd*, 28 NY2d 816, 321 NYS2d 916, 270 NE2d 732 (1971); *Cox v Greenwich*, 33 AD2d 264, 306 NYS2d 987 (3d Dept 1970); see *Monacelli v Armstrong*, 64 AD2d 428, 409 NYS2d 899 (4th Dept 1978), *aff'd*, 49 NY2d 971, 428 NYS2d 949, 406 NE2d 804 (1980); *Miller v Morania Oil of Long Island, O.C.P., Inc.*, 194 AD2d 770, 599 NYS2d 303 (2d Dept 1993); *Cuddy v Amsterdam*, 62 AD2d 119, 403 NYS2d 590 (3d Dept 1978). An individual member of a volunteer fire company, however, may not be held liable for an act done in the performance of his or her duties “except for willful negligence or malfeasance,” GML § 205-b; *Tobacco v North Babylon Fire Dept.*, 251 AD2d 398, 674 NYS2d 125 (2d Dept 1998).

2. *Vicarious Liability for Police Officers’ Torts*

Under section 50-j of the General Municipal Law, a municipality is liable for the negligent acts or torts of its duly appointed police officers, provided that the police officer was acting in the performance of his or her duties and within the scope of employment, see *Joseph v Buffalo*, 83 NY2d 141, 608 NYS2d 396, 629 NE2d 1354 (1994); *Aliferis v American Airlines, Inc.*, 63 NY2d 370, 482 NYS2d 453, 472 NE2d 303 (1984). It should be noted, however, that municipalities are not liable for negligent discretionary acts or omissions by their police officers, *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011); see *Santaiti v Ramapo*, 197 AD3d 1191, 153 NYS3d 554 (2d Dept 2021).

To establish a municipality’s vicarious liability, plaintiff must show that the employee’s purpose in performing the alleged actions was to further the employer’s interest or carry out duties incumbent upon the employee in furtherance of the employer’s business, *Stavitz v New York*, 98 AD2d 529, 471 NYS2d 272 (1st Dept 1984); see *Llorente v Wnorowski*,

204 AD3d 656, 163 NYS3d 825 (2d Dept 2022); *Schilt v New York City Transit Authority*, 304 AD2d 189, 759 NYS2d 10 (1st Dept 2003). A municipality may not be held vicariously liable for the acts of an off-duty officer absent some evidence that the officer was engaged in police business, *Joseph v Buffalo*, 83 NY2d 141, 608 NYS2d 396, 629 NE2d 1354 (1994); *Garcia v New York*, 104 AD2d 438, 478 NYS2d 957 (2d Dept 1984), *aff'd*, 65 NY2d 805, 493 NYS2d 127, 482 NE2d 923 (1985); *Campos v New York*, 32 AD3d 287, 821 NYS2d 19 (1st Dept 2006); *Schilt v New York City Transit Authority*, *supra*; *Stavitz v New York*, *supra*; see *Llorente v Wnorowski*, *supra* (issue of fact whether off-duty police officer returning home from work acted within scope of employment by attempting to pull over plaintiff); *Seymour v Gateway Productions, Inc.*, 295 AD2d 278, 744 NYS2d 398 (1st Dept 2002); *Pekarsky v New York*, 240 AD2d 645, 659 NYS2d 496 (2d Dept 1997).

Where an off-duty police officer had placed his loaded firearm underneath his son's mattress and the firearm accidentally discharged several hours later while the officer napped, injuring his son, the city was not responsible as the officer's conduct was unrelated to any duty involving his employment, *Joseph v Buffalo*, 83 NY2d 141, 608 NYS2d 396, 629 NE2d 1354 (1994). However, a question of fact existed as to whether the accident was within the scope of an officer's employment where police department regulations required the police officer to be available for duty and to carry a firearm at all times and the police officer was preparing to go on his tour of duty when his firearm accidentally discharged after having been picked up by the infant plaintiff, *Kull v New York*, 32 NY2d 951, 347 NYS2d 205, 300 NE2d 736 (1973); see *Alifieris v American Airlines, Inc.*, 63 NY2d 370, 482 NYS2d 453, 472 NE2d 303 (1984).

While the New York State Defense Emergency Act, Unconsolidated Laws § 9193, grants municipalities immunity for actions taken in good faith relating to civil defense, the immunity does not extend to actions of an auxiliary police officer on a routine, regularly scheduled patrol, *Fitzgibbon v Nassau*, 147 AD2d 40, 541 NYS2d 845 (2d Dept 1989).

For a charge on and a detailed discussion of municipal liability for police officers' acts and omissions in performing police functions, see Comment to PJI 2:229A.

3. *Liability for Acts of Sheriff and Sheriff's Deputies*

The State is not liable for the acts of a deputy sheriff, who is a local, rather than a State, officer, *Williams v State*, 90 AD2d 861, 456 NYS2d 491 (3d Dept 1982). Prior to 1990, the New York State Constitution, Article XIII, § 13(a), provided that the county "shall never be made responsible for the acts of the sheriff," including the sheriff's negligent acts. The immunity granted by that former provision extended to the sheriff's deputies, *Commisso v Meeker*, 8 NY2d 109, 202 NYS2d 287, 168 NE2d 365 (1960); *Green v Fulton*, 123 AD2d 88, 511 NYS2d 150 (3d

Dept 1987); *Laughing v Power Authority of State of N. Y.*, 68 AD2d 585, 418 NYS2d 676 (3d Dept 1979); *Delosh v Syracuse*, 64 AD2d 814, 407 NYS2d 940 (4th Dept 1978). However, the constitutional provision did not prevent counties from accepting responsibility for the acts of sheriffs' deputies, *Barr v Albany*, 50 NY2d 247, 428 NYS2d 665, 406 NE2d 481 (1980). Section 13 was modified to permit counties to adopt local laws accepting responsibility for the negligent acts of both the sheriff and the sheriff's deputies, see *Santiamagro v Orange*, 226 AD2d 359, 640 NYS2d 251 (2d Dept 1996); *Marashian v Utica*, 214 AD2d 1034, 626 NYS2d 646 (4th Dept 1995).

An assumption of responsibility by a county for the acts of deputy sheriffs must be express and the adoption of a local law providing for general indemnification of county employees is not sufficient to establish a waiver of immunity by the county, *Nichols v Rensselaer*, 129 AD2d 167, 517 NYS2d 315 (3d Dept 1987); see *Freeland v Erie*, 185 AD3d 1490, 129 NYS3d 213 (4th Dept 2020); *Mosey v Erie*, 117 AD3d 1381, 984 NYS2d 706 (4th Dept 2014); *Marashian v Utica*, 214 AD2d 1034, 626 NYS2d 646 (4th Dept 1995). If a county assumes responsibility for the misconduct of sheriff's deputies, the sheriff will no longer be vicariously liable for their conduct, *Hex Bldg. Corp. v Lepeck Const.*, 104 AD2d 231, 482 NYS2d 510 (2d Dept 1984).

The sheriff has a duty to protect prisoners in county jails under Corrections Law § 500-c, *Villar v Howard*, 126 AD3d 1297, 6 NYS3d 811 (4th Dept 2015); *Kemp v Waldron*, 115 AD2d 869, 497 NYS2d 158 (3d Dept 1985); *Wilson v Sponable*, 81 AD2d 1, 439 NYS2d 549 (4th Dept 1981). A sheriff may be held liable for negligent training and supervision of the deputy sheriffs who worked in the jail, *Villar v Howard*, *supra*. However, a sheriff is not vicariously liable for the acts of deputies in the performance of their criminal law duties, *Mosey v Erie*, 117 AD3d 1381, 984 NYS2d 706 (4th Dept 2014); *Green v Fulton*, 123 AD2d 88, 511 NYS2d 150 (3d Dept 1987) (execution of arrest warrant); *D'Amico v Rochester*, 79 AD2d 1091, 435 NYS2d 829 (4th Dept 1981) (recognizing general principle); *Isereau v Stone*, 3 AD2d 243, 160 NYS2d 336 (4th Dept 1957) (failure to protect wife from being shot by husband). Although sheriffs were previously liable for their deputies' acts in connection with civil matters, *Cassidy v Nassau*, 146 AD2d 595, 536 NYS2d 520 (2d Dept 1989) (execution of eviction warrant); *Glowinski v Braun*, 105 AD2d 1153, 482 NYS2d 395 (4th Dept 1984) (execution of arrest warrant in Family Court proceeding); see *Flaherty v Milliken*, 193 NY 564, 86 NE 558 (1908), the State Constitution was amended effective January 1, 1990 to relieve sheriffs of personal liability, *Thoubboron v New York State Dept. of Civil Service*, 79 NY2d 982, 584 NYS2d 433, 594 NE2d 927 (1992), *affg on AD memorandum*, 175 AD2d 443, 572 NYS2d 494; see NY Const, Art 13, § 13(a).

A one-year statute of limitations governs actions against the sheriff or his deputies that are based upon violations of duties specially incident to the office, CPLR 215(1); *Adams v Rensselaer*, 66 NY2d 725, 496 NYS2d 996, 487 NE2d 906 (1985) (failure to safely keep inmates in

county jail); see *Green v Fulton*, 123 AD2d 88, 511 NYS2d 150 (3d Dept 1987) (negligence in executing arrest warrant); *Passonno v Rensselaer*, 87 AD2d 693, 448 NYS2d 867 (3d Dept 1982) (false arrest and false imprisonment). However, where the duty breached is one that is imposed generally, such as using reasonable care in operating a motor vehicle, then the three-year period of limitations provided in CPLR 214(5) applies, *Dixon v Seymour*, 62 AD2d 444, 405 NYS2d 320 (3d Dept 1978); see *Kingston v Braun*, 122 AD2d 543, 504 NYS2d 916 (4th Dept 1986) (fall from a ladder while in sheriff's custody).

As to the liability of a New York City marshal in removing collateral, see *Korsinsky v Rose*, 120 AD3d 1307, 993 NYS2d 92 (2d Dept 2014); see also *Cla-Mil East Holding Corp. v Medallion Funding Corp.*, 6 NY3d 375, 813 NYS2d 1, 846 NE2d 431 (2006).

E. Limitations on Governmental Liability

1. In General

The threshold issue on a tort claim against a governmental entity is whether the entity was engaged in a “governmental” or “proprietary” activity, *Ferreira v Binghamton*, 2022 NY Slip Op 01953 (NY 2022); *Tara N.P. v Western Suffolk Board of Co-op. Educational Services*, 28 NY3d 709, 49 NYS3d 362, 71 NE3d 950 (2017); *Turturro v New York*, 28 NY3d 469, 45 NYS3d 874, 68 NE3d 693 (2016); *Connolly v Long Island Power Authority*, 30 NY3d 719, 70 NYS3d 909, 94 NE3d 471 (2018); *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 972 NYS2d 169, 995 NE2d 131 (2013). If the activity was proprietary in nature, the government entity is subject to liability under the same rules applicable to a non-government entity, *Ferreira v Binghamton*, *supra*; *Turturro v New York*, *supra*; *Wittorf v New York*, 23 NY3d 473, 991 NYS2d 578, 15 NE3d 333 (2014); see *Tara N.P. v Western Suffolk Board of Cooperative Educational Services*, *supra*. If, however, the activity was governmental in nature, the next issue is whether the entity owed a special duty to the injured party, *Ferreira v Binghamton*, *supra*; *Tara N.P. v Western Suffolk Board of Cooperative Educational Services*, *supra*; *Turturro v New York*, *supra*. If no such duty was owed to the injured party, the entity is not liable; if such a duty was owed, the entity may be liable, *Metz v State*, 20 NY3d 175, 958 NYS2d 314, 982 NE2d 76 (2012); *Flagstar Bank, FSB v State*, 114 AD3d 138, 978 NYS2d 266 (2d Dept 2013); see *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 972 NYS2d 169, 995 NE2d 131 (2013).

In a case involving governmental activity in which the entity owed a special duty to the injured party, the entity may assert as a defense that its actions were discretionary (as opposed to ministerial). If the entity's actions were discretionary, it cannot be liable; if the actions were ministerial, the entity may be liable, *Ferreira v Binghamton*, 2022 NY Slip Op 01953 (NY 2022); *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011); *Matter of World Trade Center Bombing Litigation*, 17 NY3d 428, 933 NYS2d 164, 957 NE2d 733 (2011);

Tango by Tango v Tulevech, 61 NY2d 34, 471 NYS2d 73, 459 NE2d 182 (1983); Middleton v Salina, 108 AD3d 1052, 969 NYS2d 634 (4th Dept 2013); see Turturro v New York, *supra*; Shipley v New York, 25 NY3d 645, 16 NYS3d 1, 37 NE3d 58 (2015) (right of sepulcher); see Lee v New York, 164 AD3d 415, 80 NYS3d 51 (1st Dept 2018). These principles apply to actions against the State as well as those against municipalities, even though Court of Claims Act § 8 provides that the State and its subdivisions are to be treated like any other individual or corporation with respect to civil liability.

Proprietary functions are those in which governmental activities essentially substitute for or supplement traditionally private enterprises, *Ferreira v Binghamton*, 2022 NY Slip Op 01953 (NY 2022); *Connolly v Long Island Power Authority*, 30 NY3d 719, 70 NYS3d 909, 94 NE3d 471 (2018); *Tara N.P. v Western Suffolk Board of Co-op. Educational Services*, 28 NY3d 709, 49 NYS3d 362, 71 NE3d 950 (2017); *Turturro v New York*, 28 NY3d 469, 45 NYS3d 874, 68 NE3d 693 (2016); *Wittorf v New York*, 23 NY3d 473, 991 NYS2d 578, 15 NE3d 333 (2014); *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 972 NYS2d 169, 995 NE2d 131 (2013); *J. E. v Westbury*, 200 AD3d 759, 155 NYS3d 101 (2d Dept 2021); *Santaiti v Ramapo*, 162 AD3d 921, 80 NYS3d 288 (2d Dept 2018); *Moore v Del-Rich Properties, Inc.*, 151 AD3d 1817, 58 NYS3d 772 (4th Dept 2017); *Granata v White Plains*, 120 AD3d 1187, 993 NYS2d 47 (2d Dept 2014); *Kochanski v New York*, 76 AD3d 1050, 908 NYS2d 260 (2d Dept 2010).

Generally, whether municipal activity is governmental depends on several considerations, including whether the activity was historically performed by government, whether it is undertaken for the protection and safety of the public, whether it is best executed by government and whether it is undertaken for profit or revenue, see *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 972 NYS2d 169, 995 NE2d 131 (2013); *Karedes v Colella*, 100 NY2d 45, 760 NYS2d 84, 790 NE2d 257 (2003); *Drever v State*, 134 AD3d 19, 18 NYS3d 207 (3d Dept 2015); *Kochanski v New York*, 76 AD3d 1050, 908 NYS2d 260 (2d Dept 2010). An act undertaken for the protection and safety of the public under the general police powers is governmental in nature, *Ferreira v Binghamton*, 2022 NY Slip Op 01953 (NY 2022); *Tara N.P. v Western Suffolk Board of Co-op. Educational Services*, 28 NY3d 709, 49 NYS3d 362, 71 NE3d 950 (2017); *Applewhite v Accuhealth, Inc.*, *supra*; *J. E. v Westbury*, 200 AD3d 759, 155 NYS3d 101 (2d Dept 2021); *Santaiti v Ramapo*, 162 AD3d 921, 80 NYS3d 288 (2d Dept 2018); *Cockburn v New York*, 129 AD3d 895, 10 NYS3d 630 (2d Dept 2015). That a fee is charged by the governmental entity for performing the activity does not, standing alone, mean that the activity was proprietary in nature. Where a fee is charged by a governmental entity, the critical inquiry is whether the fee is designed to defray the cost of maintaining an essential component of an entity's service or to create a profit for the taxpayers, *Applewhite v Accuhealth, Inc.*, *supra* (charging fee for municipal ambulance service did not result in assistance rendered by public fire department emergency medical technicians being characterized as proprietary). This distinction is not always easy to make.

For instance, both private enterprise and municipalities supply the public with transportation. However, in *Weiner v Metropolitan Transp. Authority*, 55 NY2d 175, 448 NYS2d 141, 433 NE2d 124 (1982), the Court recognized that although a private common carrier might be liable for failing in its duty to protect passengers against assaults, the analysis is different for a public authority rendering the same service, see *Matter of World Trade Center Bombing Litigation [Steering Committee v Port Authority of New York and New Jersey]*, 17 NY3d 428, 933 NYS2d 164, 957 NE2d 733 (2011). In that situation, the provision of protection involves discretionary decision-making with respect to the strategic allocation of police resources, and the authority is therefore insulated from liability based on the same principle that insulates a governmental body from liability for failure to provide adequate police protection, *Matter of World Trade Center Bombing Litigation [Steering Committee v Port Authority of New York and New Jersey]*, *supra*; *Weiner v Metropolitan Transp. Authority*, *supra*; see *Balsam v Delma Engineering Corp.*, 90 NY2d 966, 665 NYS2d 613, 688 NE2d 487 (1997) (action alleging failure to close roadway, redirect traffic or place warning flares or cones in area of icy condition barred because regulation of “traffic” is a classic example of a governmental function undertaken for protection and safety of public); *Clinger v New York City Transit Authority*, 85 NY2d 957, 626 NYS2d 1008, 650 NE2d 855 (1995); *Murchison v State*, 97 AD3d 1014, 949 NYS2d 789 (3d Dept 2012) (law enforcement officer engaged in traffic control or regulation performing governmental function); see also *Granata v White Plains*, 120 AD3d 1187, 993 NYS2d 47 (2d Dept 2014) (action alleging municipality failed in its capacity as a commercial owner of a public parking garage to meet basic proprietary obligation of providing minimal security for the garage governed by principles applicable to proprietary activity). Under a similar analysis, the court held in *St. Andrew v O’Brien*, 45 AD3d 1024, 845 NYS2d 184 (3d Dept 2007), that a municipality providing police coverage for a special event operated by a private entity is performing a governmental rather than a proprietary function, even though the municipality received payment from the private entity to compensate for the police officers’ overtime expenses and there was no evidence that the private entity defined the duties of the police.

In *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 972 NYS2d 169, 995 NE2d 131 (2013), the Court held that a municipal emergency response system—including the ambulance assistance rendered by first responders such as emergency medical technicians of the Fire Department of the City of New York—should be viewed as a governmental, rather than proprietary, function, see *Kralkin v New York*, 204 AD3d 772, 166 NYS3d 663 (2d Dept 2022) (EMTs transporting intoxicated plaintiff who removed restraints and jumped from ambulance were performing discretionary acts entitled to governmental immunity); *Cockburn v New York*, 129 AD3d 895, 10 NYS3d 630 (2d Dept 2015); *Kupferstein v New York*, 101 AD3d 952, 957 NYS2d 200 (2d Dept 2012). Similarly, garbage collection is viewed as a governmental function, *Katz v Clarkstown*, 120 AD3d 632, 990 NYS2d 880 (2d Dept 2014).

In contrast, the maintenance of roads and highways, which has

historically been performed by both private and governmental entities, is a function that subjects private and governmental entities to ordinary rules of negligence, *Turturro v New York*, 28 NY3d 469, 45 NYS3d 874, 68 NE3d 693 (2016); *Wittorf v New York*, 23 NY3d 473, 991 NYS2d 578, 15 NE3d 333 (2014); see *Grasso v New York State Thruway Authority*, 159 AD3d 674, 71 NYS3d 604 (2d Dept 2018) (New York State Thruway Authority, as owner of landfill requiring remediation and entity engaged in highway reconstruction project, was acting in a proprietary capacity). The proprietary nature of a municipality's duty to maintain roads and highways is not altered by the fact that liability can be, and has been, limited by prior written notice laws, *Wittorf v New York*, supra. Since transportation is traditionally operated by private enterprise, it constitutes a proprietary function when performed by a governmental entity such as Transit Authority, *Martinez v New York City Transit Authority*, 203 AD3d 87, 162 NYS3d 11 (1st Dept 2022); *Pedraza v New York City Transit Authority*, 203 AD3d 95, 162 NYS3d 19 (1st Dept 2022). A municipality's proprietary duties include the obligation to warn of or barricade a dangerous condition, regardless of who caused or created it, id, to install adequate traffic control signs, *Wager v State*, 7 NY2d 945, 198 NYS2d 316, 165 NE2d 878 (1960); *Stiggins v North Dansville*, 155 AD3d 1617, 63 NYS3d 796 (4th Dept 2017), to repaint faded road stripes, *Henriquez v Parsippany Const. Co., Inc.*, 62 AD3d 749, 879 NYS2d 512 (2d Dept 2009); *Purves v Erie*, 12 AD3d 1112, 784 NYS2d 415 (4th Dept 2004), to take measures to slow speeding vehicles, *Turturro v New York*, supra (conduct traffic calming study and implement traffic calming measures), to provide adequate warnings of ongoing road construction, *Beardsley v State*, 57 AD2d 1061, 395 NYS2d 848 (4th Dept 1977); *Miller v State*, 6 AD2d 979, 176 NYS2d 817 (3d Dept 1958), and to prevent foreseeable suicide attempts by the installation of suicide prevention barriers in connection with the design and maintenance of a bridge, *Feldman v Port Authority of New York*, 194 AD3d 137, 144 NYS3d 701 (1st Dept 2021); *Perlov v Port Authority of New York and New Jersey*, 189 AD3d 1624, 139 NYS3d 324 (2d Dept 2020). Under these principles, a municipality was properly held liable for the actions of a road-repair worker in failing to warn plaintiff of unsafe road conditions even though the worker was in the process of blocking the roadway from vehicular traffic, *Wittorf v New York*, supra. The Wittorf Court distinguished the actions of the road-repair worker, which were undertaken in connection with the proprietary function of maintaining the roadway, from the actions of the police officers in *Balsam v Delma Engineering Corp.*, 90 NY2d 966, 665 NYS2d 613, 688 NE2d 487 (1997), who were performing the governmental function of directing traffic at an accident scene. In *Cockburn v New York*, 129 AD3d 895, 10 NYS3d 630 (2d Dept 2015), the court concluded that a municipality's snow removal operation on public streets following a significant snowstorm was a governmental function. The court reasoned that the operation was undertaken for the protection and safety of the public pursuant to the municipality's general police powers.

As highlighted by *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 972 NYS2d 169, 995 NE2d 131 (2013) (ambulance assistance), in some situ-

ations both a governmental entity and a private enterprise may provide a particular service. Where a given service is provided by both public and private concerns, the issue of whether the public service is governmental or proprietary distills to whether the private entity provides supplemental support for a critical governmental duty, see *id* (fact that private entities operate ambulance services in municipality not determinative of governmental-proprietary distinction because those entities provide supplemental support for critical governmental duty); *Drever v State*, 134 AD3d 19, 18 NYS3d 207 (3d Dept 2015) (fact that private organizations enroll organ donors not determinative of government-proprietary distinction because those organizations provide supplemental support for governmental duty of enrolling individuals into organ and tissue donor registry by department of motor vehicles applications).

Where the distinction between governmental and proprietary functions is deemed relevant, “[i]t is the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred which governs liability, not whether the agency involved is engaged generally in proprietary activity or is in control of the location in which the injury occurred,” *Weiner v Metropolitan Transp. Authority*, 55 NY2d 175, 448 NYS2d 141, 433 NE2d 124 (1982); *J. E. v Westbury*, 200 AD3d 759, 155 NYS3d 101 (2d Dept 2021); see *Tara N.P. v Western Suffolk Board of Co-op. Educational Services*, 28 NY3d 709, 49 NYS3d 362, 71 NE3d 950 (2017) (county’s referral of individual for participation in welfare-to-work program is governmental function); *Turturro v New York*, 28 NY3d 469, 45 NYS3d 874, 68 NE3d 693 (2016) (conducting traffic calming study and implementing traffic calming measures are proprietary functions); *Wittorf v New York*, 23 NY3d 473, 991 NYS2d 578, 15 NE3d 333 (2014); *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 972 NYS2d 169, 995 NE2d 131 (2013) (holding that ambulance service by emergency medical technicians responding to 911 call for assistance is governmental function and cataloging other examples of governmental functions); *Metz v State*, 20 NY3d 175, 958 NYS2d 314, 982 NE2d 76 (2012) (vessel inspection undertaken by State for safety purposes is governmental activity); *Matter of World Trade Center Bombing Litigation [Steering Committee v Port Authority of New York and New Jersey]*, 17 NY3d 428, 933 NYS2d 164, 957 NE2d 733 (2011) (providing security against terrorist attack within parking garage of commercial building operated by government authority); *Sebastian v State*, 93 NY2d 790, 698 NYS2d 601, 720 NE2d 878 (1999) (state may not be held liable in negligence for injuries inflicted by adjudicated juvenile delinquent who escaped from youth facility because removal of juveniles from community by court order and their placement in public confinement is governmental activity); *P.R.B. v State*, 201 AD3d 1237, 162 NYS3d 196 (3d Dept 2022) (plaintiff’s claim that State failed to install proper security devices in dormitory implicated defendants’ proprietary function as landlord); *Zozzaro v Hempstead*, 200 AD3d 936, 155 NYS3d 357 (2d Dept 2021) (town’s provision of animal shelter constitutes government function); *Lewery v New York*, 191 AD3d 855, 138 NYS3d 895 (2d Dept 2021) (sanitation

worker cleaning up debris after storm was engaged in governmental function); *Lee v New York*, 164 AD3d 415, 80 NYS3d 51 (1st Dept 2018) (caretaking of decedent's body in morgue during hurricane and ensuing flooding governmental function); *Santaiti v Ramapo*, 162 AD3d 921, 80 NYS3d 288 (2d Dept 2018) (police department's confiscation and return of handgun after domestic dispute governmental function); *Full v Monroe County Sheriff's Dept.*, 152 AD3d 1237, 58 NYS3d 853 (4th Dept 2017) (governmental function of temporarily converting street to one way to accommodate traffic from proprietary county sponsored air show does not change action to a proprietary function); *Drever v State*, 134 AD3d 19, 18 NYS3d 207 (3d Dept 2015) (enrolling individuals into organ and tissue donor registry by department of motor vehicles applications is governmental function); *Ferguson v New York*, 118 AD3d 849, 988 NYS2d 207 (2d Dept 2014) (supervising children in school is governmental function); *Kochanski v New York*, 76 AD3d 1050, 908 NYS2d 260 (2d Dept 2010) (caring for children in need of foster care and placing those children in foster homes are governmental activities); *Kadymir v New York City Transit Authority*, 55 AD3d 549, 865 NYS2d 269 (2d Dept 2008) (removal of passengers from subway train stopped in tunnel due to blackout is governmental activity); *Melby v Duffy*, 304 AD2d 33, 758 NYS2d 89 (2d Dept 2003) (regulation of traffic on waterway is classic example of governmental function); *Hambel v Bohemia Fire Dept.*, 210 AD2d 379, 621 NYS2d 89 (2d Dept 1994) (sounding fire siren to summon volunteer members of fire department to an emergency call is governmental activity); *Bogart v New Paltz*, 145 AD2d 110, 537 NYS2d 678 (3d Dept 1989) (operation of emergency communications center for the processing of emergency communications is governmental function).

Similarly, it is not the characterization of the behavior sought to be prevented that determines whether the municipality was acting in a propriety or governmental capacity, but rather the specific act or omission by the municipality claimed to have caused the injury, *Turturro v New York*, 28 NY3d 469, 45 NYS3d 874, 68 NE3d 693 (2016).

2. *Distinction Between Discretionary and Ministerial Governmental Acts*

"[W]hen official action involves the exercise of discretion, the officer [or the municipality] is not liable for the injurious consequences of that action even if resulting from negligence or malice. Conversely, when the action is exclusively ministerial, the officer [or the municipality] will be liable if it is otherwise tortious and not justifiable pursuant to statutory command," *Tango by Tango v Tulevech*, 61 NY2d 34, 471 NYS2d 73, 459 NE2d 182 (1983); see *Shipley v New York*, 25 NY3d 645, 16 NYS3d 1, 37 NE3d 58 (2015); *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011); *Matter of World Trade Center Bombing Litigation [Steering Committee v Port Authority of New York and New Jersey]*, 17 NY3d 428, 933 NYS2d 164, 957 NE2d 733 (2011); *Johnson v New York*, 15 NY3d 676, 917 NYS2d 10, 942 NE2d 219 (2010); *Lauer v New York*, 95 NY2d 95, 711 NYS2d 112, 733 NE2d 184 (2000); *McCor-*

mack v New York, 80 NY2d 808, 587 NYS2d 580, 600 NE2d 211 (1992); Mon v New York, 78 NY2d 309, 574 NYS2d 529, 579 NE2d 689 (1991); Haddock v New York, 75 NY2d 478, 554 NYS2d 439, 553 NE2d 987 (1990). In this context, a negligent action or omission is actionable only if it involves a ministerial action, Valdez v New York, supra; McLean v New York, 12 NY3d 194, 878 NYS2d 238, 905 NE2d 1167 (2009); Murchison v State, 97 AD3d 1014, 949 NYS2d 789 (3d Dept 2012); see Santaiti v Ramapo, 197 AD3d 1191, 153 NYS3d 554 (2d Dept 2021) (ministerial actions may be basis for liability but only if they violate a special duty owed to plaintiff, apart from duty owed to public generally); Lauer v New York, supra (to sustain liability against municipality for negligent ministerial act or omission, duty breached “must be more than that owed the public generally”). Thus, a municipality acting in a discretionary governmental capacity may rely on the governmental function immunity defense, Ferreira v Binghamton, 2022 NY Slip Op 01953 (NY 2022); Turturro v New York, 28 NY3d 469, 45 NYS3d 874, 68 NE3d 693 (2016). In McLean v New York, supra, the Court of Appeals acknowledged that some of its prior cases may have suggested that the existence of a special relationship would furnish a basis for liability arising from a municipality’s negligent performance of its discretionary activities (citing Kovit v Estate of Hallums, 4 NY3d 499, 797 NYS2d 20, 829 NE2d 1188 (2005); Pelaez v Seide, 2 NY3d 186, 778 NYS2d 111, 810 NE2d 393 (2004)). The McLean Court went on to stress, however, that this suggestion was inconsistent with the holdings in Tango by Tango v Tulevech, supra, and Lauer v New York, supra, and should not be followed.

As to the difference between ministerial and discretionary functions, the Court of Appeals stated in Tango by Tango v Tulevech, 61 NY2d 34, 471 NYS2d 73, 459 NE2d 182 (1983): “Judicial efforts to distinguish between discretionary and ministerial acts have produced an array of decisions . . . difficult to harmonize[.] Nevertheless, the rule to be derived from the cases is that discretionary or quasi-judicial acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result,” see Shipley v New York, 25 NY3d 645, 16 NYS3d 1, 37 NE3d 58 (2015); Lauer v New York, 95 NY2d 95, 711 NYS2d 112, 733 NE2d 184 (2000); Feeney v Delaware, 150 AD3d 1355, 55 NYS3d 737 (3d Dept 2017); Trimble v Albany, 144 AD3d 1484, 42 NYS3d 432 (3d Dept 2016); Sherpa v New York City Health & Hospitals Corp., 90 AD3d 738, 934 NYS2d 463 (2d Dept 2011); Rodriguez v New York, 189 AD2d 166, 595 NYS2d 421 (1st Dept 1993). Alternatively, if the functions or duties in question are essentially clerical or routine, they will be deemed ministerial and no immunity will attach, Mon v New York, 78 NY2d 309, 574 NYS2d 529, 579 NE2d 689 (1991); Rugova v New York, 132 AD3d 220, 16 NYS3d 233 (1st Dept 2015) (obligation to provide notifications to family regarding deceased persons where municipality has all necessary identifying documents); Tinney v New York, 94 AD3d 417, 941 NYS2d 571 (1st Dept 2012) (same); see Valdez v New York, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011); Santaiti v Ramapo, 197 AD3d 1191,

153 NYS3d 554 (2d Dept 2021); *Katz v Clarkstown*, 120 AD3d 632, 990 NYS2d 880 (2d Dept 2014); *Kupferstein v New York*, 101 AD3d 952, 957 NYS2d 200 (2d Dept 2012) (timing of transport of infirm person to hospital by municipal ambulance and administration of sedative to calm person to effectuate transport are ministerial functions).

“The immunity afforded a municipality presupposes an exercise of discretion in compliance with its own procedures,” *Haddock v New York*, 75 NY2d 478, 554 NYS2d 439, 553 NE2d 987 (1990); see *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011); *Johnson v New York*, 15 NY3d 676, 917 NYS2d 10, 942 NE2d 219 (2010). Thus, no immunity attaches to a governmental action that did not involve the exercise of discretion and that violated internal rules and policies, *Haddock v New York*, *supra* (failure of municipality to review work assignments of employee after it became aware of employee’s criminal record); see *Santaiti v Ramapo*, 197 AD3d 1191, 153 NYS3d 554 (2d Dept 2021) (officer’s return of confiscated firearm to decedent’s husband constituted ministerial, not discretionary, action since decedent’s husband did not produce proper documentation to allow return of gun under governing rules and standards); *Xenias v New York*, 191 AD3d 453, 142 NYS3d 148 (1st Dept 2021) (although decisions related to dispatch of ambulance are discretionary in nature, City was not entitled to dismissal because it was unclear whether delay in responding to 911 call was in fact affirmative exercise of discretion, rather than unintentional failure to timely dispatch ambulance); *Trimble v Albany*, 144 AD3d 1484, 42 NYS3d 432 (3d Dept 2016) (issue of fact whether fire department’s alleged negligence in failing to remove and fully extinguish firewood and damaged furniture was consequence of considered decision on department’s part); *Luckey v New York*, 120 AD3d 403, 991 NYS2d 34 (1st Dept 2014) (City potentially liable for negligent failure to comply with mandatory rules of Department of Corrections requiring immediate response to medical emergencies and that CPR be administered by trained officers where appropriate); *Lubecki v New York*, 304 AD2d 224, 758 NYS2d 610 (1st Dept 2003); *Wyatt v State*, 176 AD2d 574, 575 NYS2d 31 (1st Dept 1991), or institutional custom and practice, *Hunt v State*, 36 AD3d 511, 828 NYS2d 355 (1st Dept 2007). Further, the immunity cannot attach unless the municipal defendant establishes that its employees’ discretion was in fact exercised in relation to the conduct on which liability is predicated, *Ferreira v Binghamton*, 2022 NY Slip Op 01953 (NY 2022); *Valdez v New York*, *supra*; *Trimble v Albany*, *supra*; see *Murchison v State*, 97 AD3d 1014, 949 NYS2d 789 (3d Dept 2012). Where officials exercised their discretion, but improperly, no tort liability attaches, *Mon v New York*, 78 NY2d 309, 574 NYS2d 529, 579 NE2d 689 (1991); see *Feeney v Delaware*, 150 AD3d 1355, 55 NYS3d 737 (3d Dept 2017).

a. Regulatory Acts and Omissions

A government regulates certain activities through its power to conduct inspections to assure compliance with statutes and ordinances and through its power to issue licenses, permits, certificates and the

like. There is generally no liability for the consequences of discretionary decisions to issue, deny or revoke a building permit, 154 East Park Ave. Corp. v Long Beach, 52 NY2d 991, 438 NYS2d 288, 420 NE2d 86 (1981); Rottkamp v Young, 21 AD2d 373, 249 NYS2d 330 (2d Dept 1964), *aff'd*, 15 NY2d 831, 257 NYS2d 944, 205 NE2d 866 (1965); Green v Irwin, 174 AD2d 879, 570 NYS2d 868 (3d Dept 1991); see Rolfe v Falconer, 62 NY2d 884, 478 NYS2d 852, 467 NE2d 516 (1984); to collect, maintain and disseminate motor vehicle and operators' records, Williams v State, 90 AD2d 861, 456 NYS2d 491 (3d Dept 1982); to disapprove an open burning permit, Charles O. Desch, Inc. v State, 60 AD2d 678, 400 NYS2d 28 (3d Dept 1977), *aff'd*, 45 NY2d 882, 410 NYS2d 811, 383 NE2d 113 (1978); to seek revocation of a corporate charter, Instalment Dept., Inc. v State, 21 AD2d 211, 250 NYS2d 124 (3d Dept 1964); to issue a permit for construction of a dam on private lands, Van Buskirk v State, 38 AD2d 349, 329 NYS2d 381 (3d Dept 1972); to issue a license to carry a firearm, Blatt v New York City Housing Authority, 123 AD2d 591, 506 NYS2d 877 (2d Dept 1986); to issue a "mass gathering permit," Burgundy Basin Inn, Ltd. v State, 47 AD2d 692, 364 NYS2d 610 (3d Dept 1975); to determine the existence of an emergency condition requiring demolition of a structure, California Suites, Inc. v Russo Demolition Inc., 98 AD3d 144, 946 NYS2d 55 (1st Dept 2012), or to improperly re-register a family day care home, McLean v New York, 12 NY3d 194, 878 NYS2d 238, 905 NE2d 1167 (2009).

In contrast, liability can arise for negligence in connection with certain ministerial regulatory acts, including acts that resulted in the issuance of a certificate of title to the wrong person, Ford Motor Credit Co. v State, 133 AD2d 980, 521 NYS2d 131 (3d Dept 1987). Issuance of a certificate of occupancy has also been deemed "ministerial" and therefore may create liability where a special relationship existed with respect to those whose reliance on the certificate was foreseeable, Garrett v Holiday Inns, Inc., 58 NY2d 253, 460 NYS2d 774, 447 NE2d 717 (1983) (plaintiffs alleged that town issued certificate of occupancy after having knowledge of blatant fire and safety violations); Sexstone v Rochester, 32 AD2d 737, 301 NYS2d 887 (4th Dept 1969); see also Multiple Residence Law § 302 (establishing conditions for issuance of certificates of occupancy). It should be noted, however, that even where a ministerial act is involved in the performance of a municipal building department's duties regarding certificates of occupancy, no liability will attach in the absence of a duty to the injured parties that is separate from the duties owed to the general public, Garrett v Greece, 78 AD2d 773, 433 NYS2d 637 (4th Dept 1980), *aff'd*, 55 NY2d 774, 447 NYS2d 246, 431 NE2d 971 (1981); Quinn v Nadler Bros., Inc., 92 AD2d 1013, 461 NYS2d 455 (3d Dept 1983), *aff'd*, 59 NY2d 914, 466 NYS2d 292, 453 NE2d 521 (1983); Santacapita v Brookhaven, 202 AD2d 489, 609 NYS2d 55 (2d Dept 1994); Diesenhouse v Wallkill, 184 AD2d 966, 584 NYS2d 957 (3d Dept 1992); see also Dutton v Mitek Realty Corp., 95 AD2d 769, 463 NYS2d 471 (2d Dept 1983).

There is generally no liability for failure to enforce compliance with statutes, ordinances or regulations, Metz v State, 20 NY3d 175, 958

NYS2d 314, 982 NE2d 76 (2012) (provisions of Navigation Law [i.e., §§ 13, 63] relating to certificates of inspection of vessels); *Pelaez v Seide*, 2 NY3d 186, 778 NYS2d 111, 810 NE2d 393 (2004) (lead poisoning prevention and abatement programs pursuant to Public Health Law §§ 1370-1376); *Kenavan v New York*, 70 NY2d 558, 523 NYS2d 60, 517 NE2d 872 (1987) (statutes and ordinances relating to removal of abandoned vehicles); *Worth Distributors, Inc. v Latham*, 59 NY2d 231, 464 NYS2d 435, 451 NE2d 193 (1983) (safety regulations); *O'Connor v New York*, 58 NY2d 184, 460 NYS2d 485, 447 NE2d 33 (1983) (building code); *Motyka v Amsterdam*, 15 NY2d 134, 256 NYS2d 595, 204 NE2d 635 (1965) (Multiple Residence Law); *Mahoney v Santa Clara*, 89 AD2d 718, 453 NYS2d 840 (3d Dept 1982), *aff'd*, 58 NY2d 661, 458 NYS2d 541, 444 NE2d 1005 (1982) (unsafe building ordinance); *Evers v Westenberg*, 38 AD2d 751, 329 NYS2d 615 (2d Dept 1972), *aff'd*, 32 NY2d 684, 343 NYS2d 361, 296 NE2d 257 (1973) (Vehicle & Traffic Law); *J. E. v Westbury*, 200 AD3d 759, 155 NYS3d 101 (2d Dept 2021) (laws that prohibit keeping, maintaining and harboring of vicious or dangerous animals); *Bhandari v Isis*, 45 AD3d 619, 846 NYS2d 266 (2d Dept 2007) (New York City Adm. Code § 27-493(b), involving permits for new swimming pools); *Metcalf v Islip*, 225 AD2d 744, 640 NYS2d 150 (2d Dept 1996) (building code); *Bounauto v William Floyd School Dist.*, 203 AD2d 225, 609 NYS2d 661 (2d Dept 1994) (town code provision regarding highway obstructions and limitations on foliage height at intersections); *Lee v New York*, 193 AD2d 787, 598 NYS2d 273 (2d Dept 1993) (statutes and ordinances relating to removal of abandoned vehicles); *Miller v State*, 125 AD2d 853, 510 NYS2d 214 (3d Dept 1986) (fire safety provisions of sanitary code); *Browne v Hempstead*, 110 AD2d 102, 493 NYS2d 329 (2d Dept 1985) (sanitary code provisions respecting suspected rabid animals); *Johns v Potsdam*, 92 AD2d 660, 460 NYS2d 162 (3d Dept 1983) (unsafe building ordinance); *Young v Abdella*, 84 AD2d 890, 444 NYS2d 766 (3d Dept 1981) (building code); *Pansa v Sitrin*, 27 AD2d 636, 275 NYS2d 689 (4th Dept 1966) (abatement of zoning violation); *Whitney v New York*, 27 AD2d 528, 275 NYS2d 783 (1st Dept 1966) (New York City Admin Code); *Bernkrant v State*, 26 AD2d 964, 274 NYS2d 749 (3d Dept 1966) (administration of Rent Control Law); *Stranger v New York State Elec. & Gas Corp.*, 25 AD2d 169, 268 NYS2d 214 (3d Dept 1966) (housing and building code).

A municipality has no duty to inspect the activities of those issued a permit unless the permit authorizes dangerous or imminently dangerous activities in the municipality's thoroughfares, see *Gillette Shoe Co., Inc. v New York*, 58 NY2d 853, 460 NYS2d 490, 447 NE2d 38 (1983); *De Witt Properties, Inc. v New York*, 44 NY2d 417, 406 NYS2d 16, 377 NE2d 461 (1978). Continued supervision and inspection of work being performed on the highway imposes no affirmative duty to assure that safety barriers erected by the State's contractor were properly placed, *Himbele v State*, 49 NY2d 864, 427 NYS2d 931, 405 NE2d 176 (1980). The Court of Appeals has upheld liability where a government inspector knew of a specific safety violation and was present when the injured worker was exposed to the resulting danger, *Smullen v New York*, 28 NY2d 66, 320 NYS2d 19, 268 NE2d 763 (1971), but that case was

subsequently limited to situations where the municipality assumed positive direction and control in the face of a known, blatant and dangerous safety violation, *Pelaez v Seide*, 2 NY3d 186, 778 NYS2d 111, 810 NE2d 393 (2004).

Municipalities were held not liable for their conduct in the following cases involving regulatory activity: *Shipley v New York*, 25 NY3d 645, 16 NYS3d 1, 37 NE3d 58 (2015) (medical examiner's determination to conduct autopsy and decision to remove organs and tissue for further study); *Cremonese v New York*, 17 NY2d 22, 267 NYS2d 897, 215 NE2d 157 (1966) (decision to perform autopsy); *Lewis v State*, 68 AD3d 1513, 892 NYS2d 583 (3d Dept 2009) (notifying patients of health risk after discovery of physician's unsafe re-use of syringes); *Abraham v New York*, 39 AD3d 21, 828 NYS2d 502 (2d Dept 2007) (citing 10 NYCRR 2.6(a); 24 RCNY § 11.47(b)) (investigating possible outbreak of tuberculosis in school); *Rampart Tennis Corp. v New York*, 212 AD2d 481, 623 NYS2d 209 (1st Dept 1995) (taking down wall that appeared in danger of imminent collapse); *Cheektowaga v Buffalo*, 67 AD2d 812, 413 NYS2d 52 (4th Dept 1979) (interpreting traffic ordinances).

It is important to note that many of the foregoing decisions focus on the lack of a duty arising from a special relationship between the municipality and the injured plaintiff as a basis for rejecting liability, *Metz v State*, 20 NY3d 175, 958 NYS2d 314, 982 NE2d 76 (2012); *Pelaez v Seide*, 2 NY3d 186, 778 NYS2d 111, 810 NE2d 393 (2004); *Worth Distributors, Inc. v Latham*, 59 NY2d 231, 464 NYS2d 435, 451 NE2d 193 (1983); *O'Connor v New York*, 58 NY2d 184, 460 NYS2d 485, 447 NE2d 33 (1983); *Abraham v New York*, 39 AD3d 21, 828 NYS2d 502 (2d Dept 2007). While the presence or lack of a special relationship is treated as a threshold matter for plaintiff to demonstrate, *Metz v State*, 20 NY3d 175, 958 NYS2d 314, 982 NE2d 76 (2012); *Flagstar Bank, FSB v State*, 114 AD3d 138, 978 NYS2d 266 (2d Dept 2013); the issue is actually analytically significant only to the extent that the activity giving rise to the harm was ministerial in nature, *DiMeo v Rotterdam Emergency Medical Services, Inc.*, 110 AD3d 1423, 974 NYS2d 178 (3d Dept 2013); see *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011); *Matter of World Trade Center Bombing Litigation* [*Steering Committee v Port Authority of New York and New Jersey*], 17 NY3d 428, 933 NYS2d 164, 957 NE2d 733 (2011); *McLean v New York*, 12 NY3d 194, 878 NYS2d 238, 905 NE2d 1167 (2009); *Lauer v New York*, 95 NY2d 95, 711 NYS2d 112, 733 NE2d 184 (2000). This is so because, where the municipality has raised the government function immunity defense, government action, if discretionary, may not be a basis for liability, *Ferreira v Binghamton*, 2022 NY Slip Op 01953 (NY 2022); *Turturro v New York*, 28 NY3d 469, 45 NYS3d 874, 68 NE3d 693 (2016).

b. Other Discretionary Acts

In a line of recent cases, the Court of Appeals made clear that, where the governmental immunity defense has been raised, there is no

governmental liability for negligence in the performance of discretionary acts, regardless of the absence or presence of a special relationship between the municipality and the injured plaintiff, *Ferreira v Binghamton*, 2022 NY Slip Op 01953 (NY 2022); *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011); *McLean v New York*, 12 NY3d 194, 878 NYS2d 238, 905 NE2d 1167 (2009); *Lauer v New York*, 95 NY2d 95, 711 NYS2d 112, 733 NE2d 184 (2000); see *Matter of World Trade Center Bombing Litigation [Steering Committee v Port Authority of New York and New Jersey]*, 17 NY3d 428, 933 NYS2d 164, 957 NE2d 733 (2011).

The following cases are examples of that principle: *Johnson v New York*, 15 NY3d 676, 917 NYS2d 10, 942 NE2d 219 (2010) (police officers' use of deadly physical force against armed suspect, pursuant to and in compliance with departmental guidelines); *Saarinen v Kerr*, 84 NY2d 494, 620 NYS2d 297, 644 NE2d 988 (1994) (village's choice to adopt "discretionary," rather than more "restrictive" or "discouraging," model to govern police pursuits); *McCormack v New York*, 80 NY2d 808, 587 NYS2d 580, 600 NE2d 211 (1992) (choice of safety equipment for use by municipality police department); *Mon v New York*, 78 NY2d 309, 574 NYS2d 529, 579 NE2d 689 (1991) (misjudgment in hiring a police officer, despite known unfavorable information as to officer's character); *Arteaga v State*, 72 NY2d 212, 532 NYS2d 57, 527 NE2d 1194 (1988) (bringing of formal disciplinary proceedings against prison inmates resulting in imposition of sanctions); *Kenavan v New York*, 70 NY2d 558, 523 NYS2d 60, 517 NE2d 872 (1987) (positioning of fire fighting equipment and failing to remove abandoned vehicle); *Riss v New York*, 22 NY2d 579, 293 NYS2d 897, 240 NE2d 860 (1968) (allocation of police resources); *Stevens & Thompson Paper Company Inc. v Middle Falls Fire Department, Inc.*, 188 AD3d 1504, 137 NYS3d 529 (3d Dept 2020) (firefighters' decision to discharge unneeded water, which damaged a facility near the location of a fire); *Lee v New York*, 164 AD3d 415, 80 NYS3d 51 (1st Dept 2018) (treatment of decedent's body in morgue during hurricane); *Feeney v Delaware*, 150 AD3d 1355, 55 NYS3d 737 (3d Dept 2017) (police officer's decisions not to use certain restraints on individual in custody while individual received emergency room medical care and to leave examination room while medical personnel attended to him were discretionary decisions); *Watt v Albany*, 140 AD3d 1260, 33 NYS3d 511 (3d Dept 2016) (determining when and where drainage ditches should be constructed and their capacities are discretionary decisions); *Dixon v New York*, 120 AD3d 751, 991 NYS2d 463 (2d Dept 2014) (emergency dispatcher's decision regarding which type of ambulance to send to assist plaintiff, EMTs' decision to summon advance life support ambulance, and paramedics' reassessment of plaintiff's condition and treatment decisions); *Casale v New York*, 117 AD3d 414, 984 NYS2d 373 (1st Dept 2014) (traffic control is discretionary act); *Middleton v Salina*, 108 AD3d 1052, 969 NYS2d 634 (4th Dept 2013) (determining when and where sewers shall be built and where anti-backflow devices should be installed involves exercise of judgment and discretion); *DiMeo v Rotterdam Emergency Medical Services, Inc.*, 110 AD3d 1423, 974 NYS2d 178 (3d Dept 2013) (paramedic's medical

determinations concerning decedent's condition, whether decedent was stable enough to be transported to hospital, and whether he could be transported with basic life support services); *Bailey v New York*, 102 AD3d 606, 959 NYS2d 58 (1st Dept 2013) (officer acting as part of motorcycle parade escort); *Murchison v State*, 97 AD3d 1014, 949 NYS2d 789 (3d Dept 2012) (traffic control is an inherently discretionary act); *Bawa v New York*, 94 AD3d 926, 942 NYS2d 191 (2d Dept 2012) (police handling of series of 911 calls involving domestic violence at family home); *Sherpa v New York City Health & Hospitals Corp.*, 90 AD3d 738, 934 NYS2d 463 (2d Dept 2011) (dispatcher's decision as to what type of ambulance to send on emergency call); *Miniero v New York*, 65 AD3d 861, 885 NYS2d 45 (1st Dept 2009) (allocation of police resources); *Verizon New York, Inc. v Athens*, 43 AD3d 526, 840 NYS2d 484 (3d Dept 2007) (assessment as to whether water main break constituted "emergency" eliminating need to give prior notice of excavation under 16 NYCRR 753-3.1(b)); *Amodio v New York*, 33 AD3d 456, 822 NYS2d 530 (1st Dept 2006) (selecting fire fighting equipment); *Santana v Seagrave Fire Apparatus Corp.*, 305 AD2d 395, 759 NYS2d 509 (2d Dept 2003) (same); *Di Florio v Worden*, 303 AD2d 924, 757 NYS2d 656 (4th Dept 2003) (State Troopers' implementation of plan to remove disabled vehicle and safeguard oncoming traffic after accident); *Flynn v New York*, 258 AD2d 129, 693 NYS2d 569 (1st Dept 1999) (inspector's order to subordinate police officers not to wear helmets or carry batons while responding to riot); *Litchhult v Reiss*, 183 AD2d 1067, 583 NYS2d 671 (3d Dept 1992) (failure by county to notify school of issuance of tornado watch pursuant to previously adopted plan); *Santangelo v State*, 101 AD2d 20, 474 NYS2d 995 (4th Dept 1984) (granting furlough to inmate); *Bellows v State*, 37 AD2d 342, 325 NYS2d 225 (4th Dept 1971) (determining extent of psychiatric services to be provided to prisoner).

For other examples of discretionary acts for which a governmental defendant was not liable, see *Crawford v State*, 60 AD2d 729, 401 NYS2d 307 (3d Dept 1977), *aff'd*, 47 NY2d 884, 419 NYS2d 494, 393 NE2d 488 (1979) (diagnosis and treatment by state psychiatric facility); *Lewis v State*, 68 AD3d 1513, 892 NYS2d 583 (3d Dept 2009) (providing advice on health and hygiene issues); *Rosario v State*, 33 AD2d 122, 305 NYS2d 574 (3d Dept 1969), *aff'd*, 36 NY2d 901, 372 NYS2d 647, 334 NE2d 596 (1975) (physicians' decision to retain patient in hospital). It should be noted that some of the foregoing cases, including *Litchhult v Reiss*, 183 AD2d 1067, 583 NYS2d 671 (3d Dept 1992), preceded *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011); *Matter of World Trade Center Bombing Litigation*, 17 NY3d 428, 933 NYS2d 164, 957 NE2d 733 (2011), *McLean v New York*, 12 NY3d 194, 878 NYS2d 238, 905 NE2d 1167 (2009), and *Lauer v New York*, 95 NY2d 95, 711 NYS2d 112, 733 NE2d 184 (2000), and thus their discussion of "special relationship" may no longer be valid, see *Signature Health Center, LLC v State*, 92 AD3d 11, 935 NYS2d 357 (3d Dept 2011) (*McLean v New York*, *supra*, and *Dinardo v New York*, 13 NY3d 872, 893 NYS2d 818, 921 NE2d 585 (2009), "clarified and arguably changed the law with respect to governmental immunity for ministerial and discretionary acts").

For a discussion of the authority of a medical examiner or coroner to perform autopsies and testing related thereto, and the immunity to which those officers are entitled, see *Shipley v New York*, 25 NY3d 645, 16 NYS3d 1, 37 NE3d 58 (2015) (right of sepulcher); see also *Rugova v New York*, 132 AD3d 220, 16 NYS3d 233 (1st Dept 2015).

c. Governmental Immunity Based on the Exercise of Professional Judgment

Mere misjudgment, such as failing to consider relevant information, see *Clark v State*, 99 AD2d 616, 472 NYS2d 170 (3d Dept 1984); *Bell v New York City Health & Hospitals Corp.*, 90 AD2d 270, 456 NYS2d 787 (2d Dept 1982); *Bartels v Westchester*, 76 AD2d 517, 429 NYS2d 906 (2d Dept 1980); *Homere v State*, 48 AD2d 422, 370 NYS2d 246 (3d Dept 1975), cannot give rise to governmental liability, see *Johnson v New York*, 15 NY3d 676, 917 NYS2d 10, 942 NE2d 219 (2010); *Lubecki v New York*, 304 AD2d 224, 758 NYS2d 610 (1st Dept 2003). This principle, sometimes referred to as the “professional judgment rule,” is analogous to the principle that the government is ordinarily not liable for the negligent performance or nonperformance of discretionary acts, see *Johnson v New York*, *supra*. Under the professional judgment rule, a municipality is insulated from liability for its employees’ performance of their duties where the conduct involves the exercise of professional judgment, including electing one among many acceptable methods of carrying out tasks or making tactical decisions, *id*; see also *Relf v Troy*, 169 AD3d 1223, 94 NYS3d 672 (3d Dept 2019). The immunity afforded to such exercises of professional judgment reflects a policy favoring the broader social interest in having government officers and employees free to exercise judgment and discretion unhampered by fear of second-guessing and retaliatory lawsuit, *id*.

The immunity afforded by the professional judgment rule presupposes that judgment and discretion were exercised in compliance with the municipality’s prescribed procedures and internal rules, *Johnson v New York*, 15 NY3d 676, 917 NYS2d 10, 942 NE2d 219 (2010); see *Relf v Troy*, 169 AD3d 1223, 94 NYS3d 672 (3d Dept 2019) (police dog bite); *Newsome v Suffolk*, 109 AD3d 802, 971 NYS2d 208 (2d Dept 2013) (police dog bite). Thus, the immunity was not available where a civilian was injured when police officers violated the Police Department Patrol Guide and Interim Order in failing to call a hostage negotiator and firing at a suspect while he was using his hostage as a shield, *Lubecki v New York*, 304 AD2d 224, 758 NYS2d 610 (1st Dept 2003). Nor was it available where an officer violated police procedure by discharging a weapon at a suspect when there was a crowd between them, *Rodriguez v New York*, 189 AD2d 166, 595 NYS2d 421 (1st Dept 1993).

In contrast, professional-judgment immunity was available where the police department guidelines authorized officers to exercise discretion by permitting discharge of firearms near civilians if it did not “unnecessarily endanger innocent persons” and there were no circumstances suggesting that that guideline had been violated, *Johnson v*

New York, *supra*. The immunity has also been applied to a police decision to fire CS gas canisters into an apartment building to end a hostage situation, *Malay v Syracuse*, 151 AD3d 1624, 57 NYS3d 267 (4th Dept 2017), and to a decision not to arrest a third party, *Keselman v New York*, 95 AD3d 1278, 944 NYS2d 763 (2d Dept 2012); *Rodriguez v New York*, *supra*.

3. *Duty to the Public at Large and Exception for Special Relationships in Cases Involving Ministerial Activities*

a. *General Rule—No Duty to the Individual*

In addition to drawing distinctions between proprietary and governmental activities and between discretionary and ministerial activities, the courts have limited the liability of governmental entities by holding that such entities cannot be held liable to individuals for breaches of governmental duties that were owed to the public at large, see *Metz v State*, 20 NY3d 175, 958 NYS2d 314, 982 NE2d 76 (2012) (Navigation Law §§ 13, 63, which require State to issue certificate of inspection of vessel indicating that vessel is safe and certifying number of passengers it can transport safely, benefit public generally and do not create special duty to specific individuals); *Solomon by Solomon v New York*, 66 NY2d 1026, 499 NYS2d 392, 489 NE2d 1294 (1985) (promulgation of regulations prohibiting activity is for benefit of the public generally and does not create special duty to protect specific persons from prohibited activity); *Flagstar Bank, FSB v State*, 114 AD3d 138, 978 NYS2d 266 (2d Dept 2013) (CPLR 5018(b) and 5203(a), which provide for docketing of judgments by County Clerk, were intended to benefit public and do not give rise to special duty to judgment creditors); *Middleton v Salina*, 108 AD3d 1052, 969 NYS2d 634 (4th Dept 2013) (choice to install or not to install check valve or other anti-backflow device in plaintiff's sewer line to prevent sewage from flowing into plaintiff's house is governmental function involving duty owed only to public at large); *Marino v State*, 16 AD3d 386, 790 NYS2d 553 (2d Dept 2005) (same); *Dickerson v New York*, 258 AD2d 433, 684 NYS2d 584 (2d Dept 1999) (deployment of security personnel throughout a school building); *Krakower v New York*, 217 AD2d 441, 629 NYS2d 435 (1st Dept 1995); *Logan v New York*, 148 AD2d 167, 543 NYS2d 661 (1st Dept 1989) (contract between Board of Education and teacher's union with respect to a school safety plan); *Pascarella v New York*, 146 AD2d 61, 538 NYS2d 815 (1st Dept 1989) (no special duty toward police officer created by an internal police manual that recommended certain police procedures in event of bomb threat); *Isaksson v Rulffes*, 135 AD2d 611, 522 NYS2d 189 (2d Dept 1987) (police department regulations requiring securing of accident scene do not create special duty to protect bystanders from conditions at scene). On the other hand, governmental entities may be liable to individuals in their exercise of governmental duties that were owed to specific individuals, not the public at large, see *Ferreira v Binghamton*, 2022 NY Slip Op 01953 (NY 2022) (police officers executing a no-knock warrant at a targeted residence owe a special duty to occupants); *Ferguson v New York*, 118 AD3d 849, 988 NYS2d 207 (2d

Dept 2014) (school district owes special duty to students by virtue of doctrine that district acts in loco parentis with respect to its minor students).

In *Rugova v New York*, 132 AD3d 220, 16 NYS3d 233 (1st Dept 2015), the First Department held that a municipality's function of informing a family of the death of a relative constitutes a special duty that runs to the decedent's next of kin. By contrast, in *Green v Iacovangelo*, 184 AD3d 1198, 125 NYS3d 790 (4th Dept 2020), the Fourth Department found no special duty with respect to a public administrator's investigation to identify a decedent's next of kin.

Notably, special duty analysis is applicable only to cases involving governmental functions and is not used in cases involving proprietary functions, see *Ferreira v Binghamton*, 2022 NY Slip Op 01953 (NY 2022); *Turturro v New York*, 28 NY3d 469, 45 NYS3d 874, 68 NE3d 693 (2016); *Kowal v Deer Park Fire Dist.*, 13 AD3d 489, 787 NYS2d 352 (2d Dept 2004) (fire district's provision of emergency medical care is proprietary not governmental); *Johnston v Jerusalem*, 2 AD3d 1403, 768 NYS2d 916 (4th Dept 2003) (operation, maintenance and repair of sewer system is proprietary and liability therefore not contingent upon special relationship).

Although much of the case law elaborating upon the concept of "special duty" concerns the municipal policing function, the same principles have been routinely applied in cases involving municipalities' other health and safety functions, see *Tara N.P. v Western Suffolk Board of Co-op. Educational Services*, 28 NY3d 709, 49 NYS3d 362, 71 NE3d 950 (2017); *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 972 NYS2d 169, 995 NE2d 131 (2013); *Metz v State*, 20 NY3d 175, 958 NYS2d 314, 982 NE2d 76 (2012); *Pelaez v Seide*, 2 NY3d 186, 778 NYS2d 111, 810 NE2d 393 (2004); *Lauer v New York*, 95 NY2d 95, 711 NYS2d 112, 733 NE2d 184 (2000); *Halberstam v Port Authority of New York and New Jersey*, 175 AD3d 1264 (2d Dept 2019); *Full v Monroe County Sheriff's Dept.*, 152 AD3d 1237, 58 NYS3d 853 (4th Dept 2017); *Abraham v New York*, 39 AD3d 21, 828 NYS2d 502 (2d Dept 2007); see also *Trimble v Albany*, 144 AD3d 1484, 42 NYS3d 432 (3d Dept 2016).

The special duty analysis is relevant only in cases involving negligent exercises of ministerial functions or a failure to exercise discretion, *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011); *McLean v New York*, 12 NY3d 194, 878 NYS2d 238, 905 NE2d 1167 (2009); *Lauer v New York*, *supra*; see *Turturro v New York*, 28 NY3d 469, 45 NYS3d 874, 68 NE3d 693 (2016); *Matter of World Trade Center Bombing Litigation [Steering Committee v Port Authority of New York and New Jersey]*, 17 NY3d 428, 933 NYS2d 164, 957 NE2d 733 (2011). In cases involving the performance of discretionary acts, the municipality is insulated from liability regardless of the existence of a special duty, *Valdez v New York*, *supra*; *Matter of World Trade Center Bombing Litigation [Steering Committee v Port Authority of New York and New Jersey]*, *supra*; *McLean v New York*, *supra*; *Lauer v New*

York, *supra*. For a more detailed discussion of the principles governing municipalities' common-law tort liability for failing to provide police protection, see PJI 2:229A, *infra*.

b. Civil Liability Under the Fourteenth Amendment

The due-process clause of the Fourteenth Amendment is ordinarily not implicated in cases involving an alleged failure by municipal entities to protect citizens from harm arising from the actions of private actors, *DeShaney v Winnebago County Dept. of Social Services*, 489 US 189, 109 SCt 998 (1989); *Chavis v New York*, 94 AD3d 440, 941 NYS2d 582 (1st Dept 2012). Thus, there is ordinarily no liability under 42 U.S.C. § 1983 for such failures, *Chavis v New York*, *supra*. However, the Second Circuit has held that the state may owe a constitutional obligation to the victim of private violence if it had a "special relationship" with the victim or assisted in creating or increasing the danger to the victim, *Matican v New York*, 524 F3d 151 (2d Cir 2008); see *Chavis v New York*, *supra*. Moreover, liability under this principle is limited to situations in which the actions or inactions of the municipal police were egregious enough to "shock the conscience," *Chavis v New York*, *supra*. Mere negligence is "categorically" beneath the conduct required for liability, while culpability within the middle range, i.e., "something more than negligence but less than intentional conduct, such as recklessness or gross negligence, is a matter for closer calls," *Chavis v New York*, quoting *Sacramento v Lewis*, 523 US 833, 118 SCt 1708 (1998). Although deliberate indifference may, under some circumstances, give rise to liability under 42 U.S.C. § 1983, liability will be rare in situations involving time-sensitive emergencies or situations that are "subject to the pull of competing obligations," *Lombardi v Whitman*, 485 F3d 73 (2d Cir 2007); see *Luckey v New York*, 120 AD3d 403, 991 NYS2d 34 (1st Dept 2014) (City potentially liable for correction officer's alleged deliberate indifference to serious medical needs of inmate who died of asthma attack); *Chavis v New York*, *supra*.

c. Special Relationship, Special Duty

A special duty exists in a narrow class of cases where the plaintiff establishes a duty on the part of the municipal defendant running to the plaintiff, *Ferreira v Binghamton*, 2022 NY Slip Op 01953 (NY 2022). More specifically, a special duty arises in three situations: (1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition, *Ferreira v Binghamton*, *supra*; *Tara N.P. v Western Suffolk Board of Co-op. Educational Services*, 28 NY3d 709, 49 NYS3d 362, 71 NE3d 950 (2017); *Coleson v New York*, 24 NY3d 476, 999 NYS2d 810, 24 NE3d 1074 (2014); *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 972 NYS2d 169, 995 NE2d 131 (2013); *Metz v State*, 20 NY3d 175, 958 NYS2d 314, 982 NE2d 76 (2012); *Pelaez v Seide*, 2 NY3d 186, 778 NYS2d 111, 810 NE2d 393 (2004); see *Zurich American Insurance Company v New York*, 176

AD3d 1145, 111 NYS3d 38 (2d Dept 2019); *Destefano v New York*, 149 AD3d 696, 52 NYS3d 374 (2d Dept 2017); *Signature Health Center, LLC v State*, 92 AD3d 11, 935 NYS2d 357 (3d Dept 2011). It is the plaintiff's obligation to prove that the government defendant owed a special duty of care to the injured party because duty is an essential element of the negligence claim itself, *Ferreira v Binghamton*, supra; *Applewhite v Accuhealth, Inc.*, supra; see *Tara N.P. v Western Suffolk Board of Cooperative Educational Services*, supra. The plaintiff has a heavy burden in establishing a special relationship, *Pelaez v Seide*, supra. Once a special relationship exists, the municipality is required only to exercise reasonable care and is not required to guarantee plaintiff's safety, *Axon v New York City Transit Authority*, 120 AD2d 475, 502 NYS2d 31 (2d Dept 1986).

It should be noted that in *McLean v New York*, 12 NY3d 194, 878 NYS2d 238, 905 NE2d 1167 (2009), the Court of Appeals indicated that *Pelaez v Seide*, 2 NY3d 186, 778 NYS2d 111, 810 NE2d 393 (2004), and *Kovit v Estate of Hallums*, 4 NY3d 499, 797 NYS2d 20, 829 NE2d 1188 (2005), were incorrect to the extent that they may have suggested that the existence of a special relationship would furnish a basis for liability arising from negligent performance of a municipality's discretionary acts. Nevertheless, the portion of *Pelaez* that discusses the manner in which a special relationship may be formed remains good law and is fully applicable in situations where a ministerial act was allegedly performed negligently or in the absence of discretionary decision-making. The Court of Appeals case law does not differentiate between misfeasance and nonfeasance, and such a distinction is irrelevant to the special duty analysis, *Ferreira v Binghamton*, 2022 NY Slip Op 01953 (NY 2022); *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 972 NYS2d 169, 995 NE2d 131 (2013). Similarly, the distinction between affirmatively inflicted injuries and those occasioned by a failure to adequately respond or protect is also irrelevant to the special duty analysis, *Ferreira v Binghamton*, supra.

A special relationship through the breach of a statutory duty may arise only if the governing statute either expressly or impliedly authorizes a private right of action, *Pelaez v Seide*, 2 NY3d 186, 778 NYS2d 111, 810 NE2d 393 (2004); *Flagstar Bank, FSB v State*, 114 AD3d 138, 978 NYS2d 266 (2d Dept 2013); *Signature Health Center, LLC v State*, 92 AD3d 11, 935 NYS2d 357 (3d Dept 2011); see *Lee v New York*, 164 AD3d 415, 80 NYS3d 51 (1st Dept 2018) (violations of Public Health Law §§ 4201 or 4215 do not give rise to private rights of action and, therefore, do not create special duty). A private right of action may be implied when (1) plaintiff is one of the class for whose particular benefit the statute was enacted, (2) recognition of a private right of action would promote the legislative purpose of the statute, and (3) recognition of a private right of action would be consistent with the legislative scheme, *Pelaez v Seide*, supra; *Rennix v Jackson*, 152 AD3d 551, 59 NYS3d 57 (2d Dept 2017) (violation of Penal Law § 195.00(2) does not give rise to special duty since plaintiff was not of class for whose particular benefit statute was enacted); *Signature Health Center*,

LLC v State, *supra* (declining to recognize private right of action for medical providers under Public Health Law § 2807); see *Metz v State*, 20 NY3d 175, 958 NYS2d 314, 982 NE2d 76 (2012) (Navigation Law §§ 13, 63, which require State to issue certificate of inspection of vessel indicating that vessel is safe and certifying number of passengers it can transport safely, do not create special duty to specific individuals); *Bynum v Camp Bisco, LLC*, 135 AD3d 1060, 22 NYS3d 677 (3d Dept 2016) (sections of State Sanitary Code requiring provision of certain levels of medical services at events depending on number of attendees at large events do not create special duty to individual event attendee); *Sutton v New York*, 119 AD3d 851, 990 NYS2d 546 (2d Dept 2014) (Agriculture and Markets Law § 123, which permits an individual to report dangerous behavior by a dog to local officials, and authorizes special proceeding to ascertain whether dog is “dangerous” within the meaning of the statute, does not create special duty to specific individuals); *Flagstar Bank, FSB v State*, *supra* (CPLR 5018(b) and 5203(a), which provide for docketing of judgments by County Clerk, were intended to benefit public and do not give rise to special duty to judgment creditors). In *Bawa v New York*, 94 AD3d 926, 942 NYS2d 191 (2d Dept 2012), the court held that the Family Protection and Domestic Violence Intervention Act of 1994, L 1994, ch 22, which provides for the mandatory arrest in certain domestic violence cases, see CPL 140.10, does not give rise to a private right of action. Similarly, CPL 330.20, which describes the procedures to be followed when a criminal defendant is acquitted by reason of mental disease or defect, does not give rise to a private right of action based on the State’s failure to follow an imposed order of conditions, *Justice v State*, 116 AD3d 1196, 985 NYS2d 294 (3d Dept 2014).

A special relationship through a municipality’s assumption of positive direction or control in the face of a known, blatant and dangerous safety violation arises only in rare circumstances, *Sutton v New York*, 119 AD3d 851, 990 NYS2d 546 (2d Dept 2014). Even so, a special duty was established under this category where a municipal inspector on a work site informed the decedent that a trench did not need to be shored just before it collapsed, killing the decedent, *Smullen v New York*, 28 NY2d 66, 320 NYS2d 19, 268 NE2d 763 (1971); see *Ferreira v Binghamton*, 2022 NY Slip Op 01953 (NY 2022). A special duty arises when the police plan and execute a no-knock search warrant at an identified residence, running to the individuals within the targeted premises at the time the warrant is executed, *Ferreira v Binghamton*, *supra*. A special duty arose under this category where a municipal plumbing inspector directed the plaintiff to perform a clearly unsafe air pressure test, *Delanoy v White Plains*, 122 AD3d 663, 995 NYS2d 725 (2d Dept 2014).

As to voluntarily assumed special duty generally, see PJI 2:24. Notably, a municipality does not voluntarily assume a special duty toward an individual and thereby establish a “special relationship” with that individual unless it has volunteered to do something that it was not already obligated by law to do, *Abraham v New York*, 39 AD3d 21, 828 NYS2d 502 (2d Dept 2007). Where a municipality has voluntarily as-

sumed a duty of care toward an individual by undertaking to perform a service for that individual, its duty extends to potential rescuers who might be prompted to come to the aid of the individual if the service is performed negligently and thereby places the individual in peril, *Velazquez v New York City Health and Hosp. Corp.*, 65 AD3d 981, 886 NYS2d 129 (1st Dept 2009); see PJI 2:13.

A plaintiff must establish four elements to show a “special relationship” giving rise to a voluntarily assumed duty: (a) the assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the injured party; (b) knowledge on the part of the municipality that inaction could lead to harm; (c) some form of direct contact between the municipality and the injured party; and (d) justifiable reliance by the injured party on the municipality’s affirmative undertaking, *Ferreira v Binghamton*, 2022 NY Slip Op 01953 (NY 2022); *Tara N.P. v Western Suffolk Board of Co-op. Educational Services*, 28 NY3d 709, 49 NYS3d 362, 71 NE3d 950 (2017); *Coleson v New York*, 24 NY3d 476, 999 NYS2d 810, 24 NE3d 1074 (2014); *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 972 NYS2d 169, 995 NE2d 131 (2013); *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011); *Kovit v Estate of Hallums*, 4 NY3d 499, 797 NYS2d 20, 829 NE2d 1188 (2005); *Mastroianni v Suffolk*, 91 NY2d 198, 668 NYS2d 542, 691 NE2d 613 (1997); *Kircher v Jamestown*, 74 NY2d 251, 544 NYS2d 995, 543 NE2d 443 (1989); *Cuffy v New York*, 69 NY2d 255, 513 NYS2d 372, 505 NE2d 937 (1987); *Sorichetti by Sorichetti v New York*, 65 NY2d 461, 492 NYS2d 591, 482 NE2d 70 (1985); *Stevens v Town of East Fishkill Police Department*, 198 AD3d 832, 156 NYS3d 288 (2d Dept 2021); *Santaiti v Ramapo*, 162 AD3d 921, 80 NYS3d 288 (2d Dept 2018); *Barnes v State*, 156 AD3d 975, 66 NYS3d 716 (3d Dept 2017); see *Merced v New York*, 75 NY2d 798, 552 NYS2d 96, 551 NE2d 589 (1990). Where the harm is related to plaintiff’s medical situation, the second element requires that the municipality’s agent was “clearly on notice of palpable danger, as where it is so obvious that a layman would ascertain it without inquiry, or where a person unambiguously communicated his incapacity to the officer,” *Kovit v Estate of Hallums*, *supra*. There must also be a showing that the justifiable reliance was causally related to the event that resulted in injury, *Cuffy v New York*, *supra*. For a charge and more detailed discussion of the application of the special duty rule to police activities, see PJI 2:229A.

(i) Requirement of Direct Contact

With respect to the requirement of direct contact between the municipality and the injured party, *Cuffy v New York*, 69 NY2d 255, 513 NYS2d 372, 505 NE2d 937 (1987), stated that this aspect of the rule is not to be rigidly applied. However, in *Laratro v New York*, 8 NY3d 79, 828 NYS2d 280, 861 NE2d 95 (2006), the Court of Appeals noted that its prior cases accepted direct contact by someone other than the injured plaintiff only where the person making contact was acting on behalf of his or her immediate family member. While the Court stopped short of requiring an immediate familial relationship, it held

that no special duty arose where the person having direct contact with the municipality was a longtime friend and co-worker of the injured plaintiff and was also in close physical proximity to plaintiff at the time she made the 911 call, *id*; see *Kircher v Jamestown*, 74 NY2d 251, 544 NYS2d 995, 543 NE2d 443 (1989) (no special duty where concerned bystanders were deflected from attempting rescue of kidnapped plaintiff by municipal assurances of which plaintiff was unaware); *Baez v New York*, 309 AD2d 679, 765 NYS2d 875 (1st Dept 2003) (direct contact not established where individuals who made 911 calls were disinterested volunteers who did not act at direction of either plaintiff or decedent); *D'Ambra v Di Donna*, 305 AD2d 958, 761 NYS2d 129 (3d Dept 2003); *Harris v New York City Housing Authority*, 187 AD2d 362, 589 NYS2d 883 (1st Dept 1992); see also *Tara N.P. v Western Suffolk Board of Co-op. Educational Services*, 28 NY3d 709, 49 NYS3d 362, 71 NE3d 950 (2017); *Kovit v Estate of Hallums*, 4 NY3d 499, 797 NYS2d 20, 829 NE2d 1188 (2005) (contacts between municipality and strangers to plaintiff insufficient).

(ii) *Requirement of Justifiable Reliance*

Since the basis for most special duty exceptions is the unfairness of precluding recovery where the municipality's actions lulled the injured party into a false sense of security, plaintiff must establish that the injured party justifiably relied upon the municipality's promises or actions and that the justifiable reliance is causally related to the incident that resulted in injury, *Coleson v New York*, 24 NY3d 476, 999 NYS2d 810, 24 NE3d 1074 (2014); *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011); *Cuffy v New York*, 69 NY2d 255, 513 NYS2d 372, 505 NE2d 937 (1987); see *Tara N.P. v Western Suffolk Board of Co-op. Educational Services*, 28 NY3d 709, 49 NYS3d 362, 71 NE3d 950 (2017); *Merced v New York*, 75 NY2d 798, 552 NYS2d 96, 551 NE2d 589 (1990); *Tarter v State*, 68 NY2d 511, 510 NYS2d 528, 503 NE2d 84 (1986); but see *Boland v State*, 218 AD2d 235, 638 NYS2d 500 (3d Dept 1996) (elements of contact and reliance satisfied by statute requiring action).

Absent reliance on plaintiff's part on an affirmative undertaking or specific assurances of protection, no special duty exists, *Merced v New York*, 75 NY2d 798, 552 NYS2d 96, 551 NE2d 589 (1990); *Tarter v State*, 68 NY2d 511, 510 NYS2d 528, 503 NE2d 84 (1986); *Barnes v State*, 156 AD3d 975, 66 NYS3d 716 (3d Dept 2017); *Middleton v Salina*, 108 AD3d 1052, 969 NYS2d 634 (4th Dept 2013); *Badillo v New York*, 35 AD3d 307, 827 NYS2d 133 (1st Dept 2006); see *Grieshaber v Albany*, 279 AD2d 232, 720 NYS2d 214 (3d Dept 2001). To establish the requisite justifiable reliance, plaintiff must show not only that the injured party had a reasonable expectation that help was on the way, but also that the injured party acted on that expectation to his or her detriment such that he or she was placed in a worse position than he or she would have been in absent the municipality's affirmative undertaking or assurances, *Grieshaber v Albany*, *supra*. An assurance by a 911 operator that help is on the way is not alone sufficient to establish reliance, since the

contrary rule would conflate the separate elements of assurance and reliance, *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011); *Bawa v New York*, 94 AD3d 926, 942 NYS2d 191 (2d Dept 2012). Where the conduct of defendant's police officers did not lull plaintiff into a false sense of security, and the limited assurance of police protection did not increase the risk of harm to plaintiff, plaintiff's claim was dismissed, *Clark v Ticonderoga*, 291 AD2d 597, 737 NYS2d 412 (3d Dept 2002); *Ritenour v Cheektowaga*, 192 AD2d 1078, 596 NYS2d 236 (4th Dept 1993).

In *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011), the Court of Appeals held that, even where the police gave plaintiff assurances that they would act to enforce a protective order by making an arrest "immediately," any expectation by plaintiff that the police had made the arrest after 24 hours had passed was not reasonable, since the location of the person posing the threat was not even known at the time the assurances were given. Moreover, from her prior experience, plaintiff knew that the police would call her once an arrest had been made and, thus, her decision to relax her vigilance before receiving such a call was not justifiable, *id.* In so ruling, the Valdez Court distinguished *Mastroianni v Suffolk*, 91 NY2d 198, 668 NYS2d 542, 691 NE2d 613 (1997), in which the police had assured the injured wife that they would assist her in the event of an attack by her husband and remained across the street from her home, thereby permitting her to reasonably believe that she could relax her vigilance. The Valdez Court also distinguished *Sorichetti v New York*, 65 NY2d 461, 492 NYS2d 591, 482 NE2d 70 (1985), on its facts and noted that the case should not be cited as precedent for an analysis of the reliance element, since "it is not clear that the [Sorichetti] Court applied the 'justifiable reliance' element as it is currently constituted."

Subsequent to its decision in *Valdez*, the Court of Appeals determined that a triable issue of fact existed as to whether the mother of a child experiencing a medical emergency justifiably relied on the assurances of emergency medical technicians who responded to a 911 call for assistance for the child, *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 972 NYS2d 169, 995 NE2d 131 (2013). In *Applewhite*, the Court of Appeals found that triable issues of fact existed as to whether the special duty requirements of assumption of duty and reasonable reliance were met where the plaintiff child was suffering from shock, seizure and cardiac arrest, and despite the mother's entreaties to the Fire Department emergency medical technicians to transport the child to a nearby hospital, the technicians waited for an advanced life support ambulance and the resulting delay allegedly caused serious injury. Police officers' vague assurances that a plaintiff would "be okay" and that her former boyfriend would not be coming back after they escorted him from her apartment on several occasions did not constitute promises giving rise to a special relationship, *Howell v New York*, 191 AD3d 771, 142 NYS3d 81 (2d Dept 2021). In *Xenias v New York*, 191 AD3d 453, 142 NYS3d 148 (1st Dept 2021), the plaintiff raised a triable issue of fact as to her justifiable reliance on a 911 operator's statement that "we are on our

way” by submitting an affidavit listing several additional actions she would have taken to secure help but for the operator’s assurances.

In another post-Valdez decision, the Court of Appeals in *Coleson v New York*, 24 NY3d 476, 999 NYS2d 810, 24 NE3d 1074 (2014), determined that a triable issue of fact existed as to whether a woman who was assaulted by her husband had justifiably relied on certain statements made to her by police officers regarding her safety. The wife had been told by a police officer that her husband was in jail—for threatening her—and that he would be in jail for “a while.” An officer also told the wife that the officer “was going to keep in contact with [the wife].” These assurances would permit a jury to conclude that it was reasonable for the wife to believe that her husband would be imprisoned for the foreseeable future, and that the police would contact her if that turned out not to be the case. Similarly, in *Santaiti v Ramapo*, 162 AD3d 921, 80 NYS3d 288 (2d Dept 2018), the complaint sufficiently alleged that decedent justifiably relied upon affirmative conduct where police officers confiscated unlicensed handgun from assailant after responding to domestic incident, but then returned weapon under mistaken belief that assailant could lawfully possess it.

Factual issues may be present as to whether reliance upon assurances of protection was justifiable in light of the lapse of time between the making of the assurances and the injury to plaintiff, see *Harris by Harris v New York*, 147 AD2d 186, 542 NYS2d 550 (1st Dept 1989). Where factual issues exist regarding whether justifiable reliance was established, the court must instruct the jury as to that requirement, *Carole A. v New York*, 143 AD2d 242, 532 NYS2d 163 (2d Dept 1988).

(iii) *Nature of Required Assurances*

The “assurances” from the municipality on which plaintiff relied must have been definite enough to give rise to justifiable reliance, *Dinardo v New York*, 13 NY3d 872, 893 NYS2d 818, 921 NE2d 585 (2009); *Brown v New York*, 73 AD3d 1113, 902 NYS2d 594 (2d Dept 2010). Thus, no special relationship arose between a school district and a teacher who complained about an aggressive student and was told only to “hang in there” and that “something” was being done to have the student removed, *Dinardo v New York*, supra. Similarly, statements by police officers such as “don’t worry” and “I am going to take care of it” are too vague and ambiguous to constitute the requisite assurances or to prompt justifiable reliance, particularly where plaintiff was told to call the police if anything actually happened, *Brown v New York*, supra. In *McLean v New York*, 12 NY3d 194, 878 NYS2d 238, 905 NE2d 1167 (2009), the Court of Appeals held that a telephone call in which a municipal official gave plaintiff parent a list of registered day care providers and incorrectly assured her that all listed providers are frequently investigated and have prompted no complaints did not give rise to a special duty, since the official did not make any specific promises to plaintiff. In contrast, an assurance by an EMT that it would be better to wait for a properly supplied ambulance rather than taking the distressed infant to

a nearby hospital was sufficient to raise a triable issue of fact regarding whether the municipality assumed an affirmative duty to act sufficient to give rise to a special duty, *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 972 NYS2d 169, 995 NE2d 131 (2013). Assurances by police officers to a woman who had been threatened by her husband that her husband was in jail, that he would be incarcerated for “a while,” and that an officer “was going to keep in contact with [the wife],” were not vague, and raised a triable issue of fact regarding whether the wife was lulled into believing that she could relax her vigilance for a reasonable period of time, *Coleson v New York*, 24 NY3d 476, 999 NYS2d 810, 24 NE3d 1074 (2014); see *Santaiti v Ramapo*, 162 AD3d 921, 80 NYS3d 288 (2d Dept 2018).

Further, even a tacit assurance that is sufficiently specific may create a special relationship in a proper case. For example, in *Bloom v New York*, 123 AD2d 594, 507 NYS2d 13 (2d Dept 1986), the court held that a special duty could be found where a security guard agreed to accompany a teacher to the scene of an anticipated student fight but did not intervene when the fight actually erupted. Conduct by police officers that lulls a plaintiff into a false sense of security or relaxes his or her own vigilance or leads a plaintiff to forgo other avenues of protection not offered by the officers, and that places the plaintiff in a worse position than if the officers never had assumed any duty to him may be sufficient to establish justifiable reliance for purposes of establishing a special duty, see *Stevens v Town of East Fishkill Police Department*, 198 AD3d 832, 156 NYS3d 288 (2d Dept 2021).

(iv) Cases in Which Special Duty Principles Were Applied

There exists a line of cases holding that a special duty was owed to plaintiff under the particular facts. However, this line of cases, discussed below, must be read in light of *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011); *McLean v New York*, 12 NY3d 194, 878 NYS2d 238, 905 NE2d 1167 (2009); and *Lauer v New York*, 95 NY2d 95, 711 NYS2d 112, 733 NE2d 184 (2000), in which the Court of Appeals held that, even where a special duty has been shown, a municipality can be held liable only for the negligent performance of ministerial, as distinguished from discretionary, acts; see *Signature Health Center, LLC v State*, 92 AD3d 11, 935 NYS2d 357 (3d Dept 2011) (*McLean v New York*, *supra*, and *Dinardo v New York*, 13 NY3d 872, 893 NYS2d 818, 921 NE2d 585 (2009), “clarified and arguably changed the law with respect to governmental immunity for ministerial and discretionary actions”).

A special duty was found to be owed to informers, *Schuster v New York*, 5 NY2d 75, 180 NYS2d 265, 154 NE2d 534 (1958); *Matican v New York*, 94 AD3d 826, 941 NYS2d 698 (2d Dept 2012) (post-*Valdez* case not discussing *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011)), the operator of a warehouse, where firefighters assumed control over a fire, turned the building sprinkler system off, certified to employees that it was safe to reenter, and then the fire

rekindled and destroyed the building, *Zurich American Insurance Company v New York*, 176 AD3d 1145, 111 NYS3d 38 (2d Dept 2019), a neighbor whose services as an interpreter had been requested to assist in investigation of domestic violence complaint, *Alvarado v New York*, 60 AD3d 427, 874 NYS2d 96 (1st Dept 2009), and a person whose assistance in capturing fleeing suspects is requested, see *Ast v State*, 66 NY2d 998, 499 NYS2d 384, 489 NE2d 1286 (1985); *Mohan v State*, 131 AD2d 737, 516 NYS2d 787 (2d Dept 1987).

A special duty may also arise where the municipality undertakes the rendition of specific aid to an individual or readily defined group, *De Long v Erie*, 60 NY2d 296, 469 NYS2d 611, 457 NE2d 717 (1983); see *Coleson v New York*, 24 NY3d 476, 999 NYS2d 810, 24 NE3d 1074 (2014) (triable issue of fact as to special duty; police provided definite assurances to wife regarding her safety from physically abusive husband, and triable issue existed as to whether she justifiably relied on those assurances); *Santaiti v Ramapo*, 162 AD3d 921, 80 NYS3d 288 (2d Dept 2018) (complaint sufficiently pleaded special duty to victim when police mistakenly returned unlicensed, previously confiscated handgun to assailant after domestic incident); *Pascucci v Board of Educ. of the City of New York*, 305 AD2d 103, 758 NYS2d 54 (1st Dept 2003) (triable issue of fact as to special duty; school board provided special emergency service of intercom connection between classrooms and main office, which, in turn, could immediately dispatch principal or security guards, and fact issue existed whether defendant implicitly promised to act); *Julmis v New York*, 194 AD2d 522, 598 NYS2d 312 (2d Dept 1993) (special duty existed where two uniformed police officers promised to protect plaintiff against off-duty police officer). A special duty was found to exist where the municipal entity provided and then, without prior notice, withdrew school crossing guards, *Florence v Goldberg*, 44 NY2d 189, 404 NYS2d 583, 375 NE2d 763 (1978), where plaintiff relied for protection on a security guard employed by the municipality who accompanied plaintiff to the scene of an altercation and then failed to take any action to protect plaintiff from an assault, *Bloom v New York*, 123 AD2d 594, 507 NYS2d 13 (2d Dept 1986), where police officers removed plaintiff from her automobile in a visibly intoxicated state and allowed her to walk upon nearby railroad tracks, *Parvi v Kingston*, 41 NY2d 553, 394 NYS2d 161, 362 NE2d 960 (1977); but see *Walsh v Cheek-towaga*, 237 AD2d 947, 654 NYS2d 912 (4th Dept 1997). The court found issues of fact as to whether officers owed a special duty to a teenage passenger in a vehicle they had stopped, where the officers arrested the driver and entrusted the vehicle to another passenger whose restricted license prohibited him from operating the vehicle under the circumstances, *Stevens v Town of East Fishkill Police Department*, 198 AD3d 832, 156 NYS3d 288 (2d Dept 2021). There was an issue of fact as to whether the municipality voluntarily assumed a duty beyond what was owed to the public where a sanitation worker cleaning up debris was shocked by a downed power line after his supervisor allegedly assured him the power was turned off, *Lewery v New York*, 191 AD3d 855, 138 NYS3d 895 (2d Dept 2021).

In contrast, no special duty arose from a school district's advice to a

teacher to “hang in there” and that “something” was being done to have the student removed, *Dinardo v New York*, 13 NY3d 872, 893 NYS2d 818, 921 NE2d 585 (2009), a municipality’s supplying plaintiff with a list of registered day care providers with assurances that all such providers are frequently investigated, *McLean v New York*, 12 NY3d 194, 878 NYS2d 238, 905 NE2d 1167 (2009), where officers and dispatchers, in responding to an emergency call, made no promises giving rise to an affirmative duty running to the decedent personally, *Flynn v Southampton*, 177 AD3d 855, 111 NYS3d 350 (2d Dept 2019), where a city-owned ambulance carrying the plaintiff broke down and there was nothing in the record to suggest the plaintiff was lulled into a false sense of security or induced to forego other forms of transportation, *Halberstam v Port Authority of New York and New Jersey*, 175 AD3d 1264 (2d Dept 2019), state troopers’ failure to arrest decedent for drunk driving before he died in fatal one-car accident, *Barnes v State*, 156 AD3d 975, 66 NYS3d 716 (3d Dept 2017), from the relationship between a school district and the plaintiff bus matron who was injured when a 12-year-old student grabbed the wheel of the bus, causing the driver to brake and the plaintiff to fall, *Destefano v New York*, 149 AD3d 696, 52 NYS3d 374 (2d Dept 2017), a firefighter’s statement to a woman trapped in building to “[h]old on,” *Ewadi v New York*, 117 AD3d 439, 985 NYS2d 233 (1st Dept 2014), a police dispatcher’s cautionary advice concerning the use of a road, *Hynes v Cornwall*, 234 AD2d 423, 651 NYS2d 147 (2d Dept 1996), unsuccessful police efforts to locate a victim’s assailant, *Hamill v Dewitt*, 162 AD2d 1012, 557 NYS2d 217 (4th Dept 1990), or a police officer’s direction that plaintiff move off the street and onto a sidewalk during a fireworks display, *Labriola v New York*, 129 AD2d 505, 514 NYS2d 345 (1st Dept 1987).

In *Mastroianni v Suffolk*, 91 NY2d 198, 668 NYS2d 542, 691 NE2d 613 (1997), and *Sorichetti v Sorichetti* by *Sorichetti v New York*, 65 NY2d 461, 492 NYS2d 591, 482 NE2d 70 (1985), the Court of Appeals found special duties arising out of an order of protection. However, in *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011), the Court indicated that the *Sorichetti* holding was of questionable validity because the case was decided without benefit of the “justifiable reliance” element as it is presently constituted. Further, the *Valdez* Court raised, but did not answer, a question as to whether the police’s negligent enforcement of an order of protection could, under certain circumstances, constitute a ministerial act potentially giving rise to governmental liability.

(v) *Municipal Liability for Inadequate Fire Protection*

The general rule is that, absent facts showing the assumption of a special duty, there is no municipal liability for failing to provide fire protection, *Messineo v Amsterdam*, 17 NY2d 523, 267 NYS2d 905, 215 NE2d 163 (1966); *Motyka v Amsterdam*, 15 NY2d 134, 256 NYS2d 595, 204 NE2d 635 (1965); *Steitz v Beacon*, 295 NY 51, 64 NE2d 704 (1945); see *Tuthill v Rochester*, 32 AD2d 873, 301 NYS2d 648 (4th Dept 1969), *aff’d*, 27 NY2d 558, 313 NYS2d 127, 261 NE2d 267 (1970); see also

Trimble v Albany, 144 AD3d 1484, 42 NYS3d 432 (3d Dept 2016) (triable issue of fact whether special relationship existed between homeowners and fire department where department assured homeowners that fire in home had been fully extinguished and that it was safe to reenter home, but fire rekindled and destroyed premises). Nor may liability be imposed, in the absence of a special duty, for failure to supply sufficient water pressure, Kogel Lumber and Supply, Inc. v Suffolk County Water Authority, 131 AD2d 728, 517 NYS2d 42 (2d Dept 1987). There was no liability because of governmental immunity against a municipality where its firefighters, while fighting a building fire, allegedly damaged a neighboring facility when they discharged water they had withdrawn from a canal but had not needed for purposes of the fire, Stevens & Thompson Paper Company Inc. v Middle Falls Fire Department, Inc., 188 AD3d 1504, 137 NYS3d 529 (3d Dept 2020).

F. Governmental Entities' Liability for Condition of Premises

Generally, as to real property, the liability of a municipality or the State is the same as that of a private landowner, O'Connor v State, 70 NY2d 914, 524 NYS2d 391, 519 NE2d 302 (1987); Preston v State, 59 NY2d 997, 466 NYS2d 952, 453 NE2d 1241 (1983); see Price ex rel. Price v New York City Housing Authority, 92 NY2d 553, 684 NYS2d 143, 706 NE2d 1167 (1998); Benjamin by Benjamin v New York, 64 NY2d 44, 484 NYS2d 525, 473 NE2d 753 (1984); Miller v State, 62 NY2d 506, 478 NYS2d 829, 467 NE2d 493 (1984); Sega v State, 60 NY2d 183, 469 NYS2d 51, 456 NE2d 1174 (1983); McMullen v State, 199 AD2d 603, 604 NYS2d 335 (3d Dept 1993) (state-owned golf course); Pizzola v State, 130 AD2d 796, 515 NYS2d 129 (3d Dept 1987); Mesick v State, 118 AD2d 214, 504 NYS2d 279 (3d Dept 1986). A municipality's operation of a landfill or a public park is a proprietary function, subjecting the municipality to general principles of tort law, Dangler v Whites-town, 241 AD2d 290, 672 NYS2d 188 (4th Dept 1998). Where a governmental entity operating a bridge allegedly failed to erect suicide prevention barriers, the allegations were deemed to fall within the defendant's proprietary duties with respect to design and maintenance of the bridge, and not related to its governmental duty to provide security, Feldman v Port Authority of New York, 194 AD3d 137, 144 NYS3d 701 (1st Dept 2021); Perlov v Port Authority of New York and New Jersey, 189 AD3d 1624, 139 NYS3d 324 (2d Dept 2020). However, a municipality's liability is limited with respect to negligence in the design or planning of construction for a public improvement, Joyce v State, 152 AD2d 306, 549 NYS2d 191 (3d Dept 1989); see Weiss v Fote, 7 NY2d 579, 586, 200 NYS2d 409, 167 NE2d 63 (1960). For a further discussion of a municipality's liability for designing and planning a public improvement, see section K of this Introductory Statement, *infra*. For a further discussion of the distinction between proprietary and governmental functions, see section E(1) of this Introductory Comment, *supra*.

The mere fact that a town clerk conducted some business from her home was not enough to make the town liable for a dangerous or defective condition on the property, Noble v Pound, 5 AD3d 936, 774 NYS2d

95 (3d Dept 2004). In *Noble*, the plaintiff was injured when he fell through a landing at the front door of the private residence of a town clerk whom the plaintiff visited, with the clerk's permission, to obtain a hunting license. The court determined that the town, which provided an office to the clerk at the town hall and neither directed nor required the clerk to perform her duties from the residence, was not liable to the plaintiff.

Miller v State, 62 NY2d 506, 478 NYS2d 829, 467 NE2d 493 (1984), held that "a student who is injured in a criminal assault in a State-operated college dormitory may recover damages against the State in its capacity as a landlord upon a showing that there was a reasonably foreseeable likelihood of criminal intrusion into the building, that the State negligently failed to keep the outer doors locked, and that the failure was a proximate cause of the injury," see *Melville v New York City Housing Authority*, 242 AD2d 244, 661 NYS2d 632 (1st Dept 1997); see also *Dawson v New York City Housing Authority*, 203 AD2d 55, 610 NYS2d 28 (1st Dept 1994) (no liability absent evidence that assailant took advantage of unlocked outer door to gain entry to the building). However, a municipal landlord does not owe a duty to protect a passerby from a criminal who takes the victim onto the property for the commission of a crime, *Waters v New York City Housing Authority*, 116 AD2d 384, 501 NYS2d 385 (2d Dept 1986), *aff'd*, 69 NY2d 225, 513 NYS2d 356, 505 NE2d 922 (1987). Nor may liability be imposed for failure to provide a locked outer door where the outer door led to a locked inner door, *Robinson v New York City Housing Authority*, 150 AD2d 208, 540 NYS2d 811 (1st Dept 1989) (plaintiff raped by stranger who followed her through inner door before it could close and lock; Multiple Dwelling Law § 50-a(2) requires locks on outer doors only when leading directly into lobby).

A governmental defendant sued as a landlord for failing to protect against foreseeable crime may be deemed to have been acting in a governmental rather than a proprietary capacity in certain circumstances, *Matter of World Trade Center Bombing Litigation [Steering Committee v Port Authority of New York and New Jersey]*, 17 NY3d 428, 933 NYS2d 164, 957 NE2d 733 (2011); *Miller v State*, 62 NY2d 506, 478 NYS2d 829, 467 NE2d 493 (1984); see *Granata v White Plains*, 120 AD3d 1187, 993 NYS2d 47 (2d Dept 2014). The government's proprietary and governmental functions rest upon a continuum, beginning with the simplest matters directly concerning the property such as the maintenance of locks in government-owned property and "extend[ing] gradually out to more complex measures of safety and security for a greater area and populace" such as the maintenance of police and fire protection, *Miller v State*, *supra*; see *Matter of World Trade Center Bombing Litigation [Steering Committee v Port Authority of New York and New Jersey]*, *supra*. Thus, a government landlord's acts and omissions may be treated as allocations of governmental police resources when the protective task extends beyond the duty of a landlord to protect tenants and their visitors from foreseeable criminal acts, *Matter of World Trade Center Bombing Litigation [Steering Committee v Port*

Authority of New York and New Jersey], *supra*. For example, the provision of security at the former World Trade Center, which involved planning for the possibility of terrorist acts, was deemed a matter involving governmental allocation of police resources in *Matter of World Trade Center Bombing Litigation* [Steering Committee v Port Authority of New York and New Jersey], *supra*. Similarly, in *Weiner v Metropolitan Transp. Authority*, 55 NY2d 175, 448 NYS2d 141, 433 NE2d 124 (1982), the failure to secure a subway station during the late-night hours was held to be a governmental matter rather than one involving proprietary duties. On the other hand, in *Miller v State*, *supra*, the failure to lock the outer doors of a state-operated dormitory was held to involve the government's proprietary role, see *Granata v White Plains*, *supra* (action alleging municipality failed in its capacity as a commercial owner of a public parking garage to meet basic proprietary obligation of providing minimal security for the garage governed by principles applicable to proprietary activity). In general, what distinguishes police protection from a landowner's duty to maintain its property in a reasonably safe condition is that the former "is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed," *Matter of World Trade Center Bombing Litigation* [Steering Committee v Port Authority of New York and New Jersey], *supra* (quoting *Riss v New York*, 22 NY2d 579, 293 NYS2d 897, 240 NE2d 860 (1968)).

The subject of governmental entities' liability for the condition of premises is covered at greater length in PJI 2:225, 2:225C, 2:226.

G. Governmental Liability for Acts and Omissions of Public Educational Institutions

"[A]s a matter of public policy the courts [will] not second-guess the professional judgments of public school educators and administrators in selecting programs for particular students," *Torres v Little Flower Children's Services*, 64 NY2d 119, 485 NYS2d 15, 474 NE2d 223 (1984) (extending principle to protect legal custodians from liability for plaintiffs' "failure to receive an appropriate education"); see *DeRosa v New York*, 132 AD2d 592, 517 NYS2d 754 (2d Dept 1987) (no liability for placing deaf child in class for mentally deficient children); see also *Hoffman v Board of Ed. of City of New York*, 49 NY2d 121, 424 NYS2d 376, 400 NE2d 317 (1979); *Donohue v Copiague Union Free School Dist.*, 47 NY2d 440, 418 NYS2d 375, 391 NE2d 1352 (1979); *Sitomer v Half Hollow Hills Cent. School Dist.*, 133 AD2d 748, 520 NYS2d 37 (2d Dept 1987); but see *Snow v State*, 64 NY2d 745, 485 NYS2d 987, 475 NE2d 454 (1984) (misdiagnosis of "patient" in state school characterized as medical, not educational, malpractice). A public college, in general, has no legal duty to protect students from the dangerous acts of other students, *Eiseman v State*, 70 NY2d 175, 518 NYS2d 608, 511 NE2d 1128 (1987).

With respect to the duty of public schools, the provision of security against physical attacks by non-students who foreseeably pose a threat

to students is a governmental function involving policy-making, and no liability arises from the performance of such a function absent a special duty of protection, *Dickerson v New York*, 258 AD2d 433, 684 NYS2d 584 (2d Dept 1999). A school district has no duty to protect its students from the publication of a newspaper article or to prevent reporters from speaking with students, *Prescott v Newsday, Inc.*, 150 AD2d 541, 541 NYS2d 501 (2d Dept 1989); see PJI 2:227. The mere implementation of security measures at a high school does not give rise to a special duty to protect any particular student, *Dickerson v New York*, *supra*; *Logan v New York*, 148 AD2d 167, 543 NYS2d 661 (1st Dept 1989); see also *Feinsilver v New York*, 277 AD2d 199, 715 NYS2d 441 (2d Dept 2000) (teacher).

For a discussion of the liability of schools for inadequate supervision of students, see PJI 2:227.

H. Governmental Liability for Foster Care Placement and Oversight

A county owes a duty to use due care in selecting foster parents and to oversee diligently the care rendered, *Barnes v Nassau*, 108 AD2d 50, 487 NYS2d 827 (2d Dept 1985); *Bartels v Westchester*, 76 AD2d 517, 429 NYS2d 906 (2d Dept 1980); see *George v Windham*, 169 AD3d 876, 94 NYS3d 363 (2d Dept 2019). However, *Blanca C. by Carmen M. v Nassau*, 65 NY2d 712, 492 NYS2d 5, 481 NE2d 545 (1985), held that the county is not vicariously liable for the negligence of foster parents and left open the question whether a county may be held liable for the negligence of its own employees in supervising foster parents. Since *Blanca C.* was decided, all the Appellate Divisions have answered that question in the affirmative and held that a county may be held liable for negligent supervision of children in foster care and group homes, *George v Windham*, *supra*; *McCabe v Dutchess*, 72 AD3d 145, 895 NYS2d 446 (2d Dept 2010); *Sean M. v New York*, 20 AD3d 146, 795 NYS2d 539 (1st Dept 2005); *Liang v Rosedale Group Home*, 19 AD3d 654, 799 NYS2d 69 (2d Dept 2005); *La Fountain by La Fountain v Clinton*, 237 AD2d 808, 654 NYS2d 870 (3d Dept 1997); see *Sinkler by Sinkler v Monroe*, 127 AD2d 1006, 513 NYS2d 67 (4th Dept 1987) (day care facility); *Barnes v Nassau*, 108 AD2d 50, 487 NYS2d 827 (2d Dept 1985). As to the duty of a child care agency to a foster parent to prevent harm caused by the foster child, see *Wynn v Little Flower Children's Services*, 106 AD3d 64, 963 NYS2d 6 (1st Dept 2013).

A county or foster care agency will not be held liable for breach of its duty to supervise children entrusted to its care unless plaintiff establishes that it had specific knowledge or notice of the dangerous condition that caused the injury, i.e., actions by a third party that could reasonably have been anticipated, *George v Windham*, 169 AD3d 876, 94 NYS3d 363 (2d Dept 2019); *McCabe v Dutchess*, 72 AD3d 145, 895 NYS2d 446 (2d Dept 2010); *Simpson v Dutchess*, 35 AD3d 712, 826 NYS2d 678 (2d Dept 2006). Such liability cannot be imposed where the child's injuries were due to the momentary inattention of a foster parent that were not reasonably foreseeable by the county foster care

agency, *McCabe v Dutchess*, supra; *Ogletree v Rush Realty Associates, LLC*, 29 AD3d 875, 814 NYS2d 878 (2d Dept 2006). Liability may be imposed upon a county where it has placed a child in a home with foster parents who were caring for more foster children than they were certified to have under Social Services Law § 378 and the statutory violation was a proximate cause of the foster child's injury, *Mattison ex rel. Mattison v Craig*, 266 AD2d 797, 699 NYS2d 161 (3d Dept 1999). A municipality has been held liable for a failure to exercise due care in supervising foster parents during a pre-adoptive period, *Johnson v New York*, 111 AD2d 782, 490 NYS2d 529 (2d Dept 1985), and liability has been imposed upon the State for placing a mentally disabled epileptic in a family-care home which was not reasonably safe for such patients, *Harris v State*, 117 AD2d 298, 502 NYS2d 760 (2d Dept 1986). On the other hand, since relevant statutes and regulations did not impose any duty upon a city to license, investigate, inspect or supervise day care centers or family homes, liability for injuries sustained by children sexually abused by the operators of such a facility may not be imposed absent facts showing the voluntary assumption of a special duty, *Doe by Doe v Mount Vernon*, 156 AD2d 329, 548 NYS2d 282 (2d Dept 1989).

I. Liability for Court Activities

Effective performance of the judicial function requires that judges be free to make decisions without fear of retribution through accusations of malicious wrongdoing, *Mosher-Simons v Allegany*, 99 NY2d 214, 753 NYS2d 444, 783 NE2d 509 (2002) (judicial decision placing child in maternal aunt's custody). A judge has immunity only for acts done in the exercise of the judicial function, *Murray v Brancato*, 290 NY 52, 26 Ohio Ops 20, 48 NE2d 257 (1943); see *Tarter v State*, 68 NY2d 511, 510 NYS2d 528, 503 NE2d 84 (1986) (quasi-judicial officer), and not for those performed in the clear absence of any jurisdiction over the subject matter, *Sassower v Finnerty*, 96 AD2d 585, 465 NYS2d 543 (2d Dept 1983). That rule insulates judges from tort liability for their judicial activities, discourages inappropriate collateral attacks on court rulings and fosters judicial independence by protecting courts and judges from vexatious litigation, *Murray v Brancato*, supra; see *Tarter v State*, supra. The same rule is available to other neutrally positioned government officials, regardless of title, who are delegated judicial or quasi-judicial functions that are integral to the judicial process, *Mosher-Simons v Allegany*, supra. The extension of the rule to this class of officials, however, is limited to claims arising from their performance of the specific judicially delegated function, *id* (county's performance of court-ordered home study); see *Albino v New York City Housing Authority*, 78 AD3d 485, 912 NYS2d 27 (1st Dept 2010) (child protective service agency that assisted the court in effecting adoption placement).

Certain activities and functions of court personnel are solely ministerial and the negligent performance of such activities and functions may give rise to liability, *Lapidus v State*, 57 AD3d 83, 866 NYS2d 711 (2d Dept 2008). Thus, the First Department has held that a Supreme Court Clerk's failure to timely docket a judgment was a valid basis for

an action where the delay enabled the judgment debtor to convey his property free of any lien, *National Westminster Bank, USA v State*, 155 AD2d 261, 546 NYS2d 864 (1st Dept 1989), *aff'd*, 76 NY2d 507, 561 NYS2d 541, 562 NE2d 866 (1990); but see *Flagstar Bank, FSB v State*, 114 AD3d 138, 978 NYS2d 266 (2d Dept 2013) (noting that Court of Appeals did not address issue in affirming First Department's decision). Similarly, in *Marx v State*, 169 AD2d 642, 564 NYS2d 774 (1st Dept 1991), the State was held liable where Housing Court clerks had made a series of mistakes in the handling of the court file that resulted in an erroneous issuance and execution of a warrant of eviction. A similar analysis was used to hold the State potentially liable for the court clerk's errors in recording a criminal jury verdict and sentence, resulting in plaintiff's incarceration for an excessive period, *Lapidus v State*, *supra*; see *Hunt v State*, 36 AD3d 511, 828 NYS2d 355 (1st Dept 2007).

J. Governmental Tort Liability to Prisoners

Having assumed physical custody of inmates who cannot protect and defend themselves in the same way as individuals at liberty can, the State owes a duty of care to protect the health and safety of prisoners, *Sanchez v State*, 99 NY2d 247, 754 NYS2d 621, 784 NE2d 675 (2002); *Gordon v New York*, 70 NY2d 839, 523 NYS2d 445, 517 NE2d 1331 (1987); *Smith v Albany*, 12 AD3d 912, 784 NYS2d 709 (3d Dept 2004); see *McAllister v New York*, 159 AD3d 887, 74 NYS3d 54 (2d Dept 2018). This duty, which applies to state prisoners, pretrial detainees and individuals housed in county jails, includes the duty to maintain the premises in reasonably safe condition under the circumstances, *Jones v Rensselaer*, 51 AD3d 1073, 856 NYS2d 717 (3d Dept 2008). While the duty includes the obligation to use reasonable care to prevent a prisoner with known suicidal tendencies from injuring himself, it does not extend beyond guarding against conduct that is reasonably foreseeable, *Gordon v New York*, *supra*; *Moore v Troy*, 179 AD2d 842, 577 NYS2d 969 (3d Dept 1992); see *Rappaport v Correctional Medical Care, Inc.*, 200 AD3d 1150, 159 NYS3d 205 (3d Dept 2021) (triable issues of fact regarding whether defendant properly screened decedent for suicidal tendencies). The duty of the State extends to proper securing of the area surrounding an inmate's cell to prevent loss of personal property, *Foy v State*, 182 AD2d 670, 582 NYS2d 262 (2d Dept 1992).

When a governmental entity, through its correctional authorities, directs a prison inmate to participate in a work program during incarceration, it owes the inmate a duty to provide reasonably safe machinery and equipment with which to work and adequate warnings and instructions for the safe operation of such machinery and equipment, *Callahan v State*, 19 AD2d 437, 243 NYS2d 881 (3d Dept 1963), *aff'd*, 14 NY2d 665, 249 NYS2d 871, 198 NE2d 903 (1964); *Bernard v State*, 34 AD3d 1065, 824 NYS2d 481 (3d Dept 2006); *Muhammad v State*, 15 AD3d 807, 790 NYS2d 570 (3d Dept 2005); *Kandrach v State*, 188 AD2d 910, 591 NYS2d 868 (3d Dept 1992); see *Lamp v Cortland*, 98 NY2d 748, 751 NYS2d 840, 781 NE2d 905 (2002). Given the penalties that may be imposed for not following orders in a prison environment, it

is not unreasonable for an inmate to proceed as directed by prison authorities even if he or she thereby ignores a danger which should have been foreseen, *Lowe v State*, 194 AD2d 898, 599 NYS2d 639 (3d Dept 1993). Moreover, the special circumstances that confront an incarcerated inmate should be taken into consideration in assessing whether the inmate was comparatively negligent, *Bernard v State*, supra. However, where an inmate fails to use ordinary care and pursues a dangerous course of conduct, the inmate is required to take some responsibility for his or her own negligence, *Muhammad v State*, supra; *Martinez v State*, 225 AD2d 877, 639 NYS2d 145 (3d Dept 1996).

The State and corrections officials have a duty of care to protect inmates, even from attacks by other inmates, *Sanchez v State*, 99 NY2d 247, 754 NYS2d 621, 784 NE2d 675 (2002); *Campbell v State*, 186 AD3d 1849, 130 NYS3d 869 (3d Dept 2020); *McAllister v New York*, 159 AD3d 887, 74 NYS3d 54 (2d Dept 2018); *Vasquez v State*, 68 AD3d 1275, 890 NYS2d 184 (3d Dept 2009). The duty is limited to providing reasonable care to protect [them] from risks of harm that are reasonably foreseeable, i.e., those that the defendant knew or should have known, *Sanchez v State*, supra; *Campbell v State*, supra; *Vasquez v State*, supra. An inmate is not required to prove that prison authorities actually knew that the particular victim was vulnerable to assault or that the particular assailant was dangerous or that they actually knew the assault was about to take place and had an opportunity to intervene and protect the victim, *Sanchez v State*, supra; see *Smith v Albany*, 12 AD3d 912, 784 NYS2d 709 (3d Dept 2004). Prison authorities' constructive notice will suffice to justify imposition of liability, *Sanchez v State*, supra. However, the duty is a general one and the State is not an insurer of inmate safety, see *Flaherty v State*, 296 NY 342, 73 NE2d 543 (1947); *McAllister v New York*, supra; *Smith v Albany*, supra; *Zi Guang v State*, 263 AD2d 745, 695 NYS2d 142 (3d Dept 1999). Liability will not be imposed where, short of constant guarding and watching—unreasonable under the circumstances—the authorities could not have prevented the act, *Flaherty v State*, supra; see *Sanchez v State*, supra. It is sufficient if the actions taken were reasonable under the circumstances and guarded against what was reasonably foreseeable, *Gordon v New York*, 70 NY2d 839, 523 NYS2d 445, 517 NE2d 1331 (1987). An inmate assault, without credible evidence that the assault was reasonably foreseeable, is insufficient to establish that the correctional officials were negligent, *Sanchez v State*, supra; see *Campbell v State*, supra (“trash talk” between inmates prior to basketball game was insufficient to put defendant on notice that assault was imminent). The duty of incarcerating authorities to make reasonable safety provisions also extends to protecting medical personnel from prisoners temporarily transferred to hospitals for purposes of receiving medical treatment, see *Hare v State*, 173 AD2d 523, 570 NYS2d 125 (2d Dept 1991).

The State and its corrections employees are absolutely free from liability from common-law actions predicated upon their initiating authorized disciplinary proceedings and imposing sanctions even where their disciplinary efforts are ultimately unsuccessful, *Arteaga v State*, 72 NY2d 212, 532 NYS2d 57, 527 NE2d 1194 (1988).

The removal of juvenile delinquents from the community by court order and their placement in public confinement, at least in part for the protection of society as a whole, “denotes a quintessentially governmental activity,” *Sebastian v State*, 93 NY2d 790, 698 NYS2d 601, 720 NE2d 878 (1999). Therefore, the State may not be held liable in negligence for injuries inflicted by an adjudicated juvenile delinquent who escapes from a limited security facility, *id.*

K. Public Works and Services—Design, Planning and Rendition

The leading case of *Weiss v Fote*, 7 NY2d 579, 586, 200 NYS2d 409, 167 NE2d 63 (1960), holds that in the exercise of judgment in planning governmental services, a municipality cannot be held responsible “absent some indication that due care was not exercised in the preparation of the design or that no reasonable official could have adopted it,” see *Alexander v Eldred*, 63 NY2d 460, 483 NYS2d 168, 472 NE2d 996 (1984); see also *Turturro v New York*, 28 NY3d 469, 45 NYS3d 874, 68 NE3d 693 (2016); *Gutelle v New York*, 55 NY2d 794, 447 NYS2d 422, 432 NE2d 124 (1981); *Tomassi v Union*, 46 NY2d 91, 412 NYS2d 842, 385 NE2d 581 (1978); *Pratt v Robinson*, 39 NY2d 554, 384 NYS2d 749, 349 NE2d 849 (1976); *Pedraza v New York City Transit Authority*, 203 AD3d 95, 162 NYS3d 19 (1st Dept 2022); *Redcross v State*, 241 AD2d 787, 660 NYS2d 211 (3d Dept 1997); *Joyce v State*, 152 AD2d 306, 549 NYS2d 191 (3d Dept 1989); *Van De Bogart v State*, 133 AD2d 974, 521 NYS2d 125 (3d Dept 1987); *Van Son v State*, 116 AD2d 1013, 498 NYS2d 938 (4th Dept 1986); *Niagara Frontier Transit System, Inc. v State*, 57 AD2d 59, 394 NYS2d 930 (4th Dept 1977). The qualified immunity afforded to municipalities by *Weiss* and its progeny applies to claims sounding in negligent design and planning. Qualified immunity is not, however, applicable to claims for negligent maintenance, *Pedraza v New York City Transit Authority*, *supra*; *Nachamie v Nassau*, 147 AD3d 770, 47 NYS3d 58 (2d Dept 2017); *Selca v Peekskill*, 78 AD3d 1160, 912 NYS2d 287 (2d Dept 2010).

A municipality’s admitted ownership and maintenance of a road is sufficient to raise a question of fact regarding whether the municipality actually designed and/or constructed the road, *Good v Sullivan*, 198 AD2d 706, 604 NYS2d 285 (3d Dept 1993); *Merchant v Halfmoon*, 194 AD2d 1031, 599 NYS2d 687 (3d Dept 1993). Although the New York State Department of Transportation publishes a Highway Design Manual, there is no statutory or common-law requirement that municipalities comply with its contents in the design of their highways, *Cave v Galen*, 23 AD3d 1108, 804 NYS2d 219 (4th Dept 2005).

A governmental body may be liable for a traffic planning decision only when its study is plainly inadequate or there is no reasonable basis for its plan, *Affleck v Buckley*, 96 NY2d 553, 732 NYS2d 625, 758 NE2d 651 (2001); see *Turturro v New York*, 28 NY3d 469, 45 NYS3d 874, 68 NE3d 693 (2016); *Aliasgarian v State*, 199 AD3d 1439, 158 NYS3d 493 (4th Dept 2021) (no qualified immunity where court rationally determined that there was no reasonable basis for State’s decision to not

install lighting in underpass). Whether there has been an adequate study prior to adopting the design or plan is relevant to the reasonableness of the decision made, *Schwartz v New York State Thruway Authority*, 95 AD2d 928, 463 NYS2d 941 (3d Dept 1983), *aff'd*, 61 NY2d 955, 475 NYS2d 271, 463 NE2d 612 (1984); *Office Park Corp. v Onondaga*, 64 AD2d 252, 409 NYS2d 854 (4th Dept 1978), *aff'd*, 48 NY2d 765, 423 NYS2d 920, 399 NE2d 950 (1979); *Southworth v State*, 62 AD2d 731, 405 NYS2d 548 (4th Dept 1978), *aff'd*, 47 NY2d 874, 419 NYS2d 71, 392 NE2d 1254 (1979); *Klein v New York State Thruway Authority*, 220 AD2d 486, 632 NYS2d 184 (2d Dept 1995); *Sanford v State*, 94 AD2d 857, 463 NYS2d 595 (3d Dept 1983); *Lewis v State*, 70 AD2d 707, 416 NYS2d 439 (3d Dept 1979); *St. Vladimir's Orthodox Theological Seminary v State*, 63 AD2d 1099, 406 NYS2d 385 (3d Dept 1978); *Franks v State*, 55 AD2d 978, 390 NYS2d 689 (3d Dept 1977); *Zalewski v State*, 53 AD2d 781, 384 NYS2d 545 (3d Dept 1976). In *Affleck v Buckley*, *supra*, the county considered data contained in an engineer's study commissioned by a third party as well as its own independently obtained data collected before and after the study. The Court dismissed the complaint, finding that there was no issue of fact with respect to the adequacy of the county's determination.

A blanket policy to conduct traffic studies only when an intersection has had a designated number of accidents and has exceeded a designated accident rate and only if its traffic engineer has determined that a study is warranted is insufficient to establish qualified immunity as a matter of law, *Evans v Stranger*, 307 AD2d 439, 762 NYS2d 678 (3d Dept 2003); see *Gardner v State*, 79 AD3d 1635, 914 NYS2d 537 (4th Dept 2010) (certain Department of Transportation guidelines for snow and ice removal on State highway evolved without proper study and lacked reasonable basis and defendant's adherence to them could not immunize it from suit).

Something more than a mere choice between conflicting opinions of experts is required before a governmental entity may be charged with the failure to discharge its duty to plan highways for the safety of the traveling public, *Affleck v Buckley*, 96 NY2d 553, 732 NYS2d 625, 758 NE2d 651 (2001); *Schuster v McDonald*, 263 AD2d 473, 692 NYS2d 721 (2d Dept 1999); *Light v State*, 250 AD2d 988, 672 NYS2d 543 (3d Dept 1998). The plaintiff must show not merely that another option was available, but also that the plan adopted by the municipality lacked a reasonable basis, *Affleck v Buckley*, *supra*.

Liability may be imposed upon the municipality if it did not undertake an adequate study, *Brown v State*, 31 NY3d 514 (2018); *Turturro v New York*, 28 NY3d 469, 45 NYS3d 874, 68 NE3d 693 (2016); *Scheemaker v State*, 70 NY2d 985, 526 NYS2d 420, 521 NE2d 427 (1988); *Bounaiuto v William Floyd School Dist.*, 203 AD2d 225, 609 NYS2d 661 (2d Dept 1994); *Bailey v Honda Motor Co., Ltd.*, 144 AD2d 119, 534 NYS2d 711 (3d Dept 1988), and simply allowed the situation to "evolve," *Cordero v New York*, 112 AD2d 914, 492 NYS2d 430 (2d Dept 1985). Where the claimant failed to prove that the safety plan evolved

without adequate study, the claim was dismissed, *Galvin v State*, 245 AD2d 418, 666 NYS2d 673 (2d Dept 1997). Liability will not be imposed where the municipality made a study which, although recommending improvements, did not find that the condition was dangerous and where the municipality's decision had a rational basis, *Longo by Longo v Tafaro*, 137 AD2d 661, 524 NYS2d 754 (2d Dept 1988).

A municipal defendant has qualified immunity where a duly authorized public planning body has entertained and passed on the same question of risk as would ordinarily go to the jury, *Weiss v Fote*, 7 NY2d 579, 200 NYS2d 409, 167 NE2d 63 (1960); see *Pedraza v New York City Transit Authority*, 203 AD3d 95, 162 NYS3d 19 (1st Dept 2022) (held that testimony that transit authority analyzed effect of reducing subway train speeds to 15 mph at subject station where passenger was struck on tracks was relevant to transit authority's assertion of qualified immunity); *Selca v Peekskill*, 78 AD3d 1160, 912 NYS2d 287 (2d Dept 2010); *Jackson v New York City Transit Authority*, 30 AD3d 289, 818 NYS2d 32 (1st Dept 2006). However, where an accident arises out of a specific danger that was not the subject of a study conducted by a public planning body, qualified immunity will not apply, *Turturro v New York*, 28 NY3d 469, 45 NYS3d 874, 68 NE3d 693 (2016); *Ernest v Red Creek Cent. School Dist.*, 93 NY2d 664, 695 NYS2d 531, 717 NE2d 690 (1999); *Jackson v New York City Transit Authority*, *supra* (defendant transit authority failed to show that it made inquiry into issue of safety of passengers walking through buses and whether grab bars or handholds were needed for passengers' safety); see *Brown v State*, 79 AD3d 1579, 914 NYS2d 512 (4th Dept 2010). In *Pedraza v New York City Transit Authority*, *supra*, the plaintiff alleged that the decedent was killed as a result of the negligence of a subway train operator entering the station at a speed in excess of 15 mph. The First Department held that it was reversible error for the trial court to have precluded transit authority witnesses from testifying about speed policy decisions pertaining to the entire subway system which were relevant to the transit authority's qualified immunity defense, *id.*

If a defendant is not entitled to the qualified immunity afforded by *Weiss v Fote*, 7 NY2d 579, 200 NYS2d 409, 167 NE2d 63 (1960), because defendant's decision was not the product of a plan or study, the appropriate inquiry is whether defendant was made aware of a dangerous condition and failed to take action to remedy it and whether the dangerous condition was a proximate cause of the accident, see *Brown v State*, 31 NY3d 514 (2018); *Turturro v New York*, 28 NY3d 469, 45 NYS3d 874, 68 NE3d 693 (2016); *Chowdhury v Phillips*, 205 AD3d 471, 168 NYS3d 58 (1st Dept 2022). In such a case, plaintiff does not have to establish what corrective action defendant could have taken that would have prevented plaintiff's accident, *Brown v State*, *supra*. Thus, the plaintiff need not identify a specific remedy and prove it would have been timely implemented and prevented the accident, *id.* The plaintiff need only prove that the absence of safety measures contributed to the happening of the accident by materially increasing the risk or by greatly increasing the probability of the occurrence, *id.*

The municipality has a continuing duty to take reasonable steps to review the plan and make those changes reasonably required by its actual operation, *Alexander v Eldred*, 63 NY2d 460, 483 NYS2d 168, 472 NE2d 996 (1984); *Weiss v Fote*, 7 NY2d 579, 200 NYS2d 409, 167 NE2d 63 (1960); *Colegrove v Steuben*, 216 AD2d 888, 629 NYS2d 154 (4th Dept 1995); see *Turturro v New York*, 28 NY3d 469, 45 NYS3d 874, 68 NE3d 693 (2016); *Atkinson v Oneida*, 59 NY2d 840, 464 NYS2d 747, 451 NE2d 494 (1983); *Gutelle v New York*, 55 NY2d 794, 447 NYS2d 422, 432 NE2d 124 (1981); *Merrill Transport Co. v State*, 97 AD2d 921, 470 NYS2d 764 (3d Dept 1983); *Heffler v State*, 96 AD2d 926, 466 NYS2d 370 (2d Dept 1983). Further, once a decision has been made to remedy a dangerous condition, liability may be imposed for injuries sustained during a failure to effectuate the plan within a reasonable time, unless the government provides an adequate justification for the delay, *Friedman v State*, 67 NY2d 271, 502 NYS2d 669, 493 NE2d 893 (1986); *Witkowski v Escobar*, 28 AD3d 543, 813 NYS2d 486 (2d Dept 2006); *Cruz v New York*, 201 AD2d 606, 607 NYS2d 969 (2d Dept 1994); see *Brown v State*, 31 NY3d 514 (2018); *Turturro v New York*, *supra*; *Chowdhury v Phillips*, 205 AD3d 471, 168 NYS3d 58 (1st Dept 2022). Such justification may include the scope of the reconstruction project and the availability of funding and design factors, *Sangirardi v State*, 205 AD2d 603, 613 NYS2d 224 (2d Dept 1994); *Trautman v State*, 179 AD2d 635, 578 NYS2d 245 (2d Dept 1992); see *Ring v State*, 270 AD2d 788, 705 NYS2d 427 (3d Dept 2000). *Friedman* suggests that where a dangerous condition develops over an extended period of time, the government may be liable if it fails to review the situation, see *Giske v State*, 191 AD2d 675, 595 NYS2d 559 (2d Dept 1993). Evidence that the municipality subsequently installed safety devices is not admissible on the issue of delayed implementation of a safety plan, *Ramundo v Guilderland*, 142 AD2d 50, 534 NYS2d 543 (3d Dept 1988); see *Roque v State*, 199 AD3d 1092, 156 NYS3d 557 (3d Dept 2021) (subsequent remedial measures inadmissible to prove that defendant maintained shoulder in a dangerous condition). However, evidence of prior substantially similar accidents in the same area may be admissible to show notice of a dangerous condition, *Chowdhury v Phillips*, *supra*; *Brown v State*, 79 AD3d 1579, 914 NYS2d 512 (4th Dept 2010); *Martin v State*, 305 AD2d 784, 759 NYS2d 802 (3d Dept 2003).

A municipality may be liable for negligent snow removal where its snow removal practice itself created a dangerous condition, *Grevelding v State*, 91 AD3d 1309, 937 NYS2d 782 (4th Dept 2012); *Gardner v State*, 79 AD3d 1635, 914 NYS2d 537 (4th Dept 2010). Adherence to Department of Transportation guidelines for snow and ice removal does not immunize municipality from suit where the guidelines evolved without adequate study and lacked a reasonable basis, *Grevelding v State*, *supra*; *Gardner v State*, *supra*. Although vaulting accidents involving bridges are rare, the occurrence of a vaulting accident at the same location ten years earlier and a similar fatal accident on the bridge in the same weekend were a sufficient basis for concluding that defendant State had created a dangerous condition through its snow plowing method, *Grevelding v State*, *supra*.

L. Liability to Residents in State Operated Mental Institutions

The State owes patients in its institutions a duty of reasonable care to protect them from injury, whatever the source, *Killeen v State*, 66 NY2d 850, 498 NYS2d 358, 489 NE2d 245 (1985). While the duty does not require constant individual supervision of a patient, see *Hirsh v State*, 8 NY2d 125, 202 NYS2d 296, 168 NE2d 372 (1960), it does require the use of reasonable care to prevent readily foreseeable injuries, *Goble v State*, 123 AD2d 664, 507 NYS2d 35 (2d Dept 1986). However, where the governmental entity provided a vocational training and employment program for mentally retarded adults at its premises, the duty owed to participants did not encompass activity that occurred off the premises and after hours, *Bodaness v Staten Island Aid Inc.*, 170 AD2d 637, 567 NYS2d 63 (2d Dept 1991).

In providing medical and psychiatric care, the State is held to the same duty of care as private individuals and institutions engaging in the same activity, *Schrempf v State*, 66 NY2d 289, 496 NYS2d 973, 487 NE2d 883 (1985); see *Padula v Tompkins*, 303 AD2d 804, 756 NYS2d 664 (3d Dept 2003). This standard has been applied in cases where it is alleged that negligent care of a mental patient by the State or one of its subdivisions has produced injury to the patient or others, *Schrempf v State*, *supra*. For example, this duty has been recognized in cases where the State has been negligent in permitting a mental patient to escape, and where the State has been negligent in discharging a mental patient or releasing the patient to outpatient care, *Schrempf v State*, *supra*; see *D'Avolio v Prado*, 277 AD2d 877, 715 NYS2d 827 (4th Dept 2000); see also *Padula v Tompkins*, *supra* (claimed negligent monitoring of voluntary outpatient).

M. Mental Health Services

The provision of mental health services by a governmental agency is a proprietary function and does not implicate the requirements of a special duty, *D'Avolio v Prado*, 277 AD2d 877, 715 NYS2d 827 (4th Dept 2000). However, an agency is engaged in a governmental function when it arranges and coordinates various mental health services provided by other entities for a person adjudicated a juvenile delinquent, *Brown v Speed*, 302 AD2d 915, 754 NYS2d 810 (4th Dept 2003).

N. Medical Services

Medical services are provided by both governmental and private entities, and care must be taken in classifying as governmental or proprietary a particular activity or service. Mental health care, obstetrics and surgery are services that are generally considered proprietary, see *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 972 NYS2d 169, 995 NE2d 131 (2013). Emergency medical services, such as ambulance assistance rendered by first responders, are governmental in nature, *id.*

II. Public Authorities

The Legislature which has the power to create an Authority, can

refuse to waive immunity and thus can forbid suits against that Authority, *Trippe v Port of New York Authority*, 14 NY2d 119, 249 NYS2d 409, 198 NE2d 585 (1964); *Easley v New York State Thruway Authority*, 1 NY2d 374, 153 NYS2d 28, 135 NE2d 572 (1956). For a discussion of the liability of a subcontractor who has agreed to perform work along the Thruway, see *Church ex rel. Smith v Callanan Industries, Inc.*, 99 NY2d 104, 752 NYS2d 254, 782 NE2d 50 (2002).

Many of the special acts creating public authorities contain provisions concerning actions in tort against them. For example, the enabling acts of the New York State Thruway Authority (Public Authorities Law § 361-b), the Jones Beach State Parkway Authority (Public Authorities Law § 163-a), and the Saratoga Springs Authority (Public Authorities Law § 1607) confer upon the Court of Claims exclusive jurisdiction to adjudicate claims against those authorities for tortious acts. The Supreme Court and other courts having jurisdiction may hear claims against other authorities or agencies.

The Port Authority of New York and New Jersey is a governmental agency of the States of New York and New Jersey, *Whalen v Wagner*, 4 NY2d 575, 176 NYS2d 616, 152 NE2d 54 (1958); see *Trippe v Port of New York Authority*, 14 NY2d 119, 249 NYS2d 409, 198 NE2d 585 (1964). Because of its dual State character, it is governed by special statutes, Unconsolidated Laws §§ 6401–7154. The courts of general jurisdiction may hear claims against the Port Authority, Unconsolidated Laws §§ 7101, 7106. Notice of claim against it must be served and action must be brought within one year after injury, Unconsolidated Laws § 7107. The form of such notice, manner of service thereof and provisions relating to extension of time for service are to be found in Unconsolidated Laws § 7108. However, the requirement that the action be commenced within one year of accrual is a condition precedent, rather than a statute of limitations, *Savino v Demiglia*, 133 AD2d 389, 519 NYS2d 384 (2d Dept 1987), and is not subject to tolls or extensions, including those under CPLR 205(a), *Yonkers Contracting Co., Inc. v Port Authority Trans-Hudson Corp.*, 93 NY2d 375, 690 NYS2d 512, 712 NE2d 678 (1999).

Several water authority acts contain provisions absolving authority agents and members from personal liability for tortious acts while engaged in authority activities and acting within the scope of their authority, Public Authorities Law §§ 1071, 1111, 1171. The act governing the New York City Transit Authority provides indemnification for its employees, Public Authorities Law § 1212(3).

The Metropolitan Transportation Authority is a public benefit corporation intended to secure the continuance and improvement of commuter transportation within New York City and certain suburban counties, Public Authorities Law §§ 1263, 1264. The MTA is liable for the negligence of its employees in the operation of vehicles or other transportation facilities under the jurisdiction and control of the Authority when acting in the performance of duties and within the scope of

employment, id § 1276(3). However, the MTA may delegate its functions to subsidiary corporations, id § 1266(5), such as the New York City Transit Authority and the Long Island Railroad. Such subsidiaries may be distinct legal entities for purposes of suit and where the acts complained of were committed by employees of such a legal subsidiary, liability may be imposed upon the subsidiary but not upon the MTA, *Adams v New York City Transit Authority*, 140 AD2d 572, 528 NYS2d 638 (2d Dept 1988); *Cusick v Lutheran Medical Center*, 105 AD2d 681, 481 NYS2d 122 (2d Dept 1984); *Wenthen v Metropolitan Transp. Authority*, 95 AD2d 852, 464 NYS2d 212 (2d Dept 1983); *Bujosa v Metropolitan Transp. Authority*, 44 AD2d 849, 355 NYS2d 800 (2d Dept 1974).

There are a few cases in which plaintiff sued or provided notice of claim to the wrong entity, but the entity was deemed estopped from asserting the error as a defense because of its own wrongful conduct, *Bender v New York City Health & Hospitals Corp.*, 38 NY2d 662, 382 NYS2d 18, 345 NE2d 561 (1976); *Fryczynski v Niagara Frontier Transp. Authority*, 116 AD2d 979, 498 NYS2d 933 (4th Dept 1986); see also *Hitzfield v Wilmorite, Inc.*, 237 AD2d 879, 654 NYS2d 506 (4th Dept 1997). However, the Court of Appeals has repeatedly emphasized its commitment to the general rule that estoppel may not be invoked against a governmental agency to prevent it from discharging its statutory duties, *E.F.S. Ventures Corp. v Foster*, 71 NY2d 359, 526 NYS2d 56, 520 NE2d 1345 (1988); *Daleview Nursing Home v Axelrod*, 62 NY2d 30, 475 NYS2d 826, 464 NE2d 130 (1984). The limitation of *Bender v New York City Health & Hospitals Corp.*, *supra*, to its particular facts was emphasized in *Hamptons Hospital & Medical Center, Inc. v Moore*, 52 NY2d 88, 436 NYS2d 239, 417 NE2d 533 (1981). In that case, the Court stated that its decision in *Bender* was “addressed to an unusual factual situation, is of very limited application and should not be read as diminishing the vitality of the general rule that the doctrine of estoppel is not applicable to agencies of the State acting in a governmental capacity,” see *Rodriguez v New York*, 169 AD2d 532, 564 NYS2d 384 (1st Dept 1991). Thus, situations in which estoppel may successfully be invoked will, most likely, be rare. In *Gorman v Huntington*, 12 NY3d 275, 879 NYS2d 379, 907 NE2d 292 (2009), the Court of Appeals observed that even assuming a “third exception” might be recognized under estoppel principles where the municipality’s conduct misled the injured plaintiff, such an exception could not be invoked where the party who relied on the municipality’s misleading conduct or statements was the person who provided the written notice rather than the person who was ultimately injured. For a discussion of prior written notice provisions, see PJI 2:225.

The time within which an action must be commenced under Public Authorities Law § 1276(2), governing suits against the MTA and its subsidiaries, constitutes a period of limitation that may be tolled or extended pursuant to CPLR 210(a) when the claimant dies before the expiration of the statute, *Trepel v Metropolitan Suburban Bus Authority*, 262 AD2d 552, 693 NYS2d 159 (2d Dept 1999).

New York has applied notice of claim provisions of other states as a matter of comity, *Crair v Brookdale Hosp. Medical Center*, 94 NY2d 524, 707 NYS2d 375, 728 NE2d 974 (2000).

a. PUBLIC PREMISES AND WAYS

PJI 2:225. Municipal Liability—Public Premises and Ways—No Prior Written Notice Requirement

As you have heard, the plaintiff, AB, claims that (he, she) was injured when (he, she) tripped and fell as a result of an unsafe condition, that is, a hole in the pavement at *[name location]*, that AB claims CD, *[name municipality]*, should have repaired. The law requires CD to maintain its streets and highways in reasonably safe condition for people who use them. AB must prove that CD was negligent in not maintaining *[name location]* in reasonably safe condition.

In order to recover, AB must establish: (1) that the *[identify allegedly defective area]* was not reasonably safe; (2) that CD did not exercise reasonable care in failing to repair the *[name defect]* or to take suitable precautions or to give adequate warning; and (3) that CD's failure to repair the *[name defect]* or to take suitable precautions or to give adequate warning was a substantial factor in causing injury to AB.

You must first consider whether the *[identify allegedly defective area]* was reasonably safe. AB claims that the *[identify allegedly defective area]* was not in a reasonably safe condition because *[state AB's claim]*. CD claims *[state CD's claim]*. If you decide that the *[identify allegedly defective area]* was reasonably safe, you will find for CD and proceed no further. If you decide that the *[identify allegedly defective area]* was not reasonably safe, you will proceed to consider whether CD was negligent in failing to repair or to take suitable precautions or to give adequate warning.

Negligence is the failure to use reasonable care. Reasonable care means that degree of care that a reasonably prudent property owner would use under the same circumstances. Negligence includes both a foreseeable danger of injury to an

other and conduct that is unreasonable in proportion to the danger.

In order to find that CD was negligent, you must find that (1) CD knew of the unsafe condition long enough before AB's injury to have permitted CD in the use of reasonable care to have it corrected, or to take other suitable precautions, or to give adequate warning, and it did not do so; or (2) CD did not know of the condition but in the use of reasonable care should have known of it in time to have corrected it (or taken other suitable precautions, or given adequate warning). If you find that CD did not know of the condition and that by the use of reasonable care would not have been able to discover and correct it, or if you find that CD knew of the unsafe condition but took suitable precautions or gave adequate warning, you will find that CD was not negligent.

If you find that CD was negligent, you must next consider whether that negligence was a substantial factor in causing AB's injury. An act or failure to act is a substantial factor in bringing about an injury if a reasonable person would regard it as a cause of the injury. If you find that CD's negligence was not a substantial factor in causing the injury, then AB may not recover (on this claim). If you find that CD's negligence was a substantial factor in causing AB's injury, you will proceed to consider [*state next appropriate step, e.g. comparative fault, damages, verdict*].

Comment

[*See also, Introductory Statement to this subdivision, supra.*]

Caveat 1: This charge is to be given only where the defendant municipality does not have an applicable prior written notice statute or ordinance, *Quinn v New York*, 305 AD2d 570, 761 NYS2d 231 (2d Dept 2003); see *Amabile v Buffalo*, 93 NY2d 471, 693 NYS2d 77, 715 NE2d 104 (1999). For charges to be used where the defendant municipality has such a statute or ordinance, see PJI 2:225A and 2:225B.

Caveat 2: Where prior written notice to the municipality of an unsafe condition is required the court must avoid charging the jury

with respect to actual or constructive notice, *Amabile v Buffalo*, 93 NY2d 471, 693 NYS2d 77, 715 NE2d 104 (1999); *Quinn v New York*, 305 AD2d 570, 761 NYS2d 231 (2d Dept 2003); *David v New York*, 267 AD2d 419, 700 NYS2d 235 (2d Dept 1999); see *Passaro v Newburgh*, 272 AD2d 385, 707 NYS2d 224 (2d Dept 2000). For a discussion of statutory rules requiring prior written notice and the two recognized exceptions to such rules, see the Comment to this section (I)(B), *infra*. For charges where there is a question of fact regarding compliance with a prior written notice requirement, see *infra* PJI 2:225A.

The charge should be used in a case involving an allegedly defective condition upon the state's or a municipality's public premises, ways, and facilities such as sidewalks, highways, schools, parks, surface and subsurface structures, etc., other than alleged defects consisting of the accumulation of snow and ice. For cases involving alleged defects consisting of snow and ice, see PJI 2:225C.

The above charge sets forth the rule that a governmental body, be it the state or a municipality, is under a continuing, nondelegable duty to maintain its public premises, ways, and facilities in a reasonably safe condition, and that liability will flow from injuries caused by a breach of that duty, even if the dangerous condition of the road, which caused the injury, is created by an independent contractor, *Lopes v Rostad*, 45 NY2d 617, 412 NYS2d 127, 384 NE2d 673 (1978); *McAllen v New York*, 270 AD2d 43, 704 NYS2d 48 (1st Dept 2000); but see *Melby v Duffy*, 304 AD2d 33, 758 NYS2d 89 (2d Dept 2003) (municipality's obligation to keep its ways in reasonably safe condition does not apply to waterways, exempt from the jurisdiction and control of the State, that are open to the public by virtue of their navigability). The source of the rule is statute and common law, *id.* The charge also sets forth the rule that no duty or liability arises unless the defendant had actual or constructive notice of the defective or dangerous condition, *Harris v East Hills*, 41 NY2d 446, 393 NYS2d 691, 362 NE2d 243 (1977). The charge defines actual notice as specific information about the defect that is directly and explicitly brought to the attention of the defendant's responsible agents. It defines constructive notice as the existence of the defect for such length of time that it can be inferred that the defendant or its responsible agents, in the exercise of due care, should have discovered the defect. That is in accordance with general principles of negligence law, which hold that, before a defendant may be held liable for a defective condition, plaintiff must show that defendant knew or should have known about the condition and could have taken steps to remedy it.

When the undisputed evidence establishes actual notice of the defect and ample time to repair, the issue of notice should not be submitted to the jury, *Schlam v New York*, 33 AD2d 1025, 308 NYS2d 122 (2d Dept 1970). Where there is evidence of constructive notice the issue is for the jury, *Blake v Albany*, 48 NY2d 875, 424 NYS2d 358, 400 NE2d 300 (1979). Notice may be proved in a variety of ways and it is error to

restrict plaintiff to proving notice only by evidence of prior similar accidents, *Gillooly v Onondaga*, 168 AD2d 921, 564 NYS2d 889 (4th Dept 1990). Photographs of the accident site, if taken reasonably close to the time of the occurrence when conditions are substantially the same, are admissible on the question of constructive notice, *Batton v Elghanayan*, 43 NY2d 898, 403 NYS2d 717, 374 NE2d 611 (1978); see *Zavaro v Westbury Property Inv. Co.*, 244 AD2d 547, 664 NYS2d 611 (2d Dept 1997). However, where photographs were taken four years after the accident, they were not admitted in evidence for the purpose of proving constructive notice of a defect, *Anis v Associated Restaurant Management Corp.*, 202 AD2d 459, 609 NYS2d 51 (2d Dept 1994). The jury may infer from the irregularity, width, depth, and appearance of the defect exhibited in the photograph that the condition existed for such length of time that defendant, in the exercise of reasonable care, should have known of it, *Reardon v Benderson Development Co., Inc.*, 266 AD2d 869, 697 NYS2d 893 (4th Dept 1999); *Taylor v New York City Transit Authority*, 48 NY2d 903, 424 NYS2d 888, 400 NE2d 1340 (1979); *Karten v New York*, 109 AD2d 126, 490 NYS2d 503 (1st Dept 1985); see *Hecker v New York City Housing Authority*, 245 AD2d 131, 665 NYS2d 660 (1st Dept 1997) (plaintiff described large defect). The absence of prior accidents, although not conclusive, is a factor to be considered by the jury not only with respect to notice but also in determining whether a dangerous condition existed, *Noskewicz v New York*, 155 AD2d 646, 548 NYS2d 237 (2d Dept 1989) (error to charge that absence of prior accidents required verdict for defendant); see *Zeigler v Wolfert's Roost Country Club*, 291 AD2d 609, 737 NYS2d 676 (3d Dept 2002). Actual notice may be established through admissions of defendant or its agents and constructive notice may be shown by proof that the defect was so obvious and existed for so long that the municipality should have discovered and corrected it, *id.* For additional comment concerning notice in premises liability cases, see PJI 2:90.2.

A defendant municipality may have a local law or ordinance that requires prior written notice of a defect as a condition to bringing an action to recover for injury resulting from the defect. In cases where such a local law or ordinance is applicable and there is a dispute as to whether its requirements have been satisfied, the following charge must be given.

**PJI 2:225A. State or Municipal Liability—Public
Premises and Ways—Prior Written Notice
Required**

As you have heard, the plaintiff, AB, claims that (he, she) was injured when (he, she) tripped and fell as a result of an unsafe condition, that is, a hole in the pavement at [name location], that AB claims CD [name municipality] should have repaired. The law requires CD to maintain its streets and

highways in reasonably safe condition for people who use them.

In order to recover for (his, her) injury, AB must first prove that on [state date], CD received written notice that there was a hole at the location where AB claims to have fallen. The written notice can come from any person or organization, but the notice must be specific enough for CD to know that there was a hole at a particular location. CD claims that ([state claim such as:] it did not receive any notice, the notice did not specify the location that AB claims was unsafe.)

If you find that CD did not receive prior written notice or that the written notice CD received did not identify the location and condition that AB claims caused (his, her) injury, you will proceed no further and report to the court.

If you find that CD received written notice identifying the location and condition, you will proceed to consider whether CD was negligent.

To prove that CD was negligent, AB must establish: (1) that the [identify allegedly defective area] was not reasonably safe; (2) that CD did not exercise reasonable care in failing to repair the [name defect] or to take suitable precautions or to give adequate warning; and (3) that CD's failure to repair the [name defect] or to take suitable precautions or to give adequate warning was a substantial factor in causing injury to AB.

You must first consider whether the [identify allegedly defective area] was reasonably safe. AB claims that the [identify allegedly defective area] was not in a reasonably safe condition because [state plaintiff's claim]. CD claims [state defendant's claim]. If you decide that the [identify allegedly defective area] was reasonably safe, you will proceed no further and report to the court. If you decide that the [identify allegedly defective area] was not reasonably safe, you will proceed to consider whether CD was negligent

in failing to repair the unsafe condition or to take suitable precautions or to give adequate warning.

Negligence is the failure to use reasonable care. Reasonable care means that degree of care that a reasonably prudent person would use under the same circumstances. You should consider whether CD received the written notice long enough before AB's injury to have repaired the condition, to have taken suitable precautions or to have given adequate warning. If you find that CD did not receive notice long enough before AB's injury to have repaired the condition or to have taken suitable precautions or to have given adequate warning or if you find that CD repaired the condition or took suitable precautions or gave adequate warning, you will proceed no further and report to the court.

If you find that CD did receive notice long enough before AB's injury to have repaired the condition or to have taken suitable precautions or to have given adequate warning and if you find that CD did not repair the condition or take suitable precautions or give adequate warning, you will find that CD was negligent. You must then consider whether that negligence was a substantial factor in causing AB's injury.

An act or failure to act is a substantial factor in bringing about an injury if a reasonable person would regard it as a cause of the injury. If you find that CD's negligence was not a substantial factor in causing the injury, you will proceed no further and report to the court. If you find that CD's negligence was a substantial factor in causing AB's injury, you will proceed to consider [*state next appropriate step, e.g. damages, verdict*].

Comment

Based on *Gorman v Huntington*, 12 NY3d 275, 879 NYS2d 379, 907 NE2d 292 (2009); *Poirier v Schenectady*, 85 NY2d 310, 624 NYS2d 555, 648 NE2d 1318 (1995); *Martin v Cohoes*, 37 NY2d 162, 371 NYS2d 687, 332 NE2d 867 (1975); *Doremus v Lynbrook*, 18 NY2d 362, 275 NYS2d

505, 222 NE2d 376 (1966); *Brooks v Binghamton*, 55 AD2d 482, 390 NYS2d 693 (3d Dept 1977).

I. In General

The purpose and practical effect of prior written notice provisions is to impose liability only for those defects or hazardous conditions of which the municipality has actual knowledge, *San Marco v Mount Kisco*, 16 NY3d 111, 919 NYS2d 459, 944 NE2d 1098 (2010); *Poirier v Schenectady*, 85 NY2d 310, 624 NYS2d 555, 648 NE2d 1318 (1995); *Martin v Cohoes*, 37 NY2d 162, 371 NYS2d 687, 332 NE2d 867 (1975). Such provisions represent a recognition that municipal officials cannot be aware of every dangerous condition on public streets and walkways, yet are responsible for repairs once notified, *Gorman v Huntington*, 12 NY3d 275, 879 NYS2d 379, 907 NE2d 292 (2009); *Amabile v Buffalo*, 93 NY2d 471, 693 NYS2d 77, 715 NE2d 104 (1999); *Poirier v Schenectady*, *supra*; see *San Marco v Mount Kisco*, *supra*. Prior written notice laws do not apply to private entities, even where such entities are contractually obligated to provide services to municipalities, *Karac v Elmira*, 14 AD3d 842, 788 NYS2d 456 (3d Dept 2005). Nor do prior written notice laws apply to defects in municipally-owned property that has been leased to another entity, *Dick v Wappinger*, 63 AD3d 661, 880 NYS2d 180 (2d Dept 2009). In such situations, the municipality is functioning in a proprietary capacity and is therefore subject to the same tort principles as a private landlord, *id.* Enacted in derogation of common law, prior written notice provisions are “always strictly construed,” *Gorman v Huntington*, 12 NY3d 275, 879 NYS2d 379, 907 NE2d 292 (2009). Care must be taken to distinguish notice of defect requirements from notice of claim requirements applicable to certain actions against the State and its political subdivisions.

Actual or constructive notice of the defect ordinarily is not a substitute for compliance with prior written notice statutes, *Amabile v Buffalo*, 93 NY2d 471, 693 NYS2d 77, 715 NE2d 104 (1999); *Pagillo v Oneonta*, 25 AD3d 1044, 807 NYS2d 489 (3d Dept 2006); *Oswald v Niagara Falls*, 13 AD3d 1155, 787 NYS2d 757 (4th Dept 2004); *Quinn v New York*, 305 AD2d 570, 761 NYS2d 231 (2d Dept 2003); but see *Norton v Endicott*, 280 AD2d 853, 720 NYS2d 412 (3d Dept 2001) (recognizing actual or constructive notice exception to prior written notice requirement in denying defendant Village’s motion for summary judgment dismissing complaint). However, a prior written notice provision adopted by a county does not eliminate liability under Highway Law § 139(2), which allows for tort recovery for dangerous highway conditions where such conditions existed for so long a period that it should have been discovered and remedied in the exercise of reasonable care and diligence, *Phillips v Nassau*, 50 AD3d 755, 856 NYS2d 172 (2d Dept 2008); see *Loughren v Ulster*, 75 AD3d 976, 906 NYS2d 384 (3d Dept 2010). Thus, even in the absence of prior written notice, a county may be liable for dangerous highway conditions of which the county had constructive notice, *Napolitano v Suffolk County Dept. of Public Works*, 65 AD3d 676, 884 NYS2d 484 (2d Dept 2009); *Moxey v Westchester*, 63 AD3d

1124, 883 NYS2d 80 (2d Dept 2009); *Phillips v Nassau*, supra; *Goldburdt v Nassau*, 307 AD2d 1019, 763 NYS2d 776 (2d Dept 2003). It should be noted that, by its own terms, the exception provided in Highway Law § 139(2) does not extend to accidents resulting solely from the existence of snow or ice on a highway, bridge or culvert, *Napolitano v Suffolk County Dept. of Public Works*, supra. If a prior written notice statute is applicable, actual notice of the obstruction does not obviate the necessity for prior written notice, *Delcamp v Brocton*, 270 AD2d 842, 705 NYS2d 150 (4th Dept 2000).

Generally, prior written notice provisions require a showing that such notice was given to defendant through its responsible agents as a condition precedent to the imposition of liability, *Acevedo v New York*, 128 AD2d 488, 512 NYS2d 414 (2d Dept 1987). Prior notice means notice prior to plaintiff's injury, *Barry v Niagara Frontier Transit System, Inc.*, 35 NY2d 629, 364 NYS2d 823, 324 NE2d 312 (1974). Plaintiff must also show that defendant failed to remedy the defect within a reasonable time after receiving written notice, *Poirier v Schenectady*, 85 NY2d 310, 624 NYS2d 555, 648 NE2d 1318 (1995).

Where applicable, the requirement of prior written notice is not a mere procedural requirement, or an affirmative defense, but a substantive element of plaintiff's cause of action, *Cipriano v New York*, 96 AD2d 817, 465 NYS2d 564 (2d Dept 1983). Plaintiff must plead and prove compliance with the written notice requirement as a condition precedent to suit, *Katz v New York*, 87 NY2d 241, 638 NYS2d 593, 661 NE2d 1374 (1995); *Shepardson by Shepardson v Schodack*, 83 NY2d 894, 613 NYS2d 850, 636 NE2d 1383 (1994); *Becker v New York*, 131 AD2d 413, 516 NYS2d 225 (2d Dept 1987); *Acevedo v New York*, 128 AD2d 488, 512 NYS2d 414 (2d Dept 1987). Written notice requirements pertain equally to direct claims, cross claims, and third party claims, *Barry v Niagara Frontier Transit System, Inc.*, 35 NY2d 629, 364 NYS2d 823, 324 NE2d 312 (1974); *Banta v Erie*, 134 AD2d 839, 521 NYS2d 589 (4th Dept 1987); *Powell v Gates-Chili Central School Dist.*, 50 AD2d 1079, 376 NYS2d 332 (4th Dept 1975), as well as to claims by police officers brought under General Municipal Law § 205-e, *Montalvo v New York*, 46 AD3d 772, 848 NYS2d 330 (2d Dept 2007). Additionally, the prior written notice requirement is applicable without regard to whether plaintiff's underlying legal theory rests on negligence or breach of contract, *Davidson v Chili*, 35 AD3d 1246, 827 NYS2d 795 (4th Dept 2006) (claim based on alleged breach of municipality's contractual duty to erect snow fences).

There has been an inconsistent approach within and among the appellate departments with respect to the application of the prior written notice rule as it applies in the burden-shifting framework of a defendant's motion for summary judgment, see *Smith v New York*, 175 NYS3d 529 (2d Dept 2022). Prior to *Smith v New York*, supra, the Second Department had held that, in a prior written notice case, the prima facie burden of a defendant moving for summary judgment is governed by the allegations in the pleadings, *Nigro v Mamaroneck*, 184

AD3d 842, 124 NYS3d 549 (2d Dept 2020). Thus, under one line of cases in the Second Department pre-dating *Smith*, it had been held that where a complaint and bill of particulars allege that the defendant municipality affirmatively created the defect that caused the accident, to meet its prima facie burden for summary judgment, the defendant must demonstrate both that it did not have prior written notice of the defect and that it did not create the defect, *Nigro v Mamaroneck*, supra; *McManus v Klein*, 136 AD3d 700, 24 NYS3d 205 (2d Dept 2016); *Miller v East Hampton*, 98 AD3d 1007, 951 NYS2d 171 (2d Dept 2012); see *Beiner v Scarsdale*, 149 AD3d 679, 51 NYS3d 578 (2d Dept 2017). In another line of cases within the Second Department, it had been held that a municipal defendant satisfies its prima facie burden on a motion for summary judgment by demonstrating that it lacked prior written notice, shifting the burden to the plaintiff to demonstrate the applicability of one of the two recognized exceptions, i.e., that the defendant affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the defendant, see *Smith v New York*, 175 NYS3d 529 (2d Dept 2022) (recognizing the split within the Second Department); see also *Thompson v Nassau*, 200 AD3d 823, 160 NYS3d 274 (2d Dept 2021); *Torres v Rockville Centre*, 195 AD3d 974, 146 NYS3d 519 (2d Dept 2021); *Lichtman v Kiryas Joel*, 90 AD3d 1001, 935 NYS2d 331 (2d Dept 2011). In *Smith v New York*, supra, the Second Department held that notwithstanding allegations in the complaint asserting the applicability of either of the two recognized exceptions to the prior written notice rule, the defendant municipality meets its prima facie burden on summary judgment by establishing that it was not given prior written notice, shifting the burden to the plaintiff to demonstrate the applicability of an exception to the prior written notice rule, *id.* In so doing, the Second Department overruled its line of cases holding to the contrary, *id.*

The Fourth Department likewise holds that a municipality moving for summary judgment on a defense of lack of written notice meets its prima facie burden merely by demonstrating that it did not receive prior written notice in the manner prescribed by its law, which then shifts the burden to the plaintiff to raise a triable issue of fact as to the existence of the requisite written notice or a judicially-recognized exception, i.e., that the municipality created the defect or that a special use resulted in a special benefit to the locality, *Horst v Syracuse*, 191 AD3d 1297, 141 NYS3d 205 (4th Dept 2021).

The First Department has generally followed an approach that aligns with the Second and Fourth Department's, see *Correa v Mana Construction Group Ltd.*, 192 AD3d 555, 146 NYS3d 5 (1st Dept 2021); *Bania v New York*, 157 AD3d 612, 70 NYS3d 183 (1st Dept 2018); *Flynn v New York*, 154 AD3d 488, 61 NYS3d 483 (1st Dept 2017); but see *O'Connor v Tishman Construction Corporation*, 182 AD3d 502, 123 NYS3d 91 (1st Dept 2020) (denying City defendants' motion for summary judgment because they failed to demonstrate that their employees did not cause or create the alleged defect); *Bisulco v Bisulco v New York*, 186 AD2d 84, 588 NYS2d 26 (1st Dept 1992) (City defendants'

motion claiming lack of prior written notice was “inapplicable” to cause of action alleging creation of defective condition). The Third Department has held that where the complaint does not allege that the municipality created the defect, the defendant’s prima facie burden on summary judgment is met simply by establishing lack of prior written notice, *Cornish v Ithaca*, 149 AD3d 1321, 52 NYS3d 565 (3d Dept 2017). Notably, however, the Third Department has expressly left open the question of the scope of a defendant’s initial burden where the plaintiff has pleaded liability based upon an exception to the written notice requirement, *Chance v Ulster*, 144 AD3d 1257, 41 NYS3d 313 (3d Dept 2016).

II. Operation and Scope of Written Notice Requirements

Local prior-written-notice laws and ordinances are predicated on a number of state statutes. Thus, their scope, operation and applicability in a given action depends on the specific wording of the enabling state legislation. Some of the state statutes are self-executing in that they do not contemplate enactment of a local law to implement the notice of defect requirement. A municipality may enact a local prior written notice law or ordinance that supersedes but is not inconsistent with a self-executing state statute, Municipal Home Rule Law § 10(1); see *Walker v Hempstead*, 84 NY2d 360, 618 NYS2d 758, 643 NE2d 77 (1994); *Bacon v Arden*, 244 AD2d 940, 665 NYS2d 154 (4th Dept 1997); *Zash v Nassau*, 171 AD2d 743, 567 NYS2d 299 (2d Dept 1991); *Canzano v Gates*, 85 AD2d 878, 446 NYS2d 746 (4th Dept 1981); *Klimek v Ghent*, 71 AD2d 359, 423 NYS2d 517 (3d Dept 1979). The Legislature has not prohibited towns from enacting a more restrictive notice requirement than that contained in Town Law § 65-a, but the statute’s notice requirements cannot be extended to defects other than surface defects or obstructions, *Fulgum v Cortlandt*, 2 AD3d 775, 770 NYS2d 416 (2d Dept 2003); see *Wall v Niskayuna*, 14 AD3d 988, 788 NYS2d 520 (3d Dept 2005); *Bacon v Arden*, 244 AD2d 940, 665 NYS2d 154 (4th Dept 1997). Both the statute and any applicable local law must be consulted, and the constitutionality of local laws, as being beyond the municipality’s authority to supersede, must be considered on a case-by-case basis, compare *Walker v Hempstead*, 84 NY2d 360, 618 NYS2d 758, 643 NE2d 77 (1994) and *Fitzpatrick v Barone*, 215 AD2d 351, 626 NYS2d 220 (2d Dept 1995), with *Holt v Tioga*, 56 NY2d 414, 452 NYS2d 383, 437 NE2d 1140 (1982).

The statutes that are not self-executing merely permit the municipality to provide, by appropriate local law, that no civil action may be maintained unless prior written notice was given. In either instance, the general scope, operation, and applicability of the notice requirement are functions of the statute and any local law implementing or purporting to supersede the statute. The most frequently invoked local law is New York City Administrative Code, § 7-201(c)(2), the New York City “Pothole Law.”

The statutes, their general scope, and whether they are self-executing are as follows:

Highway Law § 139	Counties	Non self-executing
General Municipal Law § 50-g(1)	Cities	Non self-executing
General Municipal Law § 71-b(1)	All municipalities	Self-executing
Town Law § 65-a(1), (2)	Towns	Self-executing
Village Law § 6-628	Villages	Self-executing
CPLR 9804	Villages	Self-executing
Second Class Cities Law § 244	Second Class Cities	Non self-executing

Village Law § 6-628 and CPLR 9804 are identical in their terms and prohibit a civil action against a village for damages sustained in consequence of enumerated defects unless the village clerk receives written notice thereof and the village fails to remove the obstruction within a reasonable time after receipt of such notice. General Municipal Law § 71-b has limited applicability because it is restricted to cases of injuries arising from operation of snowmobiles and allows either prior written notice or constructive notice. Likewise, Town Law § 65-a allows either prior written notice or constructive notice as to enumerated defects other than sidewalk defects and snow and ice accumulation, *Adam v Oneonta*, 217 AD2d 894, 629 NYS2d 857 (3d Dept 1995); *Linder v Babylon*, 187 AD2d 568, 590 NYS2d 134 (2d Dept 1992); *Ferris v Suffolk*, 174 AD2d 70, 579 NYS2d 436 (2d Dept 1992); *Schmalenberger v Brookhaven*, 28 AD2d 536, 279 NYS2d 390 (2d Dept 1967); see *Albanese v Hempstead*, 176 AD2d 697, 574 NYS2d 788 (2d Dept 1991) (dismissing plaintiff's action where Town undisputedly established it had not received written notice of alleged dangerous condition of snow and ice as required by Town Law § 65-a(1)). Similarly, Highway Law § 139 allows either prior written notice or constructive notice for enumerated defects other than snow and ice accumulation, *Napolitano v Suffolk County Dept. of Public Works*, 65 AD3d 676, 884 NYS2d 484 (2d Dept 2009); *Moxey v Westchester*, 63 AD3d 1124, 883 NYS2d 80 (2d Dept 2009); *Tanner W. by Leone v Onondaga*, 225 AD2d 1074, 639 NYS2d 598 (4th Dept 1996); *Piscione v Oneida*, 159 AD2d 982, 552 NYS2d 759 (4th Dept 1990). Actual or constructive notice cannot substitute for a written notice where the condition of the highway involves snow or ice, *Piscione v Oneida*, supra; see *Conroy v Cattaraugus*, 176 AD2d 1228, 576 NYS2d 723 (4th Dept 1991), or a defective drainage system on the street, *Braun v New Square*, 3 AD3d 513, 770 NYS2d 743 (2d Dept 2004). Where there has been no prior written notice of a claimed defect, a village may not be held liable for the mere passive failure to remove snow and ice from its municipal parking lot, *DiPaolo v Tuckahoe*, 253 AD2d 841, 678 NYS2d 368 (2d Dept 1998); *Zwieli v Freeport*, 208 AD2d 920, 617 NYS2d 871 (2d Dept 1994).

III. Applicability of Enabling Statutes to Certain Defects and Locations

By their terms, the statutes require written notice of defects, or permit municipalities to enact such requirements by local law, with respect to specifically enumerated categories of defects at specifically enumerated locations as follows:

Highway, bridge, culvert	Highway Law § 139(2)
Street, highway, bridge, culvert, sidewalk, crosswalk	General Municipal Law § 50-g(1)
Highway, bridge, culvert, sidewalk	Town Law § 65-a(1), (2)
Street, highway, bridge, culvert, sidewalk, crosswalk	Village Law § 6-628 and CPLR 9804
Street, highway, bridge, culvert, sidewalk, crosswalk	Second Class Cities Law § 244
Street, highway, bridge, wharf, culvert, sidewalk crosswalk	New York City Administrative Code § 7-201(c)(2)

Such statutes are strictly construed against the municipality with respect to their applicability to certain categories of defects, *Poirier v Schenectady*, 85 NY2d 310, 624 NYS2d 555, 648 NE2d 1318 (1995); *Laing v New York*, 71 NY2d 912, 528 NYS2d 530, 523 NE2d 816 (1988). The courts will not extend the applicability of these statutes beyond their express terms, *Doremus v Lynbrook*, 18 NY2d 362, 275 NYS2d 505, 222 NE2d 376 (1966), nor will they be read in an “artificial, forced, or unnatural” or “strained” manner that might defeat their obvious intent, *Zigman v Hempstead*, 120 AD2d 520, 501 NYS2d 718 (2d Dept 1986); *Freeman v Nassau*, 95 AD2d 363, 466 NYS2d 684 (2d Dept 1983).

Whether a particular site is covered by the above-described written notice statutes depends upon whether the site shares the same functional purpose as the types of sites that are specifically enumerated, *Smith v Hancock*, 25 AD3d 975, 809 NYS2d 589 (3d Dept 2006); see *Hinton v Pulaski*, 33 NY3d 931, 98 NYS3d 534, 122 NE3d 51 (2019); *Groninger v Mamaroneck*, 17 NY3d 125, 927 NYS2d 304, 950 NE2d 908 (2011). “Streets” and “sidewalks” include steps, *Loiaconi v Tarrytown*, 36 AD3d 864, 829 NYS2d 191 (2d Dept 2007), or curbs, as well as the grassy area between the sidewalk and curb, *LoCurto v New York*, 2 AD3d 277, 770 NYS2d 25 (1st Dept 2003); *Malone v Southold*, 303 AD2d 651, 757 NYS2d 85 (2d Dept 2003); *Castiglione v Ellenville*, 291 AD2d 769, 738 NYS2d 443 (3d Dept 2002); *Hall v Syracuse*, 275 AD2d 1022, 713 NYS2d 384 (4th Dept 2000); *Zizzo v New York*, 176 AD2d 722, 574 NYS2d 966 (2d Dept 1991), and boardwalks, *Groninger v Mamaroneck*, 17 NY3d 125, 927 NYS2d 304, 950 NE2d 908 (2011); *Guiliano v Brookhaven*, 34 AD3d 734, 826 NYS2d 100 (2d Dept 2006). The New York City Administrative Code properly defines “sidewalk” as including “a boardwalk, underpass, pedestrian walk or path, step and stairway,” *Woodson v New York*, 93 NY2d 936, 693 NYS2d 69, 715 NE2d 96 (1999). Thus, when stairs are integrated with, or serve as part of, a connected standard sidewalk, they fall within the meaning of the term “sidewalk” in General Municipal Law § 50-(e)(4), *Woodson v New York*, 93 NY2d 936, 693 NYS2d 69, 715, 715 NE2d 96 (1999); see *Hinton v Pulaski*,

supra (stairway may be classified as sidewalk for purposes of a prior written notice statute if it functionally fulfills same purpose that standard sidewalk would serve). However, an unimproved trail or path in a municipal park, *Quackenbush v Buffalo*, 43 AD3d 1386, 842 NYS2d 657 (4th Dept 2007), is not the functional equivalent of a sidewalk under that statute.

The term “highways” includes parking lots and boardwalks, *Walker v Freeport*, 52 AD3d 697, 860 NYS2d 188 (2d Dept 2008); *Amarante v Tarrytown*, 226 AD2d 488, 640 NYS2d 619 (2d Dept 1996); *Mendes v Whitney-Floral Realty Corp.*, 216 AD2d 540, 629 NYS2d 63 (2d Dept 1995); *Ferris v Suffolk*, 174 AD2d 70, 579 NYS2d 436 (2d Dept 1992); see *Tuzzolo v Hempstead*, 292 AD2d 446, 738 NYS2d 692 (2d Dept 2002) (parking fields are “highways” under prior written notice statutes), as well as public parking garages, *Peters v White Plains*, 58 AD3d 824, 872 NYS2d 502 (2d Dept 2009). Ordinarily, a municipal parking lot is considered a “highway” because it is a place where the general public has a general right of passage, *Groninger v Mamaroneck*, 17 NY3d 125, 927 NYS2d 304, 950 NE2d 908 (2011); *Tuzzolo v Hempstead*, supra; *Lauria v New Rochelle*, 225 AD2d 1013, 639 NYS2d 867 (3d Dept 1996). However, an area that was no longer a portion of the street intended for pedestrian use or the functional equivalent of a crosswalk is not a “highway” to which the written notice provisions of the Village Law are applicable, *Smith v Hancock*, 25 AD3d 975, 809 NYS2d 589 (3d Dept 2006). In *Gutierrez v Ramapo*, 210 AD2d 636, 619 NYS2d 840 (3d Dept 1994), the court held that although a dirt shoulder did not constitute part of the “roadway,” it constituted a part of the “highway” for purposes of a town’s written notice statute, see *Slate v Antwerp*, 278 AD2d 857, 721 NYS2d 431 (4th Dept 2000) (requirements of Town Law § 65-a(1) applied to gravel road); see also *Murine v Utica*, 39 AD3d 1237, 834 NYS2d 761 (4th Dept 2007) (notice requirements authorized by Second Class Cities Law § 244 applicable to driveway located in city-owned park). In *Bang v Smithtown*, 291 AD2d 516, 738 NYS2d 72 (2d Dept 2002), the court found that the guardrail over which the plaintiff fell constituted an appurtenance of the adjacent parking lot, subjecting the claims to the notice requirements of Town Law § 65(a)(1). However, defendant village was not entitled to summary judgment dismissing the complaint for lack of prior written notice where the accident was allegedly caused by an anchor protruding from the ground adjacent to a municipal parking lot and defendant failed to establish that the area was considered part of the parking lot or that the area served a function similar to the parking lot, *Staudinger v Granville*, 304 AD2d 929, 758 NYS2d 415 (3d Dept 2003).

An attempt by a municipality to expand the prior written notice requirement in General Municipal Law § 50-(e)(4) to locations other than “streets, highways, bridges, culverts, sidewalks, or crosswalks” is not permissible, *Walker v Hempstead*, 84 NY2d 360, 618 NYS2d 758, 643 NE2d 77 (1994) (invalidating town code provision requiring written notice of defect in parking field, beach area, swimming pool, playground, skating rink or park); *Newman v Glens Falls*, 256 AD2d 1012, 682

NYS2d 314 (3d Dept 1998) and *Hughes v Niagara Falls*, 225 AD2d 1059, 639 NYS2d 609 (4th Dept 1996) (to extent that city charter provision purported to impose prior written notice requirement for defective condition of tree, provision was invalid); *Tyner v Buffalo*, 152 AD2d 978, 543 NYS2d 794 (4th Dept 1989) (city ordinance requiring written notice of defective traffic controls or signals invalid); *Mahoney v Oyster Bay*, 71 AD2d 879, 419 NYS2d 652 (2d Dept 1979) (skating rink); see also *Groninger v Mamaroneck*, 17 NY3d 125, 927 NYS2d 304, 950 NE2d 908 (2011); but see *Forsythe-Kane v Yorktown*, 249 AD2d 505, 672 NYS2d 355 (2d Dept 1998) (overgrown foliage constituted obstruction of “street” or “highway” pursuant to GML § 50-e(4)). Such attempts have been invalidated under the state constitution as beyond the supersession authority of the municipality, see *Walker v Hempstead*, supra; *Tyner v Buffalo*, supra; see generally General Municipal Law § 50-e(4) (providing that “no other or further notice . . . shall be required as a condition to the commencement of an action or a special proceeding for the enforcement of the claim”).

A prior written notice requirement does not apply to defects other than surface defects or actual obstructions in streets, sidewalks, and the like, *Hughes v Jahoda*, 75 NY2d 881, 554 NYS2d 467, 553 NE2d 1015 (1990) (improperly placed and unguarded utility pole); *Alexander v Eldred*, 63 NY2d 460, 483 NYS2d 168, 472 NE2d 996 (1984) (lack of stop sign); *Doremus v Lynbrook*, 18 NY2d 362, 275 NYS2d 505, 222 NE2d 376 (1966) (unrepaired stop sign); *Madden ex rel. Madden v Greene*, 64 AD3d 1117, 883 NYS2d 392 (3d Dept 2009) (guardrail design and installation); *Murine v Utica*, 39 AD3d 1237, 834 NYS2d 761 (4th Dept 2007) (inadequate illumination of park driveway following public fireworks display); *Prendergast v Cosco*, 4 AD3d 880, 771 NYS2d 470 (4th Dept 2004) (faded pavement markings); *Fulgum v Cortlandt*, 2 AD3d 775, 770 NYS2d 416 (2d Dept 2003) (latent structural defect in bridge that had allegedly been negligently inspected, maintained and repaired); *Lugo ex rel. Lugo v Essex*, 260 AD2d 711, 687 NYS2d 475 (3d Dept 1999) (lack of guardrail); *Bova v Saratoga*, 258 AD2d 748, 685 NYS2d 834 (3d Dept 1999) (failure to maintain or erect traffic signs and to construct impact absorbing barricade); *Forsythe-Kane v Yorktown*, 249 AD2d 505, 672 NYS2d 355 (2d Dept 1998) (lack of stop sign); *Akley v Clemons*, 237 AD2d 780, 655 NYS2d 149 (3d Dept 1997) (failure to erect advance warning or reduced speed signs); *Cracas v Zisko*, 204 AD2d 382, 612 NYS2d 55 (2d Dept 1994) (burned out streetlight); see *Craig v Richmond*, 122 AD3d 1429, 997 NYS2d 566 (4th Dept 2014) (prior written notice required of lack of sign warning motorists of condition of pavement).

A street or highway is obstructed if there is any hindrance or obstacle to passage, *Freeman v Nassau*, 95 AD2d 363, 466 NYS2d 684 (2d Dept 1983); *Johnstown Leather Corp. v Gloversville*, 56 AD2d 345, 393 NYS2d 89 (3d Dept 1977). It is not necessary to show that an obstruction was rooted in or set upon the surface, *Freeman v Nassau*, supra. For example, a written notice requirement was applied where the defect consisted of a protruding traffic sign post anchor on the sidewalk, *Amabile*

v Buffalo, 93 NY2d 471, 693 NYS2d 77, 715 NE2d 104 (1999); Poirier v Schenectady, 85 NY2d 310, 624 NYS2d 555, 648 NE2d 1318 (1995); Freeman v Nassau, 95 AD2d 363, 466 NYS2d 684 (2d Dept 1983), low hanging tree branches obstructing a sidewalk or street, Monteleone v Floral Park, 74 NY2d 917, 550 NYS2d 257, 549 NE2d 459 (1989); Bounauito v William Floyd School Dist., 203 AD2d 225, 609 NYS2d 661 (2d Dept 1994) (visibility at intersection obstructed by overgrown foliage); Johnstown Leather Corp. v Gloversville, 56 AD2d 345, 393 NYS2d 89 (3d Dept 1977), an oily surface on a roadway, Estrada v New York, 273 AD2d 194, 709 NYS2d 105 (2d Dept 2000); Baez v New York, 236 AD2d 305, 653 NYS2d 926 (1st Dept 1997), garbage bags obstructing a pedestrian overpass, Min Whan Ock v New York, 34 AD3d 542, 824 NYS2d 651 (2d Dept 2006), sidewalk debris, Almodovar v New York, 240 AD2d 523, 658 NYS2d 446 (2d Dept 1997), and snow or ice on a roadway or sidewalk, Wall v Niskayuna, 14 AD3d 988, 788 NYS2d 520 (3d Dept 2005); Ravina v Greenburgh, 6 AD3d 688, 775 NYS2d 164 (2d Dept 2004); Peloso v Putnam, 6 AD3d 411, 774 NYS2d 355 (2d Dept 2004). The fact that the condition may have been transitory does not in itself preclude applicability of the prior written notice requirement, Min Whan Ock v New York, 34 AD3d 542, 824 NYS2d 651 (2d Dept 2006); Estrada v New York, 273 AD2d 194, 709 NYS2d 105 (2d Dept 2000).

The cases differ concerning whether obstruction of sight lines, as by vegetation, is a defect within the meaning of the statutes. Vegetation that obstructs a view of an intersection has been found to be a defect requiring written notice, Forsythe-Kane v Yorktown, 249 AD2d 505, 672 NYS2d 355 (2d Dept 1998); Federoff v Camperlengo, 215 AD2d 806, 626 NYS2d 301 (3d Dept 1995); see Bacon v Arden, 244 AD2d 940, 665 NYS2d 154 (4th Dept 1997) (grass, weeds and foliage within right of way at corner of intersection is defect requiring prior written notice), whereas vegetation that obstructs a traffic sign does not require prior written notice because prior written notice laws do not apply to claims of defective traffic signs, DiSanto v Islip, 212 AD2d 500, 622 NYS2d 313 (2d Dept 1995); Torres by Colon v Galvin, 189 AD2d 870, 592 NYS2d 788 (2d Dept 1993); see Doremus v Lynbrook, 18 NY2d 362, 275 NYS2d 505, 222 NE2d 376 (1966); Fitzpatrick v Barone, 215 AD2d 351, 626 NYS2d 220 (2d Dept 1995); De Francisci v Baron, 97 AD2d 453, 467 NYS2d 419 (2d Dept 1983). The temporary illegal presence of a parked vehicle is not an obstruction within the meaning of an ordinance requiring prior written notice, Lopez v New York City Housing Authority, 149 AD2d 342, 539 NYS2d 749 (1st Dept 1989), whereas the presence of an abandoned vehicle may qualify as an obstruction requiring prior written notice, Lee v New York, 193 AD2d 787, 598 NYS2d 273 (2d Dept 1993).

Generally, the distinction is between defective conditions that would ordinarily come to the attention of municipal officials absent written notice, and those which would not, Hughes v Jahoda, 75 NY2d 881, 554 NYS2d 467, 553 NE2d 1015 (1990); Monteleone v Floral Park, 74 NY2d 917, 550 NYS2d 257, 549 NE2d 459 (1989); Doremus v Lynbrook, 18 NY2d 362, 275 NYS2d 505, 222 NE2d 376 (1966); Fulgum v Cortlandt, 2 AD3d 775, 770 NYS2d 416 (2d Dept 2003).

IV. Exceptions to Prior Written Notice Requirements

The Court of Appeals has recognized only two exceptions to the statutory rule requiring prior written notice: (1) where the locality created the defect or hazard through an affirmative act of negligence; or (2) where a “special use” confers a special benefit upon the locality, *Oboler v New York*, 8 NY3d 888, 832 NYS2d 871, 864 NE2d 1270 (2007); *Amabile v Buffalo*, 93 NY2d 471, 693 NYS2d 77, 715 NE2d 104 (1999). In *Gorman v Huntington*, 12 NY3d 275, 879 NYS2d 379, 907 NE2d 292 (2009), the Court of Appeals observed that even assuming a “third exception” might be recognized under estoppel principles where the municipality’s conduct misled the injured plaintiff, such an exception could not be invoked where the party who relied on the municipality’s misleading conduct or statements was the person who provided the written notice rather than the person who was ultimately injured.

The primary exception occurs when a municipality’s affirmative acts of negligence create or cause the defective condition complained of, as illustrated by the following cases: *San Marco v Mount Kisco*, 16 NY3d 111, 919 NYS2d 459, 944 NE2d 1098 (2010) (icy condition caused by municipality’s negligent snow removal efforts); *Kiernan v Thompson*, 73 NY2d 840, 537 NYS2d 122, 534 NE2d 39 (1988) (broken sidewalk caused by city’s removal of tree); *Parks v Hutchins*, 162 AD2d 666, 557 NYS2d 389 (2d Dept 1990), *aff’d*, 78 NY2d 1049, 576 NYS2d 84, 581 NE2d 1339 (1991) (negligent construction of road); *Muszynski v Buffalo*, 33 AD2d 648, 305 NYS2d 163 (4th Dept 1969), *aff’d*, 29 NY2d 810, 327 NYS2d 368, 277 NE2d 414 (1971) (negligent placement of barrel of salt that leaked and corroded sidewalk); *Urban v Albany*, 90 AD3d 1132, 933 NYS2d 457 (3d Dept 2011) (icy condition caused by municipality’s negligent snow removal); *Benty v First Methodist Church of Oakfield*, 24 AD3d 1189, 807 NYS2d 771 (4th Dept 2005) (sidewalk reconstruction project allegedly conducted in negligent manner, allowing water to pool and creating risk of ice formation); *Hepburn v Croce*, 295 AD2d 475, 744 NYS2d 458 (2d Dept 2002) (negligent oversanding of road); *Cruz v New York*, 218 AD2d 546, 630 NYS2d 523 (1st Dept 1995); *Davis by Davis v Cohoes*, 131 AD2d 907, 516 NYS2d 358 (3d Dept 1987) (negligent construction of sidewalk); *Lacey v Horan*, 119 AD2d 806, 501 NYS2d 434 (2d Dept 1986) (negligent installation of guardrail); *Rooney v Long Beach*, 42 AD2d 34, 345 NYS2d 66 (2d Dept 1973) (negligent installation of water valve above sidewalk); *Calkins v Plattsburgh*, 11 AD2d 153, 204 NYS2d 453 (3d Dept 1960) (path through snow bank negligently cut by city plows); see *Poirier v Schenectady*, 85 NY2d 310, 624 NYS2d 555, 648 NE2d 1318 (1995); but see *LoCurto v New York*, 2 AD3d 277, 770 NYS2d 25 (1st Dept 2003) (siting of parking meter on grassy area between curb and sidewalk not “affirmative act” causing dangerous condition, a hole in grass, where hole could have been caused by unrelated pedestrian traffic or normal deterioration). This exception applies whether the defect was affirmatively created by the municipality or by a private contractor working at the municipality’s behest, *Ricciuti v Tuckahoe*, 202 AD2d 488, 609 NYS2d 54 (2d Dept 1994); *Rooney v Long Beach*, 42 AD2d 34, 345 NYS2d 66 (2d Dept 1973). Under

such circumstances, plaintiff is under no burden to plead or prove notice, including prior written notice pursuant to the statute and/or local law, *Kiernan v Thompson*, 73 NY2d 840, 537 NYS2d 122, 534 NE2d 39 (1988); *Brabender v Northport*, 222 AD2d 477, 634 NYS2d 755 (2d Dept 1995); *Bisulco by Bisulco v New York City*, 186 AD2d 84, 588 NYS2d 26 (1st Dept 1992).

The exception is limited to work by the City or its retained contractors that immediately resulted in the creation of a dangerous condition, *Yarborough v New York*, 10 NY3d 726, 853 NYS2d 261, 882 NE2d 873 (2008); *Oboler v New York*, 8 NY3d 888, 832 NYS2d 871, 864 NE2d 1270 (2007); *Lopez v G & J Rudolph Inc.*, 20 AD3d 511, 799 NYS2d 254 (2d Dept 2005); *Bielecki v New York*, 14 AD3d 301, 788 NYS2d 67 (1st Dept 2005), overruling *Torres v New York*, 306 AD2d 191, 762 NYS2d 67 (1st Dept 2003); see also *San Marco v Mount Kisco*, 16 NY3d 111, 919 NYS2d 459, 944 NE2d 1098 (2010). Thus, the exception for affirmative acts cannot be invoked for allegedly negligent repairs, such as street re-paving or pothole repairs, which result in deterioration and the emergence of dangerous conditions over time, *Yarborough v New York*, *supra* (pothole repair); *Lopez v G & J Rudolph Inc.*, *supra* (sidewalk repair); *Bielecki v New York*, *supra*; see *Gold v Westchester*, 15 AD3d 439, 790 NYS2d 675 (2d Dept 2005); see also *San Marco v Mount Kisco*, *supra*; *Kushner v Albany*, 27 AD3d 851, 811 NYS2d 796 (3d Dept 2006) (declining to adopt First Department's rationale in *Bielecki*, but holding that ineffectual pothole repair that does not make condition worse not affirmative act of negligence), *aff'd*, 7 NY3d 726, 818 NYS2d 182, 850 NE2d 1157 (2006). The immediacy requirement articulated in *Yarborough*, *Oboler* and their progeny—cases that generally involve defective or hazardous conditions arising from road construction or repair—does not apply to cases involving hazards related to negligent snow removal, *San Marco v Mount Kisco*, *supra*. The rationale for the immediacy requirement for defective or hazardous conditions arising from road construction or repair is that it may be difficult, after the passage of time, to determine the cause of a particular condition, e.g. whether the condition was caused by the initial construction or repair, by wear and tear of traffic, by long-term exposure to the elements, *id.* In light of this difficulty, a defective or hazardous condition arising from road construction or repair may not be foreseeable, a municipality may not know that the condition exists and, therefore, unless the construction or repair work immediately produced the condition, prior written notice of the condition is necessary to afford the municipality a reasonable opportunity to remedy the condition, *id.* No similar difficulty is present with respect to hazardous ice conditions arising from negligent snow removal because such conditions are foreseeable to a municipality, *id.* Thus, a municipality knows or should know that its negligent snow removal may cause a hazardous ice condition, and a municipality therefore requires no additional notice of the condition, *id.* Similarly, the exception is unavailable where plaintiff can show no more than that the locality stood by while the condition of the roadway deteriorated to the point where a defect was created, such as where the curb settled in relation to the abutting sidewalk over a period

of years, *Corey v Huntington*, 9 AD3d 345, 780 NYS2d 156 (2d Dept 2004).

A municipality's nonfeasance, or passive negligence not rising to the level of affirmative negligence, does not invoke the exception, see *Monteleone v Floral Park*, 74 NY2d 917, 550 NYS2d 257, 549 NE2d 459 (1989) (village's failure to prune tree is nonfeasance even where village planted tree years earlier); *Chance v Ulster*, 144 AD3d 1257, 41 NYS3d 313 (3d Dept 2016) (failure to monitor and maintain road); *Madden ex rel. Madden v Greene*, 64 AD3d 1117, 883 NYS2d 392 (3d Dept 2009) (negligent maintenance and repair of guardrail); *Lowenthal v Theodore H. Heidrich Realty Corp.*, 304 AD2d 725, 759 NYS2d 497 (2d Dept 2003) (failure to control tree roots); *Lugo ex rel. Lugo v Essex*, 260 AD2d 711, 687 NYS2d 475 (3d Dept 1999) (failure to properly sand or remove snow and ice from roadway is nonfeasance); *Gorman ex rel. Gorman v Ravesi*, 256 AD2d 1134, 684 NYS2d 386 (4th Dept 1998) (city's failure to remove snow and ice from sidewalk constituted nonfeasance); *Hughes v Niagara Falls*, 225 AD2d 1059, 639 NYS2d 609 (4th Dept 1996) (city's alleged failure to detect and remove decayed tree limb before it fell is nonfeasance); *Radicello v Spring Valley*, 115 AD2d 466, 495 NYS2d 702 (2d Dept 1985) (failure to remove snow and ice held to be mere nonfeasance). For a discussion of the distinction between affirmative negligence and nonfeasance, see *Pittel v Hempstead*, 154 AD2d 581, 546 NYS2d 411 (2d Dept 1989).

The following charge is to be used in cases where a local law requiring prior written notice of the claimed unsafe condition has not been satisfied but the plaintiff claims that such notice was not required because the allegedly unsafe condition was caused by an affirmative act of defendant municipality.

PJI 2:225A.1

As you have heard, the plaintiff, AB, claims that (he, she) was injured when (he, she) tripped and fell as a result of an unsafe condition, that is, a hole in the pavement at [name location], that AB claims CD [name municipality] should have repaired. The law requires CD to maintain its streets and highways in reasonably safe condition for people who use them.

In order to recover AB must prove that the [identify alleged defect] was caused by an affirmative act of CD. An unsafe condition is caused by an affirmative act if it is produced by some specific action of the municipality, such as the construction or repair of the roadway or installation of a traffic

sign. The failure of CD to repair an unsafe condition caused by traffic or weather conditions or erosion or by someone other than CD is not an affirmative act. AB claims that the [*identify alleged defect*] was caused by the affirmative act of CD or its employees or agents when ([*state AB's claim, such as:*] they dug the hole during a paving job that CD did at that location). CD claims that the [*identify alleged defect*] was caused by ([*state CD's explanation, such as:*] heavy traffic, bad weather).

If you find that the [*identify alleged defect*] was not caused by an affirmative act of CD, you will proceed no further and report to the court. If you find that the [*identify alleged defect*] was caused by an affirmative act of CD, you will proceed to consider whether the [*identify allegedly defective area*] was not reasonably safe.

AB claims that the [*identify allegedly defective area*] was not in a reasonably safe condition because [*state plaintiff's claim*]. CD claims [*state defendant's claim*]. If you find that the [*identify allegedly defective area*] was reasonably safe, you will proceed no further and report to the court. If you decide that the [*identify allegedly defective area*] was not reasonably safe, you must next consider whether the [*identify alleged defect*] was a substantial factor in causing AB's injury.

An act or failure to act is a substantial factor in bringing about an injury if a reasonable person would regard it as a cause of the injury. If you find that the [*identify alleged defect*] was not a substantial factor in causing the injury, then AB may not recover. If you find that the [*identify alleged defect*] was a substantial factor in causing AB's injury, you will proceed to consider [*state next appropriate step, e.g. damages, verdict*].

A second exception to the written notice of defect requirement is the so-called "special use" rule, see *Poirier v Schenectady*, 85 NY2d 310, 624 NYS2d 555, 648 NE2d 1318 (1995) (sign post anchor not a special use); *Filsno v Rochester*, 10 AD2d 663, 196 NYS2d 311 (4th Dept 1960) (cast iron cover over survey monument installed by city was special

use). That exception allows an injured party to sue a municipality based upon a defect, absent prior written notice, where the municipality derives a special benefit from the defective location, see *Oboler v New York*, 8 NY3d 888, 832 NYS2d 871, 864 NE2d 1270 (2007).

Some cases have held that a manhole cover or water shut-off valve is a special use, *Posner v New York City Transit Authority*, 27 AD3d 542, 813 NYS2d 106 (2d Dept 2006) (manhole cover); *Ocasio v Middletown*, 148 AD2d 431, 538 NYS2d 586 (2d Dept 1989) (same); *Clark v Rochester*, 25 AD2d 713, 270 NYS2d 173 (4th Dept 1966) (same); *Smith v Corning*, 14 AD2d 27, 217 NYS2d 149 (4th Dept 1961) (water shut-off valve). However, other courts' more recent decisions have held that a manhole cover and a water valve vault cover are not special uses, *Patterson v New York*, 1 AD3d 139, 767 NYS2d 14 (1st Dept 2003); *Lado v Rome*, 269 AD2d 743, 703 NYS2d 327 (4th Dept 2000) (water valve vault cover); *ITT Hartford Ins. Co. v Ossining*, 257 AD2d 606, 684 NYS2d 258 (2d Dept 1999) (manhole cover). In *Oboler v New York*, 8 NY3d 888, 832 NYS2d 871, 864 NE2d 1270 (2007), the Court of Appeals "assume[d]" without deciding that the special use doctrine could apply to a manhole in a City street. The *Oboler* Court went on to state that, even assuming that a manhole is a special use, the exception for special uses is not available unless the manhole conferred a special benefit on the City.

As a general matter, the latter courts have concluded that the special use exception does not apply if the instrumentality was maintained by the municipality as part of its duty to maintain safe streets, see *Smith v Syracuse*, 298 AD2d 842, 747 NYS2d 876 (4th Dept 2002) (electrical "pull box" housing street light wiring); *Braunstein v Nassau*, 294 AD2d 323, 741 NYS2d 565 (2d Dept 2002) (catch basin serving drainage function); *Lado v Rome*, 269 AD2d 743, 703 NYS2d 327 (4th Dept 2000); *ITT Hartford Ins. Co. v Ossining*, 257 AD2d 606, 684 NYS2d 258 (2d Dept 1999); *Barnes v Mount Vernon*, 245 AD2d 407, 666 NYS2d 206 (2d Dept 1997) (grating serving drainage function); *Fazio v Mamaroneck*, 226 AD2d 338, 640 NYS2d 216 (2d Dept 1996) (traffic signal box); *Vise v Suffolk*, 207 AD2d 341, 615 NYS2d 429 (2d Dept 1994) (catch basin providing drainage); see also *Nixdorf v East Islip School Dist.*, 276 AD2d 759, 715 NYS2d 432 (2d Dept 2000) (public parking spaces on public road in front of elementary school not a special use). Moreover, the special-use doctrine does not apply to uses that are related to public uses, such as library steps that protrude onto the sidewalk, *Loiaconi v Tarrytown*, 36 AD3d 864, 829 NYS2d 191 (2d Dept 2007), or bus stops located on a city roadway, *Methal v New York*, 116 AD3d 743, 984 NYS2d 71 (2d Dept 2014). One court has gone further by holding that a lake adjacent to the dam and road on which the accident occurred was not a "special use" because the town used it "to serve the public need to extract water for firefighting," see *Sadler v Hurley*, 280 AD2d 805, 720 NYS2d 613 (3d Dept 2001). This rationale, if followed, would significantly narrow the class of publicly-owned special uses by eliminating all uses that serve a public function, regardless of whether those uses relate directly to road safety and maintenance. Presumably,

the special use exception would then be limited to municipal uses of the roadway that are proprietary in nature.

A third exception to the written notice of defect requirement was formerly recognized by several courts, see *Blake v Albany*, 63 AD2d 1075, 405 NYS2d 832 (3d Dept 1978), *aff'd*, 48 NY2d 875, 424 NYS2d 358, 400 NE2d 300 (1979); *Giganti v Hempstead*, 186 AD2d 627, 588 NYS2d 413 (2d Dept 1992). This exception rendered prior written notice requirements inapplicable under very limited circumstances of actual or constructive notice where the municipality had or should have had knowledge of the defective condition because responsible municipal officials either inspected or performed work at the subject location within a short time before the accident. In *Amabile v Buffalo*, 93 NY2d 471, 693 NYS2d 77, 715 NE2d 104 (1999), the Court of Appeals expressly declined to recognize this exception and concluded that constructive notice of a defect may not override the statutory requirement of prior written notice of a sidewalk defect, see also *Quinn v New York*, 305 AD2d 570, 761 NYS2d 231 (2d Dept 2003); but see *Norton v Endicott*, 280 AD2d 853, 720 NYS2d 412 (3d Dept 2001) (recognizing actual or constructive notice exception to prior written notice requirement in denying defendant Village's motion for summary judgment dismissing complaint).

V. Method of Notice

Generally, the statutes and/or local laws specify the form and proper recipient of the notice, requiring that prior notice be given in writing to a particular municipal official or officials, see Highway Law § 139(2) (clerk of governing board of county or county highway superintendent); Town Law § 65-a(1), (2) (town clerk or superintendent of highways); Village Law § 6-628, CPLR 9804 (village clerk); General Municipal Law § 50-g (city officer or employee specified by local law); Second Class Cities Law § 244 (City Commissioner of Public Works); New York City Administrative Code § 7-201(c)(2) (New York City Commissioner of Transportation). The New York City Pothole Law (Administrative Code of New York § 7-201) is unique in that it provides three alternative ways for actual notice to be conveyed or demonstrated: 1) prior written notice actually given to the City Commissioner of Transportation; 2) previous injury to persons or property and written notice to any city agency; or 3) written acknowledgment from the city, *Laing v New York*, 71 NY2d 912, 528 NYS2d 530, 523 NE2d 816 (1988). The Pothole Law also provides for a grace period that gives the City 15 days to repair or remove a defect after receiving written notice of the defect, *New York City Administrative Code* § 7-201(c)(2); see *Kruszka v New York*, 29 AD3d 742, 816 NYS2d 510 (2d Dept 2006); *Silva v New York*, 17 AD3d 566, 793 NYS2d 478 (2d Dept 2005).

A notation concerning a cracked sidewalk in a Parks Department report prepared in connection with a tree inspection does not constitute a written acknowledgment, *id*; see *Sparrock v New York*, 242 AD2d 289, 661 NYS2d 47 (2d Dept 1997). However, the New York City Pothole

Law does not require that the “written acknowledgment” must come from the City Department of Transportation. Rather, a document prepared by a City agency other than the City Department of Transportation may constitute “written acknowledgment” where the document is prepared in connection with the specific condition that caused the accident and the agency is performing the function normally performed by the Department of Transportation of remedying an unsafe condition in the roadway, *Bruni v New York*, 2 NY3d 319, 778 NYS2d 757, 811 NE2d 19 (2004); see *Dalton v Saratoga Springs*, 12 AD3d 899, 784 NYS2d 702 (3d Dept 2004). For example, the “written acknowledgment” requirement was satisfied where the Department of Environmental Protection, which was responsible for maintaining catch basins, issued a report and work order indicating the existence of “caving” or a hole in the street as a result of a defective catch basin, *Bruni v New York*, supra. That the report and work order were “internal documents” did not negate their effectiveness as “written acknowledgments,” *id.* A municipality’s internal report regarding a roadway defect cannot serve as “prior written notice” where the municipality’s local law does not provide for notice by “written acknowledgment,” *Wilkie v Huntington*, 29 AD3d 898, 816 NYS2d 148 (2d Dept 2006) (citing *Huntington Town Code* § 274-3).

To satisfy a prior written notice statute, the notice on which plaintiff relies must not be too remote in time or location, *Massey v Cohoes*, 35 AD3d 996, 826 NYS2d 779 (3d Dept 2006). Some local laws require that the written notice be received by the appropriate official within a specified period of time prior to the accident, see *New York City Administrative Code* § 7-201(c)(2) (at least 15 days). Where there is actual knowledge of a defect by the city, the fifteen-day period in the *New York City Administrative Code* does not apply to insulate the city for failing to take some other appropriate measures within a reasonable time to prevent injury from the condition, *Bernstein v New York*, 221 AD2d 214, 633 NYS2d 488 (1st Dept 1995). Other local laws merely require a failure to repair within a “reasonable time” of receipt of written notice, see *Poirier v Schenectady*, 85 NY2d 310, 624 NYS2d 555, 648 NE2d 1318 (1995).

The notice need not have been given by the plaintiff or by a private citizen; it may be furnished by anyone, including a municipal employee, *Doremus v Lynbrook*, 18 NY2d 362, 275 NYS2d 505, 222 NE2d 376 (1966); *Harrington v Plattsburgh*, 216 AD2d 724, 627 NYS2d 838 (3d Dept 1995); *Pier v Pavement Resource Managers, Inc.*, 144 AD2d 803, 534 NYS2d 555 (3d Dept 1988); *Schuster v Hempstead*, 130 AD2d 481, 515 NYS2d 64 (2d Dept 1987); *Scherm v North Hempstead*, 45 AD2d 886, 358 NYS2d 162 (2d Dept 1974). When statutes strictly require written notice, oral notice or other actual notice will not suffice, *Poirier v Schenectady*, 85 NY2d 310, 624 NYS2d 555, 648 NE2d 1318 (1995) (telephone call); *Delcamp v Brocton*, 270 AD2d 842, 705 NYS2d 150 (4th Dept 2000); see *Dalton v Saratoga Springs*, 12 AD3d 899, 784 NYS2d 702 (3d Dept 2004); *Peloso v Putnam*, 6 AD3d 411, 774 NYS2d 355 (2d Dept 2004); *Lalley v Adam, Meldrum & Anderson Co., Inc.*, 186 AD2d

1083, 588 NYS2d 500 (4th Dept 1992); *Drzewiecki v Buffalo*, 51 AD2d 870, 380 NYS2d 151 (4th Dept 1976); see also *Akcelik v Islip*, 38 AD3d 483, 831 NYS2d 491 (2d Dept 2007) (oral telephone complaint that was reduced to complaint ticket insufficient). Notice given through a municipality's online citizen reporting system was insufficient where the municipality's prior written notice statute requires that the notice be "actually given to the commissioner of public works" and there was no evidence that complaints made through that system were actually given to such commissioner, *Horst v Syracuse*, 191 AD3d 1297, 141 NYS3d 205 (4th Dept 2021). Nor will notice given to the wrong municipal official, *Gorman v Huntington*, 12 NY3d 275, 879 NYS2d 379, 907 NE2d 292 (2009); see *Farnsworth v Potsdam*, 228 AD2d 79, 651 NYS2d 748 (3d Dept 1997) (report in files of Department of Public Works did not constitute notice to village clerk); *Wisnowski v Syracuse*, 213 AD2d 1069, 624 NYS2d 329 (4th Dept 1995) (notice of claim served upon corporation counsel); *Conlon v Pleasantville*, 146 AD2d 736, 537 NYS2d 221 (2d Dept 1989) (report in files of superintendent of Water Department). In *Gorman v Huntington*, supra, the Court of Appeals held that written notice to the municipality's Department of Engineering, which was not a statutory designee, did not satisfy the municipality's written notice requirement even though that Department, as the entity responsible for making repairs, routinely recorded complaints about sidewalks.

Several Appellate Division cases have also discussed the level of content necessary to comply with various other statutes and local laws requiring prior written notice of defect. With regard to specificity, the notice must "probably have brought the particular condition at issue" to the attention of the responsible officials, *Brooks v Binghamton*, 55 AD2d 482, 390 NYS2d 693 (3d Dept 1977); see *Vasquez v New York*, 298 AD2d 187, 748 NYS2d 140 (1st Dept 2002). Notice of one defect in the area is insufficient to constitute notice of a different defect which caused the accident, *Espinosa v JMG Realty Corp.*, 53 AD3d 408, 861 NYS2d 333 (1st Dept 2008). The notice must be fairly specific as to the nature and location of the defect, *Dalton v Saratoga Springs*, 12 AD3d 899, 784 NYS2d 702 (3d Dept 2004) (work order that predated plaintiff's accident by four years stating that unspecified portions of sidewalk were "terrible" insufficient); *Busone v Troy*, 225 AD2d 967, 639 NYS2d 589 (3d Dept 1996) (letter dated two years prior to plaintiff's fall complaining of area located .4 miles from area where plaintiff fell insufficient); *Curci v New York*, 209 AD2d 574, 619 NYS2d 98 (2d Dept 1994); *Diorio v Islip*, 196 AD2d 477, 601 NYS2d 23 (2d Dept 1993); *O'Rourke v Smithtown*, 129 AD2d 570, 514 NYS2d 68 (2d Dept 1987); but see *Pier v Pavement Resource Managers, Inc.*, 144 AD2d 803, 534 NYS2d 555 (3d Dept 1988) (complaint regarding need to repair entire street sufficient) and *Rhodes v Troy*, 24 AD2d 1037, 265 NYS2d 347 (3d Dept 1965) (same). Notice of defects that are a short distance from the defect causing plaintiff's injuries is not sufficient where the noticed defects were isolated from and not a part of the allegedly defective condition complained of, *Brill v New York*, 305 AD2d 525, 759 NYS2d 346 (2d Dept 2003), rev'd on other grounds, 2 NY3d 648, 781 NYS2d 261, 814 NE2d 431 (2004) ("Big

Apple” map indicating defects in sidewalk adjacent to area of accident not sufficient to provide notice of defect at accident location); *Curci v New York*, 209 AD2d 574, 619 NYS2d 98 (2d Dept 1994); see *Marotta v Massry*, 279 AD2d 877, 719 NYS2d 737 (3d Dept 2001); *Jones by Jones v Brookhaven*, 227 AD2d 530, 642 NYS2d 708 (2d Dept 1996). The notice requirement of New York City Administrative Code § 7-201(c) is construed strictly against the City, *Vasquez v New York*, 298 AD2d 187, 748 NYS2d 140 (1st Dept 2002); see *Almadotter v New York*, 15 AD3d 426, 789 NYS2d 729 (2d Dept 2005).

Maps have been held to constitute written notice of defects, *Katz v New York*, 87 NY2d 241, 638 NYS2d 593, 661 NE2d 1374 (1995); *Cassuto v New York*, 23 AD3d 423, 805 NYS2d 580 (2d Dept 2005); *Johnson v New York*, 280 AD2d 271, 720 NYS2d 124 (1st Dept 2001); *Weinreb v New York*, 193 AD2d 596, 597 NYS2d 432 (2d Dept 1993); *Becker v New York*, 131 AD2d 413, 516 NYS2d 225 (2d Dept 1987); *Acevedo v New York*, 128 AD2d 488, 512 NYS2d 414 (2d Dept 1987); see *Fleisher v New York*, 120 AD3d 1390, 993 NYS2d 112 (2d Dept 2014) (“Big Apple” map admissible for nonhearsay purpose of demonstrating that municipality had prior written notice of defect). However, a plaintiff may not rely on an obsolete, superseded map purporting to show a defect where a subsequently filed map shows no defect. In such a case, the municipality is entitled to rely on the map currently on file, *Katz v New York*, *supra*. A general description of the condition of an entire roadway, as opposed to specific reference to a particular defect, is insufficient to put the municipality on notice, *James v New Rochelle*, 282 AD2d 503, 722 NYS2d 772 (2d Dept 2001). Similarly, the use of a symbol on a map to mark a particular defective condition such as a raised or uneven portion of a sidewalk is insufficient to give notice of a different defect, *D’Onofrio v New York*, 11 NY3d 581, 873 NYS2d 251, 901 NE2d 744 (2008); see *Vega v 103 Thayer Street, LLC*, 23 NY3d 1027, 992 NYS2d 776, 16 NE3d 1255 (2014), *rev’g* 105 AD3d 405, 961 NYS2d 467 (1st Dept 2013); *Bartels v New York*, 125 AD3d 583, 6 NYS3d 60 (2d Dept 2015). A map symbol whose meaning is not defined in the map’s legend is, likewise, not sufficient to provide notice, *D’Onofrio v New York*, *supra*; *Waldron v New York*, 175 AD2d 123, 571 NYS2d 816 (2d Dept 1991).

Where there is a dispute as to whether the alleged condition that caused the accident is designated on a map, the issue is generally one for resolution by the trier of fact, *Vertsberger v New York*, 34 AD3d 453, 824 NYS2d 346 (2d Dept 2006); *Cassuto v New York*, 23 AD3d 423, 805 NYS2d 580 (2d Dept 2005); *Almadotter v New York*, 15 AD3d 426, 789 NYS2d 729 (2d Dept 2005); *Quinn v New York*, 305 AD2d 570, 761 NYS2d 231 (2d Dept 2003). However, the issue should be resolved as a matter of law where plaintiff’s description of the accident makes clear that it was not caused by the type of defect indicated by the map symbol or where the accident site was marked by a map symbol not defined in the map’s legend, *D’Onofrio v New York*, 11 NY3d 581, 873 NYS2d 251, 901 NE2d 744 (2008).

The statutes require that the municipality maintain a record of

written notices and that it be indexed by location, see General Municipal Law § 50-g; Town Law 65-a(4); Village Law § 4-402(g); Highway Law § 139(4); *Mollahan v Port Washington North*, 153 AD2d 881, 545 NYS2d 601 (2d Dept 1989). The failure of the municipality to keep a properly indexed record of written notices received does not relieve the plaintiff from pleading and proving written notice, although it may shift the burden to the municipality to search its records to show lack of notice, *Mollahan v Port Washington North*, 153 AD2d 881, 545 NYS2d 601 (2d Dept 1989). The affidavit of an official charged with the responsibility of keeping an indexed record of all notices of defective conditions received is sufficient to establish that no prior written notice was filed, *Cruz v New York*, 218 AD2d 546, 630 NYS2d 523 (1st Dept 1995).

VI. Notice of Claim

To enable authorities to investigate, collect evidence and evaluate the merit of a claim, persons seeking to recover in tort against a municipality are required, as a precondition to suit, to serve a Notice of Claim on the municipality, General Municipal Law § 50-e. General Municipal Law § 50-e(2) ("Form of notice; Contents") requires, among other things, that a Notice of Claim "be in writing, sworn to by or on behalf of the claimant" and set forth "(1) the name and post office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable." Reasonably read, the statute does not require "those things to be stated with literal nicety or exactness," *Brown v New York*, 95 NY2d 389, 718 NYS2d 4, 740 NE2d 1078 (2000). The test of the sufficiency of a Notice of Claim is merely "whether it includes information sufficient to enable the city to investigate" and "[n]othing more may be required," *id.* However, the notice of claim must at least mention the instrumentalities that plaintiff claims proximately caused the accident, *Quinn v New York*, 113 AD3d 490, 978 NYS2d 682 (1st Dept 2014); *Rodriguez v Board of Educ. of City of New York*, 107 AD3d 651, 969 NYS2d 25 (1st Dept 2013); *Johnson v New York*, 106 AD3d 664, 966 NYS2d 408 (1st Dept 2013); *Williams v Westchester*, 103 AD3d 796, 960 NYS2d 149 (2d Dept 2013); *Tully v Glen Cove*, 102 AD3d 670, 957 NYS2d 719 (2d Dept 2013); *Clare-Hollo v Finger Lakes Ambulance EMS, Inc.*, 99 AD3d 1199, 952 NYS2d 350 (4th Dept 2012); *Ana R. v New York City Housing Authority*, 95 AD3d 981, 943 NYS2d 765 (2d Dept 2012); *Gagnon v Saratoga Springs*, 51 AD3d 1096, 858 NYS2d 797 (3d Dept 2008). Further, plaintiff may not add a new theory of liability that was not included in the notice of claim, *Fleming v New York*, 89 AD3d 405, 931 NYS2d 866 (1st Dept 2011) (dismissing negligence claims not asserted in original notice of claim and denying motion to add those claims to notice of claim alleging assault); *O'Connor v Huntington U.F.S. D.*, 87 AD3d 571, 929 NYS2d 743 (2d Dept 2011) (dismissing negligent supervision cause of action not mentioned in notice of claim); *Hudson Valley Marine, Inc. v Cortlandt*, 79 AD3d 700, 912 NYS2d 623 (2d Dept 2010) (negligent hiring cause of action properly dismissed where notice

of claim alleged only violation of federal civil rights laws and common-law malicious prosecution); but see *Betette v Monroe*, 82 AD3d 1708, 920 NYS2d 512 (4th Dept 2011) (permitting plaintiff to add cause of action not included in notice of claim where recent judicial decision changed law and permitted assertion of new claim). Finally, the *Noseworthy* doctrine, see *Noseworthy v New York*, 298 NY 76, 80 NE2d 744 (1948), does not excuse plaintiffs from stating with specificity in the notice of claim the theory or theories in which they intend to hold the municipality liable, *Williams v Westchester*, supra.

In determining compliance with the requirements of General Municipal Law § 50-e, courts should focus on the purpose served by a Notice of Claim: whether based on the claimant's description municipal authorities can locate the place, fix the time and understand the nature of the accident, *Rosenbaum v New York*, 8 NY3d 1, 828 NYS2d 228, 861 NE2d 43 (2006); *Brown v New York*, 95 NY2d 389, 718 NYS2d 4, 740 NE2d 1078 (2000). The "affirmatively created" exception to a prior written notice requirement, see this section supra (I) (B)(3), does not relieve claimant from complying with the time limits imposed by General Municipal Law § 50-e, *Hewitt v Rensselaer*, 6 AD3d 842, 775 NYS2d 112 (3d Dept 2004). When passing on the sufficiency of a notice of claim in the context of a motion to dismiss, a court is not confined to the notice of claim itself, *D'Alessandro v New York City Transit Authority*, 83 NY2d 891, 613 NYS2d 849, 636 NE2d 1382 (1994). Under General Municipal Law § 50-e(6), a mistake, omission, irregularity or defect made in good faith may be corrected, supplied or disregarded, in the discretion of the court, provided the defendant was not prejudiced, *id.* In determining whether the defendant was prejudiced, a court may look to evidence adduced at a General Municipal Law § 50-h hearing, *id.*; *Cron v New York*, 121 AD3d 601, 995 NYS2d 55 (1st Dept 2014); *Vallejo-Bayas v New York City Transit Authority*, 103 AD3d 881, 962 NYS2d 203 (2d Dept 2013); *Portillo v New York City Transit Authority*, 84 AD3d 535, 922 NYS2d 397 (1st Dept 2011). For a discussion of notice of claim requirements in a medical malpractice action against a health care facility operated by a municipal corporation, see Comment to PJI 2:149 and 2:150. For a more detailed discussion of notice of claim requirements and motions to extend the time within which to file a notice of claim, see *Siegel New York Practice*, § 32 (Fourth Edition 2005); see also *Bovich v East Meadow Public Library*, 16 AD3d 11, 789 NYS2d 511 (2d Dept 2005) (providing illustrative list of entities to which notice of claim provisions apply).

The notice of claim provisions of General Municipal Law § 50-e apply to claims against individual defendants only if a municipality is obligated to indemnify them, *Zwecker v Clinch*, 279 AD2d 572, 720 NYS2d 150 (2d Dept 2001); see *Goodwin v Pretorius*, 105 AD3d 207, 962 NYS2d 539 (4th Dept 2013); GML § 50-e(1)(b). Although the First Department has held categorically that a claimant cannot proceed against individual defendants if they are not named in the notice of claim, *Cleghorne v New York*, 99 AD3d 443, 952 NYS2d 114 (1st Dept 2012); *Tannenbaum v New York*, 30 AD3d 357, 819 NYS2d 4 (1st Dept 2006); see *Alvarez v New York*, 134 AD3d 599, 22 NYS3d 362 (1st Dept 2015), that position

has been rejected by the the other Departments, see *Blake v New York*, 148 AD3d 1101, 51 NYS3d 540 (2d Dept 2017); *Pierce v Hickey*, 129 AD3d 1287, 11 NYS3d 321 (3d Dept 2015); *Goodwin v Pretorius*, supra.

A notice of claim is not a condition precedent to maintaining a cause of action under 42 USC § 1983, *Blake v New York*, 148 AD3d 1101, 51 NYS3d 540 (2d Dept 2017); *Vargas v New York*, 105 AD3d 834, 963 NYS2d 278 (2d Dept 2013).

General Municipal Law § 50-e(7) provides that all applications regarding leave to serve a late notice of claim “shall be made to the supreme court or to the county court.” An application for a late notice of claim cannot be made in federal court, even if the action is pending there, *Woods v New York City Dept. of Sanitation*, 1999 WL 476305 (SDNY 1999).

VII. Considerations as to Liability

Municipal liability cases relating to premises and ways commonly involve sidewalks, schools, parks, surface and sub-surface structures. A short statement of the law as to each follows:

A. Sidewalks

The duty of the municipality is to keep its sidewalks in a condition reasonably safe for pedestrians, *Klepper v Seymour House Corporation of Ogdensburg*, 246 NY 85, 158 NE 29 (1927); *Kiernan v Thompson*, 134 AD2d 27, 522 NYS2d 719 (3d Dept 1987), *aff'd*, 73 NY2d 840, 537 NYS2d 122, 534 NE2d 39 (1988), or other foreseeable users of the sidewalk, *Muallem v New York*, 82 AD2d 420, 441 NYS2d 834 (2d Dept 1981), *aff'd*, 56 NY2d 866, 453 NYS2d 427, 438 NE2d 1142 (1982); *Errante v New York*, 74 AD2d 122, 427 NYS2d 18 (1st Dept 1980) (citing PJI); see PJI 2:111 and PJI 2:225C and Comments thereto. Some depressions in the sidewalk are too trivial to impose liability on the municipality, *Fox v Brown*, 15 NY2d 597, 255 NYS2d 263, 203 NE2d 650 (1964), but there is no rule that a hole in a public thoroughfare be of a particular depth before its existence can give rise to liability, *Taylor v New York City Transit Authority*, 63 AD2d 630, 405 NYS2d 95 (1st Dept 1978), *aff'd*, 48 NY2d 903, 424 NYS2d 888, 400 NE2d 1340 (1979); *Monllas v New York*, 27 AD2d 722, 277 NYS2d 461 (1st Dept 1967); or that a difference in elevation between flagstones be of a particular height or constitute a trap in order to impose liability, *Caldicott v New York*, 32 AD2d 832, 302 NYS2d 285 (2d Dept 1969); see *Marcus v Nassau*, 95 AD2d 846, 464 NYS2d 205, 206 (2d Dept 1983) (two inch depression in highway). “There is no rule that a defect must be of certain minimum dimensions in order to render a municipality liable for injuries sustained thereby,” *id.* Proof that the downward slope of a curb toward the road was of an unusual degree is *prima facie* evidence of negligence, *Martin v Cohoes*, 50 AD2d 1035, 377 NYS2d 757 (3d Dept 1975). A municipality may be held liable for a raised sidewalk which results in a pooling of water that turned to ice in the area where plaintiff fell, *Morales v New York*, 270 AD2d 239, 704 NYS2d 122 (2d Dept 2000).

Note: As to accidents occurring on or after September 14, 2003, the New York City Administrative Code places the obligation to maintain and clear sidewalks upon certain abutting landowners and imposes liability upon them for injuries sustained by third parties for the negligent failure to do so (§ 7-210), *Martinez v Khaimov*, 74 AD3d 1031, 906 NYS2d 274 (2d Dept 2010). The legislation specifically absolves the City of liability for injuries caused by the failure to maintain or clear sidewalks abutting privately owned real property. The liability-shifting provision of the legislation does not apply to one-, two-, or three-family residential property that is at least partially owner-occupied and used exclusively for residential purposes. The residential exemption was adopted in recognition of the inappropriateness of exposing small property owners, who have limited resources, to exclusive liability with respect to sidewalk maintenance and repair, *Coogan v New York*, 73 AD3d 613, 900 NYS2d 645 (1st Dept 2010). Consistent with that purpose, the liability imposed by § 7-210 should not be extended to a homeowner who occasionally used his laptop for research at home, did not claim any part of the premises as a “home office” on his tax return and denied that he operated a “home office,” *Coogan v New York*, *supra*. Further, § 7-210 does not make an abutting property owner responsible for maintaining trees or tree wells set into the sidewalk, *Vucetovic v Epsom Downs, Inc.*, *supra*, sidewalk grates, *Hurley v Related Management Co.*, 74 AD3d 648, 904 NYS2d 41 (1st Dept 2010), pedestrian ramps connecting a sidewalk to the street, *Ortiz v New York*, 67 AD3d 21, 884 NYS2d 417 (1st Dept 2009), *rev’d on other grounds*, 14 NY3d 779, 898 NYS2d 544, 925 NE2d 582 (2010), barriers erected by police for crowd control purposes, *Staruch v 1328 Broadway Owners, LLC*, 111 AD3d 698, 974 NYS2d 796 (2d Dept 2013), covers and gratings and the area extending 12 inches outward from the perimeter of such hardware, *Torres v Sander’s Furniture, Inc.*, 134 AD3d 803, 20 NYS3d 630 (2d Dept 2015), or the curb, *Garris v New York*, 65 AD3d 953, 885 NYS2d 491 (1st Dept 2009).

Under Highway Law § 327 there is no duty on the part of a town to light a public sidewalk; thus, a cause of action against the town for negligent failure to maintain proper lighting should be dismissed, *Bauer v Hempstead*, 143 AD2d 793, 533 NYS2d 342 (2d Dept 1988); see *Thompson v New York*, 78 NY2d 682, 578 NYS2d 507, 585 NE2d 819 (1991); *Cracas v Zisko*, 204 AD2d 382, 612 NYS2d 55 (2d Dept 1994). Similarly, a municipality has no duty to provide adequate lighting at an intersection, provided that a defect or other unusual condition does not exist therein, *Hayden v Ward*, 283 AD2d 942, 723 NYS2d 788 (4th Dept 2001). If there is a special use by an abutting owner, it is for the jury to decide whether the municipality had constructive notice of a sidewalk defect arising from that special use, *McCoy v New York*, 38 AD2d 961, 331 NYS2d 892 (2d Dept 1972); see *Prowse v State*, 70 AD2d 748, 416 NYS2d 889 (3d Dept 1979). A jury question may be presented as to whether the defective instrumentality constituted a special use for the benefit of the municipality, and whether it created the defective condition by improper installation, *Rooney v Long Beach*, 42 AD2d 34, 345 NYS2d 66 (2d Dept 1973); see *Barrett v Buffalo*, 96 AD2d 709, 465

NYS2d 376 (4th Dept 1983). If both the abutting owner and the municipality are liable, there is a right of contribution, *D'Ambrosio v New York*, 55 NY2d 454, 450 NYS2d 149, 435 NE2d 366 (1982); see *Santorelli v New York*, 77 AD2d 825, 430 NYS2d 618 (1st Dept 1980); PJI 2:275 (contribution generally). However, where the municipality has, pursuant to local law, given notice to the abutting owner to cure the defect and then defers its repairs by reason of the owner's promise to repair and maintain the sidewalk, the municipality is entitled to full indemnification from the abutting owner for a judgment obtained against the municipality by a pedestrian injured by the defect, *New York v Kalikow Realty Co.*, 71 NY2d 957, 529 NYS2d 62, 524 NE2d 416 (1988). As to the liability of the abutting owner generally, see PJI 2:110, 2:111. Under the New York City Charter (2904) and Administrative Code (19-152), maintenance and repair of sidewalks, including the area of bus stop shelters, is the responsibility of the City and the abutting landowner and not a responsibility of the New York City Transit Authority, *Coppersmith v New York*, 194 AD2d 586, 599 NYS2d 75 (2d Dept 1993); *Gold v New York*, 141 AD2d 502, 529 NYS2d 337 (2d Dept 1988).

B. Schools

A board of education is charged with the duty of using reasonable care in maintaining school property in a reasonably safe condition so as to prevent injury to those persons foreseeably upon it, *Education Law* §§ 1604, 1709, 1804, 1903, 2503, 2512, 2554, 2556; *Friedman v Board of Education of City of New York*, 262 NY 364, 186 NE 865 (1933); *Jaked v Board of Education of City of Albany*, 198 App Div 113, 189 NYS 697 (3d Dept 1921), *aff'd*, 234 NY 591, 138 NE 458 (1922); *McCarton v New York*, 149 App Div 516, 133 NYS 939 (1st Dept 1912). Liability is determined by the same rules and principles that govern liability of private landowners, *Stevens v Central School Dist. No. 1 of Town of Ramapo*, 25 AD2d 871, 270 NYS2d 23 (2d Dept 1966), *aff'd*, 21 NY2d 780, 288 NYS2d 475, 235 NE2d 448 (1968); see *Kass v Board of Ed. of City of New York*, 16 AD2d 76, 225 NYS2d 92 (1st Dept 1962), *aff'd*, 13 NY2d 916, 243 NYS2d 861, 193 NE2d 643 (1963); see also 2D Warren, *Negligence, School Districts*, § 4 (4th Ed); *Annot*: 34 ALR3d 1166, but see *Jackson v Board of Educ. of City of New York*, 30 AD3d 57, 812 NYS2d 91 (1st Dept 2006) (although *Educ. Law* § 6302(3) makes New York City Board of Education "sponsor" and fiscal overseer of Fashion Institute of Technology, a community college established pursuant to *Educ. Law Art. 126*, college's board of trustees is vested with responsibility for care and custody of its campus buildings under *Educ. Law* § 6306(5) and, consequently, Board of Education not liable for injuries arising from unsafe condition on premises). If a defective or dangerous condition is caused or exists by reason of the failure of the board's agents or employees to exercise reasonable care, the board is liable for injuries resulting from such defect or dangerous condition, *Nicholson v Board of Educ. of City of New York*, 36 NY2d 798, 369 NYS2d 703, 330 NE2d 651 (1975).

Notwithstanding the 2002 amendments to the Education Law

providing for greater mayoral control of the New York City public school system, which legislation significantly limited the power of the New York City Board of Education, the City of New York and the Board remain separate legal entities, *Perez ex rel. Torres v New York*, 41 AD3d 378, 837 NYS2d 571 (1st Dept 2007); see *Thomas v New York*, 124 AD3d 872, 2 NYS3d 578 (2d Dept 2015). Therefore, the Board, not the City, is the proper party defendant in a personal injury action arising from an accident that occurred on public school premises, *Thomas v New York*, supra; *Cohen v New York*, 119 AD3d 725, 989 NYS2d 296 (2d Dept 2014); *Myers v New York*, 64 AD3d 546, 882 NYS2d 306 (2d Dept 2009); *Perez ex rel. Torres v New York*, supra. The City may be liable for injuries occurring on public school property if the City affirmatively created the dangerous condition that caused plaintiff's injuries, *Bleiberg v New York*, 43 AD3d 969, 842 NYS2d 76 (2d Dept 2007).

As to liability based on inadequate supervision, see PJI 2:227.

C. Parks

A municipality is under a duty to maintain its park and playground facilities in a reasonably safe condition, *Nicholson v Board of Educ. of City of New York*, 36 NY2d 798, 369 NYS2d 703, 330 NE2d 651 (1975); *Arsenault v State*, 96 AD3d 97, 946 NYS2d 276 (3d Dept 2012); *Muzich v Bonomolo*, 209 AD2d 387, 618 NYS2d 437 (2d Dept 1994). Thus, where a municipality maintains a park, it is liable for injuries caused by defects or dangerous conditions of which it had notice or which ordinary inspection would disclose, *Preston v State*, 59 NY2d 997, 466 NYS2d 952, 453 NE2d 1241 (1983); *Rhabb v New York City Housing Authority*, 41 NY2d 200, 391 NYS2d 540, 359 NE2d 1335 (1976); *Nicholson v Board of Educ. of City of New York*, 36 NY2d 798, 369 NYS2d 703, 330 NE2d 651 (1975); *Caldwell v Island Park*, 304 NY 268, 107 NE2d 441 (1952); *Collentine v New York*, 279 NY 119, 17 NE2d 792 (1938); *Leone v Utica*, 66 AD2d 463, 414 NYS2d 412 (4th Dept 1979), aff'd for reasons in AD opinion, 49 NY2d 811, 426 NYS2d 980, 403 NE2d 964 (1980); *Santangelo v New York*, 66 AD2d 880, 411 NYS2d 666 (2d Dept 1978); see *McAuliffe v New Windsor*, 178 AD2d 905, 577 NYS2d 942 (3d Dept 1991). The municipality must clearly demarcate closed areas of lands generally open for recreational use, *Jacques v Lake Placid*, 39 AD2d 163, 332 NYS2d 743 (3d Dept 1972), aff'd, 32 NY2d 739, 344 NYS2d 641, 297 NE2d 521 (1973); *Terry v State*, 79 AD2d 1069, 435 NYS2d 389 (3d Dept 1981); *Burkart v State*, 28 AD2d 1167, 284 NYS2d 344 (3d Dept 1967); *Geigel v New York City Housing Authority*, 225 NYS2d 891 (Sup 1962), aff'd, 17 AD2d 838, 233 NYS2d 257 (2d Dept 1962); *De Marco v Albany*, 17 AD2d 250, 234 NYS2d 94 (3d Dept 1962).

The invitation to use a public park is not an absolute one, *Arsenault v State*, 96 AD3d 97, 946 NYS2d 276 (3d Dept 2012). Rather, the invitation is to use the facilities of the park in the manner in which and for the purposes for which they were designated and intended, *id.* That invitation, in turn, does not require defendant to maintain its parks in

such condition that its patrons may wander at will over each and every part thereof, nor does it mandate that defendant make its parks safe for all kinds of conduct, *id.*

Where the State, acting in its capacity as landowner, reserves an area for public swimming and provides beach facilities such as picnic tables, barbecue pits, trash cans and outhouses, it has a duty either to inspect or remove hazards from the water or to warn that the waters are to be used at the swimmer's own risk, *Preston v State*, 59 NY2d 997, 466 NYS2d 952, 453 NE2d 1241 (1983). No such duty exists, however, when the water in which the accident occurred was not designated as an area in which the public was invited to swim, *Jarmolowski v State*, 23 AD3d 786, 803 NYS2d 761 (3d Dept 2005). Moreover, the duty to inspect and/or warn does not apply to a portion of a riverbed held out to the public for use as a canoe launching site, since a landowner "is not required to scrutinize every square foot of riverbed and lake bottom that it owns," *Schiff v State*, 31 AD3d 526, 818 NYS2d 597 (2d Dept 2006); see *Herman v State*, 63 NY2d 822, 482 NYS2d 248, 472 NE2d 24 (1984) (defendant could not anticipate danger to swimmers from existence of natural, shifting conditions of sand bars in ocean); *Seetaram v State*, 146 AD3d 916, 48 NYS3d 674 (2d Dept 2017) (defendant has no duty to warn swimmers of threats arising from existence of natural, transitory conditions of ocean floor, including rip currents).

The municipality's duty to maintain parks in a reasonably safe condition includes not only the physical care of the property but also the prevention of ultrahazardous and criminal activity of which the municipality has knowledge, see *Solomon by Solomon v New York*, 66 NY2d 1026, 499 NYS2d 392, 489 NE2d 1294 (1985). Activities that have been held not to be ultrahazardous or criminal include bicycle riding on a busy promenade, *id.*, occasional rubbish fires, *Benjamin by Benjamin v New York*, 64 NY2d 44, 484 NYS2d 525, 473 NE2d 753 (1984), throwing a frisbee on a crowded beach, *Marino v State*, 16 AD3d 386, 790 NYS2d 553 (2d Dept 2005), skate boarding, *Plante v Hinton*, 271 AD2d 781, 706 NYS2d 215 (3d Dept 2000), dirt-bike riding, *Muzich v Bonomolo*, 209 AD2d 387, 618 NYS2d 437 (2d Dept 1994), and children pushing other children off of a slide, *Rosario by Vasquez v New York*, 157 AD2d 467, 549 NYS2d 661 (1st Dept 1990); but see *Griffin v Orange*, 210 AD2d 585, 619 NYS2d 814 (3d Dept 1994) (municipality potentially liable for inadequate supervision at public swimming pool); *Seideman by Seideman v Monroe*, 185 AD2d 640, 585 NYS2d 909 (4th Dept 1992) (municipality potentially liable for failure to provide adequate supervision for sledding in a park open for that purpose).

The municipality is not an insurer and is not liable absent proof that the municipality had actual or constructive notice of a potential for danger that reasonably could have been corrected, *Frontz v State*, 147 AD2d 854, 538 NYS2d 76 (3d Dept 1989); see *Arsenault v State*, 96 AD3d 97, 946 NYS2d 276 (3d Dept 2012) (public entity that owns park cannot turn blind eye to behavior of park's visitors, but it is not insurer

of their safety). Where a municipality took all reasonably necessary steps to secure its swimming pool from after-hours intruders and those measures were thwarted by persistent trespassers, the municipality could not be held liable for failure to provide life-saving equipment, a life guard, and lights for the protection of trespassing swimmers, *Garcia v New York*, 205 AD2d 49, 617 NYS2d 462 (1st Dept 1994). Similarly, a municipality is not liable for injuries sustained by a plaintiff, in an assault in a public park that had been closed for several hours, for failing to provide general supervision or better lighting, *Flowers v New York*, 283 AD2d 198, 724 NYS2d 405 (1st Dept 2001). Nor is a municipality required to enclose natural geographical features which present open and obvious, rather than latent, dangers, *Casela v Troy*, 161 AD2d 991, 557 NYS2d 562 (3d Dept 1990). In *Auwarter v Malverne Union Free School Dist.*, 274 AD2d 528, 715 NYS2d 852 (2d Dept 2000), an 11 year old seventh grader playing on and around a “jungle gym” in a playground was deemed to have consented to those commonly appreciated risks which were inherent in and arose from the nature of the activity generally and which flowed from such activity. But liability may be imposed for a municipality’s breach of the duty it owes, as owner and operator of a public park, to provide an adequate degree of general supervision of a crowd invited into the park for a free concert by a renowned entertainer, *Rotz v New York*, 143 AD2d 301, 532 NYS2d 245 (1st Dept 1988).

The obligation of reasonable care does not depend upon whether the municipality exacts an admission fee from those using its parks, *Caldwell v Island Park*, 304 NY 268, 107 NE2d 441 (1952). It may exist even though the area is not formally a park, if children can reasonably be expected to play there, *Benjamin by Benjamin v New York*, 64 NY2d 44, 484 NYS2d 525, 473 NE2d 753 (1984) (vacant lot); *Levine v New York*, 2 NY2d 246, 159 NYS2d 193, 140 NE2d 275 (1957); *Leone v Utica*, 66 AD2d 463, 414 NYS2d 412 (4th Dept 1979), *aff’d* for reasons in AD opinion, 49 NY2d 811, 426 NYS2d 980, 403 NE2d 964 (1980); see also *Plante v Hinton*, 271 AD2d 781, 706 NYS2d 215 (3d Dept 2000) (court assumed, but did not decide, that temporary stoppage of traffic on municipal streets during parade creates park like setting). One engaging in sports in a park assumes the risks of known or obvious hazardous conditions, *Heard v New York*, 82 NY2d 66, 603 NYS2d 414, 623 NE2d 541 (1993); *Maddox v New York*, 66 NY2d 270, 496 NYS2d 726, 487 NE2d 553 (1985); *Herman v State*, 94 AD2d 161, 463 NYS2d 501 (2d Dept 1983), *aff’d*, 63 NY2d 822, 482 NYS2d 248, 472 NE2d 24 (1984); *Perretti v New York*, 132 AD2d 537, 517 NYS2d 272 (2d Dept 1987). A town that maintains a softball field in a public park is required to provide screening for spectators only in the area behind home plate where the danger of being struck by a ball is the greatest, *Starke v Smithtown*, 155 AD2d 526, 547 NYS2d 383 (2d Dept 1989); see *Akins v Glens Falls City School Dist.*, 53 NY2d 325, 441 NYS2d 644, 424 NE2d 531 (1981). As to assumption of risk, see PJI 2:55. As to whether a municipality has a duty to provide padding underneath playground equipment, see *Auwarter v Malverne Union Free School Dist.*, 274 AD2d 528, 715 NYS2d 852 (2d Dept 2000); *Rosario by Vasquez v New York*, 157 AD2d

467, 549 NYS2d 661 (1st Dept 1990); see also *Kazlow v New York*, 253 AD2d 411, 676 NYS2d 229 (2d Dept 1998); *Warech v Trustees of Columbia University*, 203 AD2d 53, 610 NYS2d 480 (1st Dept 1994). No prior written notice of an unsafe condition of a playing field is required, and a local ordinance requiring such notice as a prerequisite to liability is invalid, *Zumbo v Farmington*, 60 AD2d 350, 401 NYS2d 121 (4th Dept 1978).

GOL § 9-103 limits the duty owed by an uncompensated owner or possessor of land to persons engaged in specified activities on the premises, including hunting, fishing, horseback riding, bicycling and operating motorized recreational vehicles, to refrain from wilful or malicious conduct, see *Bragg v Genesee County Agr. Soc.*, 84 NY2d 544, 620 NYS2d 322, 644 NE2d 1013 (1994); *Farnham v Kittinger*, 83 NY2d 520, 611 NYS2d 790, 634 NE2d 162 (1994). *Sega v State*, 60 NY2d 183, 469 NYS2d 51, 456 NE2d 1174 (1983), held that GOL § 9-103 applies to claims or injuries occurring on state-owned lands, see *McCarthy v New York State Canal Corp.*, 244 AD2d 57, 675 NYS2d 254 (3d Dept 1998) (GOL § 9-103 applies to claims or injuries occurring on land owned by New York State Canal Corporation and Thruway Authority). But *Sena v Greenfield*, 91 NY2d 611, 673 NYS2d 984, 696 NE2d 996 (1998) (sledding in supervised public park) and *Ferres v New Rochelle*, 68 NY2d 446, 510 NYS2d 57, 502 NE2d 972 (1986) (bicycle riding in developed city park) held that GOL § 9-103 does not limit the duty of a municipality with respect to activity taking place in a supervised public park and recreational facility, see *Schiff v State*, 31 AD3d 526, 818 NYS2d 597 (2d Dept 2006) (canoe launching site maintained and supervised by state); *English v Albany*, 235 AD2d 977, 652 NYS2d 873 (3d Dept 1997) (tobogganing on city's golf course held open to public for winter activities with supervising staff); *Meyer v Orange*, 129 AD2d 688, 514 NYS2d 450 (2d Dept 1987) (snowmobiling in patrolled, maintained, and supervised county park open for diverse recreational activities); *Leonakis v State*, 126 AD2d 706, 511 NYS2d 119 (2d Dept 1987) (bicycle riding in supervised, developed state park); *Bush v Saugerties*, 114 AD2d 176, 498 NYS2d 563 (3d Dept 1986) (citing PJI) (bicycle riding in municipal park); *O'Keefe v State*, 104 AD2d 43, 481 NYS2d 920 (4th Dept 1984) (state not insulated from liability based on claim that state was negligent in operating a marina). The *Ferres* court reasoned that the provisions of GOL § 9-103 were intended to give incentives to property owners to give permission to use their property more freely and that it would serve no purpose to apply the statute to public parks which the public is encouraged to use, *Sena v Greenfield*, *supra*.

Notwithstanding the *Ferres* holding, where public land, though open for recreational use, is largely undeveloped with limited improvements, the limitations imposed by GOL § 9-103 are applicable to the undeveloped areas, *Wilkins v State*, 165 AD2d 514, 568 NYS2d 236 (3d Dept 1991); see *Sega v State*, 60 NY2d 183, 469 NYS2d 51, 456 NE2d 1174 (1983); *Clark v State*, 178 AD2d 908, 577 NYS2d 946 (3d Dept 1991). Where there is insufficient proof of supervision on a par with that provided by municipal parks, the statute will apply, *McCarthy v*

New York State Canal Corp., 244 AD2d 57, 675 NYS2d 254 (3d Dept 1998). Therefore the statute does limit the liability of the State with respect to cross-country skiing taking place on a golf course, where the park's multipurpose trails are not maintained in the winter and are neither groomed nor routinely inspected for skiing, *Stento v State*, 245 AD2d 771, 665 NYS2d 471 (3d Dept 1997). In such circumstances, the State's role as a landowner changes so dramatically in the winter that it cannot reasonably be said to operate, maintain or supervise public recreational facilities at that time of year. *Id.*

Only those activities specifically enumerated are governed by the limitation of liability in GOL § 9-103; *Cramer v Henderson*, 120 AD2d 925, 503 NYS2d 207 (4th Dept 1986) (walking away from "swimming hole" is related to the non-enumerated activity of swimming and is not "hiking"); *Rochette v Newburgh*, 88 AD2d 614, 449 NYS2d 1013 (2d Dept 1982) (ice boating not covered by statute). The term "fishing" was broadly defined in *McCarthy v New York State Canal Corp.*, 244 AD2d 57, 675 NYS2d 254 (3d Dept 1998).

Where a defendant's alleged liability is not premised upon any condition on the land or upon the defendant's status as an owner or occupant of the land but rather is based upon defendant's allegedly improper conduct, GOL § 9-103 does not apply, *Sauberan v Ohl*, 239 AD2d 891, 659 NYS2d 658 (4th Dept 1997) (defendant advising codefendant to shoot at target defendant could not see); *Lee v Long Island R.R.*, 204 AD2d 280, 611 NYS2d 296 (2d Dept 1994) and *Del Costello v Hudson Railway Co. Inc.*, 274 AD2d 19, 711 NYS2d 77 (3d Dept 2000) (negligence of defendant's engineer in operating train).

For a charge and further discussion with respect to GOL § 9-103, see PJI 2:90A.

D. Surface and Sub-Surface Structures

A municipality is entitled to immunity on claims of negligent design of a sewer system, *Bilotta v Harrison*, 106 AD3d 848, 965 NYS2d 174 (2d Dept 2013); *Carbonaro v North Hempstead*, 97 AD3d 624, 948 NYS2d 645 (2d Dept 2012); *Azizi v Croton-on-Hudson*, 79 AD3d 953, 914 NYS2d 232 (2d Dept 2010). Further, liability cannot be predicated on a municipality's failure to install an adequate drainage system, *Watt v Albany*, 140 AD3d 1260, 33 NYS3d 511 (3d Dept 2016); *Vanguard Tours, Inc. v Yorktown*, 83 AD2d 866, 442 NYS2d 19 (2d Dept 1981). However, a municipality must use reasonable care to see that its sewers, water lines, gas lines, electric lines, tunnels, subways, underground parking areas and other structures are kept in repair, *Gillette Shoe Co., Inc. v New York*, 58 NY2d 853, 460 NYS2d 490, 447 NE2d 38 (1983); *De Witt Properties, Inc. v New York*, 44 NY2d 417, 406 NYS2d 16, 377 NE2d 461 (1978); *Weidman v New York*, 84 App Div 321, 82 NYS 771 (1st Dept 1903), *aff'd*, 176 NY 586, 68 NE 1125 (1903); *Munn v Hudson*, 61 App Div 343, 70 NYS 525 (3d Dept 1901); see 461 Broadway, LLC v Monticello, 144 AD3d 1464, 42 NYS3d 419 (3d Dept 2016) (sewer

system); *Watt v Albany*, supra (drainage system); Annot: 61 ALR2d 874. The municipality is required to use reasonable diligence to discover and remedy defects in its system, *Vanguard Tours, Inc. v Yorktown*, supra; *Lobravico v New York*, 155 App Div 184, 140 NYS 161 (1st Dept 1913); see *Kehoe v Valley Stream*, 44 NY2d 704, 405 NYS2d 445, 376 NE2d 918 (1978); *Giacotto v New York City Transit Authority*, 184 AD2d 355, 585 NYS2d 351 (1st Dept 1992) (to warrant conclusion that failure to keep access grate to subway locked at all times constitutes act of negligence, plaintiff is required to establish that tampering with grate by an intervening third party should have been anticipated). To recover for a municipality's negligence in failing to properly maintain or inspect a storm drainage system, plaintiff must demonstrate that the municipality had notice of a dangerous condition or reason to believe that a deterioration or shifting of pipes occurred that was likely to cause injury, that the municipality failed to make reasonable efforts to inspect and that the failure to inspect proximately caused plaintiff's injury, *Bilotta v Harrison*, supra.

Actions based on negligence in the construction or maintenance of subsurface structures usually result from injury to property caused by breakdown, overflow or collapse. Such liability would, of course, be placed on the person, corporation, or municipality constructing or maintaining the subsurface system. As to general rights to use subsurface, see Annot: 11 ALR2d 180. As to liability peculiar to public utilities, see PJI 2:185 through PJI 2:210.

E. Highways

Governmental entities owe the public a non-delegable duty to keep their streets and highways in a reasonably safe condition, see Highway Law §§ 12, 102, 139; *Brown v State*, 31 NY3d 514 (2018); *Stiuso v New York*, 87 NY2d 889, 639 NYS2d 1009, 663 NE2d 321 (1995); *Friedman v State*, 67 NY2d 271, 502 NYS2d 669, 493 NE2d 893 (1986); *Lopes v Rostad*, 45 NY2d 617, 412 NYS2d 127, 384 NE2d 673 (1978); *Roque v State*, 199 AD3d 1092, 156 NYS3d 557 (3d Dept 2021); *Gray v State*, 159 AD3d 1166, 72 NYS3d 208 (3d Dept 2018); *Rockenstire v State*, 135 AD3d 1131, 23 NYS3d 675 (3d Dept 2016); *Ames v New York*, 177 AD2d 528, 575 NYS2d 917 (2d Dept 1991); *Banta v Erie*, 134 AD2d 839, 521 NYS2d 589 (4th Dept 1987); *Smart v Wozniak*, 58 AD2d 993, 397 NYS2d 489 (4th Dept 1977). The duty has been defined as one "to construct and maintain . . . highways in a reasonably safe condition, taking into account such factors as the traffic conditions . . . , the terrain . . . and fiscal practicality," *Gutelle v New York*, 55 NY2d 794, 447 NYS2d 422, 432 NE2d 124 (1981); and the duty includes continuing review of the municipality's "traffic safety plan in light of actual operation," *Atkinson v Oneida*, 59 NY2d 840, 464 NYS2d 747, 451 NE2d 494 (1983); see *Sanford v State*, 94 AD2d 857, 463 NYS2d 595 (3d Dept 1983). The Third Department has held that this duty "is satisfied as long as the roads are reasonably safe for drivers who obey the rules of the road," *Howard v Tylutki*, 305 AD2d 907, 760 NYS2d 257 (3d Dept 2003); *Duger v Estate of Carey*, 295 AD2d 878, 744 NYS2d 262 (3d Dept 2002).

Because a plaintiff's claim against a municipality based on the municipality's breach of its nondelegable duty to keep its streets and highways in a reasonably safe condition sounds in negligence, plaintiff must establish that the municipality created or had notice of the hazardous condition and failed to take reasonable measures to remedy it, *Rockenstire v State*, 135 AD3d 1131, 23 NYS3d 675 (3d Dept 2016); see *Roque v State*, supra; *Gray v State*, supra.

A governmental body may be liable for a traffic planning decision only when its study is plainly inadequate or there is no reasonable basis for its plan, *Affleck v Buckley*, 96 NY2d 553, 732 NYS2d 625, 758 NE2d 651 (2001); *Aliasgarian v State*, 199 AD3d 1439, 158 NYS3d 493 (4th Dept 2021) (no qualified immunity where court rationally determined that there was no reasonable basis for State's decision to not install lighting in underpass). The municipality will be held liable for breach of that duty even if the dangerous condition of the road, which caused the injury, is created by an independent contractor, *Lopes v Rostad*, 45 NY2d 617, 412 NYS2d 127, 384 NE2d 673 (1978); *McAllen v New York*, 270 AD2d 43, 704 NYS2d 48 (1st Dept 2000). The duty is not dependent upon the existence of a special relationship between the municipality and the injured party, *Thompson v New York*, 78 NY2d 682, 578 NYS2d 507, 585 NE2d 819 (1991). Although the New York State Department of Transportation publishes a Highway Design Manual, there is no statutory or common-law requirement that municipalities comply with its contents in the design of their highways, *Cave v Galen*, 23 AD3d 1108, 804 NYS2d 219 (4th Dept 2005).

The designation of a municipal highway as a state arterial highway, thereby permitting state financing of highway improvements, does not release the municipality from its duty to keep the highway in a reasonably safe condition where title to the highway remains vested in the municipality, *Nowlin v New York*, 81 NY2d 81, 595 NYS2d 927, 612 NE2d 285 (1993); *Ames v New York*, 177 AD2d 528, 575 NYS2d 917 (2d Dept 1991); see *Nunez v New York*, 177 AD2d 394, 576 NYS2d 137 (1st Dept 1991). However, in *Albanese v New York*, 5 NY3d 217, 800 NYS2d 538, 833 NE2d 1213 (2005), the Court of Appeals distinguished *Nowlin v New York*, supra, and held that a municipality was not liable to a worker injured during a state construction project involving the rehabilitation of an arterial highway pursuant to Highway Law art. XII-B, the rehabilitation project was initiated by the State, the State was in charge of the construction project, the project was ongoing at the time of the accident, the municipality had no input into the contractors or consultants hired, and the municipality did not perform any of the work or activity that caused the condition that led to the accident. Under those circumstances, the municipality could not be held liable by virtue of its limited regulatory role in issuing work permits, reviewing plans and specification, attending meetings, inspecting the site and retaining authority to suspend or terminate the work. Despite the lack of ownership, a municipality may be cast in damages where it assumes control of a private road and maintains it, *Svartz v Fallsburg*, 241 AD2d 799, 661 NYS2d 87 (3d Dept 1997). The State has no duty to defend and

indemnify New York City for accidents that occur on State arterial highways located within and maintained by New York City, *New York v State*, 98 NY2d 740, 750 NYS2d 819, 780 NE2d 504 (2002).

Where two state roadways intersect, the statutory duty to maintain the roadways, as well as any traffic signal located thereon, falls upon the state, see Vehicle & Traffic Law § 1681; *Estate of Konstantatos by Konstantatos v Suffolk*, 208 AD2d 889, 618 NYS2d 90 (2d Dept 1994). The fact that a county may regularly patrol state roadways for purposes of enforcing traffic regulations does not subject it to liability on the theory that it controls the roadways, *Estate of Konstantatos by Konstantatos v Suffolk supra*. The state has jurisdiction over any highway intersecting a state highway for a distance not exceeding 100 feet from the intersection, *Cain v Pappalardo*, 225 AD2d 1005, 639 NYS2d 570 (3d Dept 1996). Unless the municipality assumes control of an intersection through repair or maintenance, the state's jurisdiction over the intersection continues and a municipality cannot be held liable for a dangerous condition at the intersection, *id* (placement of "stop ahead" sign insufficient to establish municipality's control).

A municipality may be liable for injuries caused by its negligence in maintaining highways that are defective, in disrepair, unsafe or dangerous, *Rockenstire v State*, 135 AD3d 1131, 23 NYS3d 675 (3d Dept 2016) (duty to remedy dangerous condition defendant created in course of repavement project); *Austin v Southampton*, 113 AD3d 711, 979 NYS2d 127 (2d Dept 2014) (duty with respect to trees adjacent to highway); *Gardner v State*, 79 AD3d 1635, 914 NYS2d 537 (4th Dept 2010) (duty to correct deadly snowbank condition on highway); *Brown v State*, 79 AD3d 1579, 914 NYS2d 512 (4th Dept 2010) (duty to post adequate signs); *Kohn v New York*, 69 AD3d 463, 894 NYS2d 379 (1st Dept 2010) (question of fact existed as to whether municipality liable for permitting dangerous condition to exist at busy city intersection by failing to act promptly either to repair nonfunctioning traffic signal or deploy traffic officer to scene); *Parada v New York*, 205 AD2d 427, 613 NYS2d 630 (1st Dept 1994); *Fowle v State*, 187 AD2d 698, 590 NYS2d 280 (2d Dept 1992) (duty respecting trees along the highway); *Kelly v Islip*, 141 AD2d 611, 529 NYS2d 530 (2d Dept 1988) (duty to remove standing water from road after rains); *Dubacs v State*, 140 AD2d 968, 529 NYS2d 643 (4th Dept 1988) (duty to correct a recurrent and unusually severe icy condition on a bridge that had a known propensity to freeze over before other roads in area); *Carlino v Albany*, 118 AD2d 928, 499 NYS2d 814 (3d Dept 1986) (actual and constructive notice requirements); *Ciccarella v Graf*, 116 AD2d 615, 497 NYS2d 704 (2d Dept 1986) (county has duty to repair pothole of which it has actual or constructive notice); *Sanchez v Lippincott*, 89 AD2d 372, 455 NYS2d 457 (4th Dept 1982) (duty to assure visibility of signs and traffic); *Green v State*, 71 AD2d 761, 419 NYS2d 313 (3d Dept 1979) (duty to clear road of debris); *Shambeau v Saratoga*, 70 AD2d 971, 417 NYS2d 133 (3d Dept 1979) (duty to correct hazardous road surface); *Gaines v Long Island State Park Commission*, 60 AD2d 724, 401 NYS2d 315 (3d Dept 1977) (duty to repair potholes); *Hepburn v Croce*, 295 AD2d 475, 744 NYS2d 458 (2d Dept 2002) (duty

to keep highways in safe condition after winter sanding operations); see also *Bailey v Honda Motor Co., Ltd.*, 144 AD2d 119, 534 NYS2d 711 (3d Dept 1988) (failure to repaint center line on repaved roadway); *Gunn v Good Luck Truck Rental, Inc.*, 85 AD2d 567, 445 NYS2d 700 (1st Dept 1981) (separate responsibility of City for maintenance and State for design of expressway). The municipality's duty to maintain public sidewalks and roadways in reasonably safe condition and good repair includes bus lanes on public roadways. Even though buses may produce unusual wear and tear on the roadways adjoining bus stops, bus lanes are the responsibility of the municipality and do not involve a special use, *Cabrera v New York*, 45 AD3d 455, 846 NYS2d 152 (1st Dept 2007) (expressly overruling *Matias v New York*, 292 AD2d 311, 741 NYS2d 497 (1st Dept 2002)).

The state is not obligated to employ a constant vigilance over its highway network, but only to pursue reasonably plausible measures, *Johnson v State*, 265 AD2d 652, 696 NYS2d 286 (3d Dept 1999); see *Gray v State*, 159 AD3d 1166, 72 NYS3d 208 (3d Dept 2018) (mere fact of prior rockfall on slope did not increase the likelihood for mudslide in same location). Thus, even an alleged failure to inspect a fence installed more than 100 years earlier is not a ground for imposing liability absent evidence of changed conditions or accidents that would have required modification of the fence, *Diakite v New York*, 42 AD3d 338, 840 NYS2d 33 (1st Dept 2007). Although there is a duty to trim growth within a highway's right of way to assure visibility of stop signs and other traffic, *Cain v Pappalardo*, 225 AD2d 1005, 1006, 639 NYS2d 570 (3d Dept 1996), the presence of trees and shrubs in close proximity to the roadway is to be expected in rural areas and does not create an unreasonable danger for the careful driver, *Duger v Estate of Carey*, 295 AD2d 878, 744 NYS2d 262 (3d Dept 2002); see *Howard v Tylutki*, 305 AD2d 907, 760 NYS2d 257 (3d Dept 2003).

A municipality will not be held responsible for negligent design or maintenance of a highway it does not own or control unless it affirmatively undertakes such duty, *Ernest v Red Creek Cent. School Dist.*, 93 NY2d 664, 695 NYS2d 531, 717 NE2d 690 (1999). Although sections of the Vehicle and Traffic Law and General Municipal Law give towns certain rights with respect to all roads, including county roads, none of the statutes establish an affirmative duty of the town to maintain any county road, *id.* Therefore, where a town did not own or control a county road, and never assumed any duty to maintain it, it owed no duty to plaintiff who was injured as a result of the alleged safety hazards on the county road, *id.* A municipality's admitted ownership and maintenance of a road is sufficient to raise a question of fact regarding whether the municipality actually designed and/or constructed the road, *Good v Sullivan*, 198 AD2d 706, 604 NYS2d 285 (3d Dept 1993); *Merchant v Halfmoon*, 194 AD2d 1031, 599 NYS2d 687 (3d Dept 1993).

At points of particular danger, a municipality must provide barriers sufficiently strong to hold an automobile traveling at a reasonable rate

of speed, *Gomez v New York State Thruway Authority*, 73 NY2d 724, 535 NYS2d 587, 532 NE2d 93 (1988); *Lattanzi v State*, 74 AD2d 378, 428 NYS2d 331 (3d Dept 1980), *aff'd* for reasons in AD opinion, 53 NY2d 1045, 442 NYS2d 499, 425 NE2d 887 (1981); *Hill v Reading*, 18 AD3d 913, 795 NYS2d 126 (3d Dept 2005); *McDonald v State*, 307 AD2d 687, 763 NYS2d 379 (3d Dept 2003); *Colegrove v Steuben*, 216 AD2d 888, 629 NYS2d 154 (4th Dept 1995); *Van Son v State*, 116 AD2d 1013, 498 NYS2d 938 (4th Dept 1986); see *Reames v State*, 158 AD3d 1117, 70 NYS3d 658 (4th Dept 2018); *Gardner v State*, 79 AD3d 1635, 914 NYS2d 537 (4th Dept 2010) (negligent snow removal around barrier, rendering it ineffective and creating dangerous snowbank condition). Where the barrier is inadequate, liability will be imposed even if the accident occurred at or near a 90-degree angle with the barrier, *McDonald v State*, *supra*. Roadside hazards such as drainage ditches are inherently dangerous and, consequently, a municipality has a duty either to prevent vehicles from leaving the road or to eliminate the danger for those vehicles that do leave the road, *Popolizio v Schenectady*, 62 AD3d 1181, 879 NYS2d 616 (3d Dept 2009); *Heins v Vanbourgonien*, 180 AD3d 1019, 119 NYS3d 158 (2d Dept 2020) (triable issue of fact as to whether V-shaped median constituted unsafe condition); see *Roque v State*, 199 AD3d 1092, 156 NYS3d 557 (3d Dept 2021).

Frequent suicide attempts from a bridge may give rise to a duty to install suicide prevention barriers, *Feldman v Port Authority of New York*, 194 AD3d 137, 144 NYS3d 701 (1st Dept 2021); *Perlov v Port Authority of New York and New Jersey*, 189 AD3d 1624, 139 NYS3d 324 (2d Dept 2020).

A municipality's duty to maintain its highways in a reasonably safe condition extends to furnishing safe guardrails, *Roque v State*, 199 AD3d 1092, 156 NYS3d 557 (3d Dept 2021); *Heins v Vanbourgonien*, 180 AD3d 1019, 119 NYS3d 158 (2d Dept 2020). In providing guardrails, the state or a municipality is not required to guard against remote or unforeseeable possibilities, *Epstein v State*, 124 AD2d 544, 507 NYS2d 689 (2d Dept 1986); see also *Heins v Vanbourgonien*, *supra* (duty to maintain highways extends to conditions beyond travel lanes and shoulders when prior accident or other event would give notice of specific dangerous condition); *Galvin v State*, 245 AD2d 418, 666 NYS2d 673 (2d Dept 1997) (where there is no history of accidents in immediate vicinity, state's discretionary determination not to replace guardrail in that area was reasonable); *Kissinger v State*, 126 AD2d 139, 513 NYS2d 275 (3d Dept 1987).

A steep slope or a ditch may be so inherently dangerous that the state or municipality has a duty to either prevent vehicles from leaving the road or eliminate the danger, *Roque v State*, 199 AD3d 1092, 156 NYS3d 557 (3d Dept 2021).

A municipality may not be held liable for the failure to install median barriers recommended by a study which found that the absence of such barriers did not create a dangerous condition, *Longo by Longo v*

Tafaro, 137 AD2d 661, 524 NYS2d 754 (2d Dept 1988). If negligence in failing to erect a median barrier is established, there may be liability for aggravation of injuries sustained by driver whose car crosses the median, see *Friedman v State*, 67 NY2d 271, 502 NYS2d 669, 493 NE2d 893 (1986); *Atkinson v Oneida*, 59 NY2d 840, 464 NYS2d 747, 451 NE2d 494 (1983); *Stuart-Bullock v State*, 33 NY2d 418, 353 NYS2d 953, 309 NE2d 419 (1974). Similarly, even though the defect in a guardrail did not cause plaintiff's vehicle to leave the roadway in the first instance, if it can be demonstrated that the defect was a substantial factor in aggravating plaintiff's injuries, a cause of action may be sustained against a municipality, *Temple v Chenango*, 228 AD2d 938, 644 NYS2d 587 (3d Dept 1996). Where an adequate guardrail was installed, the municipality is not required to replace it with a safer design but is required to maintain the existing guardrail in a reasonably safe condition, *Kirisits v State*, 107 AD2d 156, 485 NYS2d 890 (4th Dept 1985). However, the fact that guardrails met federal and state standards when installed did not insulate the state from liability where it did not make tests before establishing the standard, the standards changed prior to the accident, and the municipality was aware that the existing guardrails were dangerous, *Van Son v State*, 116 AD2d 1013, 498 NYS2d 938 (4th Dept 1986).

A municipality generally is required to install and maintain streetlights only where illumination is required to avoid dangerous and potentially hazardous conditions on the street, *Thompson v New York*, 78 NY2d 682, 578 NYS2d 507, 585 NE2d 819 (1991); see *Lee v Morris*, 297 AD2d 626, 747 NYS2d 233 (2d Dept 2002); *Abbott v Nassau*, 223 AD2d 662, 637 NYS2d 216 (2d Dept 1996) (pothole is not type of dangerous and potentially hazardous condition that imposes duty on municipality to maintain streetlights). The mere outage of an existing streetlight is not, by itself, sufficient to establish that a dangerous condition existed, *Thompson v New York*, supra; *Michetti v New York*, 184 AD2d 263, 585 NYS2d 201 (1st Dept 1992). Similarly, a "walk/don't walk" signal's failure to illuminate, standing alone, does not render dangerous an otherwise reasonably safe intersection, *Rubinfeld v New York*, 263 AD2d 448, 692 NYS2d 706 (2d Dept 1999). However, a question of fact existed as to whether a municipality permitted a dangerous condition to exist at a city intersection by failing to act promptly either to repair a nonfunctioning traffic signal or deploy a traffic officer to the scene, *Kohn v New York*, 69 AD3d 463, 894 NYS2d 379 (1st Dept 2010).

Although a municipality owes to the public a non-delegable duty to keep its streets and highways in a reasonably safe condition, in the field of traffic design engineering a municipality is accorded a qualified immunity from liability arising out of a highway planning decision, *Friedman v State*, 67 NY2d 271, 502 NYS2d 669, 493 NE2d 893 (1986); *Heins v Vanbourgonien*, 180 AD3d 1019, 119 NYS3d 158 (2d Dept 2020); *Redcross v State*, 241 AD2d 787, 660 NYS2d 211 (3d Dept 1997); *Galligan v Long Island R. Co.*, 198 AD2d 399, 603 NYS2d 895 (2d Dept 1993); see *Martinez v New York City Transit Authority*, 203 AD3d 87, 162 NYS3d 11 (1st Dept 2022) (qualified immunity applicable to train

speed policy crafted by Transit Authority); *Pedraza v New York City Transit Authority*, 203 AD3d 95, 162 NYS3d 19 (1st Dept 2022) (qualified immunity applicable to train speed policy crafted by Transit Authority); *Zambrana v New York City Transit Authority*, 14 AD3d 23, 786 NYS2d 488 (1st Dept 2004) (qualified immunity applicable to Transit Authority's decision to keep doors between cars unlocked); *McCord v New York*, 298 AD2d 438, 748 NYS2d 761 (2d Dept 2002) (qualified immunity applicable to Transit Authority's decision to lock doors between subway cars); *Stevens v New York City Transit Authority*, 288 AD2d 460, 733 NYS2d 492 (2d Dept 2001) (qualified immunity applicable to train speed policy crafted by Transit Authority); *Chase v New York City Transit Authority*, 288 AD2d 422, 733 NYS2d 233 (2d Dept 2001) (same). Once the municipality is made aware of a dangerous traffic condition, it must undertake a reasonable study with an eye towards alleviating the danger, see *Friedman v State*, 67 NY2d 271, 502 NYS2d 669, 493 NE2d 893 (1986); *Prendergast v Cosco*, 4 AD3d 880, 771 NYS2d 470 (4th Dept 2004); *Heffler v State*, 96 AD2d 926, 466 NYS2d 370 (2d Dept 1983). Under the qualified immunity doctrine, a governmental body may be held liable when its study of a traffic condition is plainly inadequate or there is no reasonable basis for its traffic plan, *Affleck v Buckley*, 96 NY2d 553, 732 NYS2d 625, 758 NE2d 651 (2001); *Friedman v State*, supra. While the municipality is not liable where it reasonably concludes, after study, that design changes are not advisable, *Affleck v Buckley*, supra; see *Kissinger v State*, 126 AD2d 139, 513 NYS2d 275 (3d Dept 1987), the municipality may be liable where it decides to proceed to remedy a dangerous condition but unjustifiably fails to effectuate its plan within a reasonable time, see *Friedman v State*, supra; *Cruz v New York*, 201 AD2d 606, 607 NYS2d 969 (2d Dept 1994); *Ames v New York*, 177 AD2d 528, 575 NYS2d 917 (2d Dept 1991).

Something more than a choice between conflicting opinions of experts is required before a governmental body may be held liable for negligently performing its traffic planning function, *Affleck v Buckley*, 96 NY2d 553, 732 NYS2d 625, 758 NE2d 651 (2001); *Weiss v Fote*, 7 NY2d 579, 200 NYS2d 409, 167 NE2d 63 (1960). The plaintiff must show not merely that another option was available, but also that the plan adopted lacked a reasonable basis, *Affleck v Buckley*, supra; *Weiss v Fote*, supra. In contrast, a blanket policy to conduct traffic studies only when an intersection has had a designated number of accidents and has exceeded a designated accident rate and only if its traffic engineer has determined that a study is warranted is insufficient to establish qualified immunity as a matter of law, *Evans v Stranger*, 307 AD2d 439, 762 NYS2d 678 (3d Dept 2003).

If a defendant is not entitled to the qualified immunity afforded by *Weiss v Fote*, 7 NY2d 579, 200 NYS2d 409, 167 NE2d 63 (1960), because defendant's decision was not the product of a plan or study, the appropriate inquiry is whether defendant was made aware of a dangerous condition and failed to take action to remedy it and whether the dangerous condition was a proximate cause of the accident, *Brown v State*, 79 AD3d 1579, 914 NYS2d 512 (4th Dept 2010). In such a case, plaintiff

does not have to establish what corrective action defendant could have taken that would have prevented plaintiff's accident, *id.*

If a road is constructed and built in accordance with good engineering practices existing at the time, the municipality's liability is limited, *Temple v Chenango*, 228 AD2d 938, 644 NYS2d 587 (3d Dept 1996) (question of fact as to whether municipality satisfied its obligations). Even the failure to inspect a fence installed more than 100 years earlier is not a ground for imposing liability absent evidence of changed conditions or accidents that would have required modification of the fence, *Diakite v New York*, 42 AD3d 338, 840 NYS2d 33 (1st Dept 2007). Although a municipality may be under a duty to redesign and reconstruct a roadway, it will not be held liable where the delay in doing so was not unreasonable in light of the scope of the reconstruction project, the availability of funding and design factors, *Edouard v Bonner*, 224 AD2d 575, 638 NYS2d 688 (2d Dept 1996); *Sangirardi v State*, 205 AD2d 603, 613 NYS2d 224 (2d Dept 1994); *Trautman v State*, 179 AD2d 635, 578 NYS2d 245 (2d Dept 1992); see *Ring v State*, 270 AD2d 788, 705 NYS2d 427 (3d Dept 2000). A municipality, in maintaining older highways, is not required to undertake expensive reconstruction simply to meet highway safety standards that have changed since the road was originally constructed, see *Preston v State*, 6 AD3d 835, 775 NYS2d 115 (3d Dept 2004); *Vizzini v State*, 278 AD2d 562, 717 NYS2d 415 (3d Dept 2000); *Van De Bogart v State*, 133 AD2d 974, 521 NYS2d 125 (3d Dept 1987); see also *Merino v New York City Transit Authority*, 218 AD2d 451, 639 NYS2d 784 (1st Dept 1996), *aff'd*, 89 NY2d 824, 653 NYS2d 270, 675 NE2d 1222 (1996) (subway station structure). Compliance with design standards adopted after construction of a highway is required only if the municipality undertakes significant repair or reconstruction that would provide an opportunity for such compliance, *Cave v Galen*, 23 AD3d 1108, 804 NYS2d 219 (4th Dept 2005).

It is well settled that an independent contractor responsible for municipal light repairs owes no duty of care to the general public, *Vergara v Tides Const. Corp.*, 280 AD2d 665, 721 NYS2d 103 (2d Dept 2001); *Pizzaro v New York*, 188 AD2d 591, 591 NYS2d 485 (2d Dept 1992). Where, however, a municipality enters into a contract with a third party contractor to repair traffic lights, it may maintain a claim for indemnification against the contractor by a showing that the contractor negligently performed its contract, even though the contractor cannot be held liable to plaintiffs who were injured because of the malfunctioning traffic light, *Powell v New York*, 250 AD2d 409, 673 NYS2d 86 (1st Dept 1998).

In a case where the adequacy of a municipality's study is presented, the following charge is suggested:

**PJI 2:225B. State or Municipal Liability—Public
Premises and Ways [Supplemental
Instruction]**

A (county, city, town, village) owes to the pub-

lic a duty to keep its streets and highways in a reasonably safe condition. Once a (county, city, town, village) is made aware of a dangerous traffic condition it must undertake a reasonable study with respect to that condition. A (county, city, town, village) may be held liable if that study is plainly inadequate or if the decision it makes after the study has no reasonable basis.

To recover in this case the plaintiff must prove (1) that the (county, city, town, village) was negligent in that: (a) the traffic study undertaken by it was plainly inadequate or that (b) there was no reasonable basis for its decision not to install a (traffic light, stop sign, etc.) at the intersection and (2) that its negligence was a substantial factor in causing the accident.

You will first consider whether the (county, city, town, village) was negligent. In order to find that the (county, city, town village) was negligent, you must decide that (a) the traffic study conducted by it was plainly inadequate or (b) there was no reasonable basis for its decision not to install a (traffic light, stop sign, etc.) at the intersection.

If you decide that the traffic study conducted by the (county, city, town, village) was not plainly inadequate and if you decide that there was a reasonable basis for its decision not to install a (traffic light, stop sign, etc.) at the intersection, you will find that the (county, city, town, village) was not negligent.

If you find that the (county, city, town, village) was negligent, you must next consider whether that negligence was a substantial factor in causing the accident.

An act or omission is regarded as a cause of an accident if it was a substantial factor in bringing about the accident, that is, if it had such an effect in producing the accident that reasonable people would regard it as a cause of the accident. *[If the*

*court intends to charge apportionment, the following language should be added to the charge: **Whether the negligence of a particular party was a substantial factor in causing an accident does not necessarily depend on the percentage of fault that may be apportioned to that party.***]

If you find that the (county's, city's, town's, village's) negligence was a substantial factor in causing the accident, you will find for the plaintiff on this issue. If you find that the (county's, city's, town's, village's) negligence was not a substantial factor in bringing about the accident, you will find in favor of the (county, city, town, village) on this issue.

Comment

Based on *Alexander v Eldred*, 63 NY2d 460, 483 NYS2d 168, 472 NE2d 996 (1984); see *Martin v Reedy*, 194 AD2d 255, 606 NYS2d 455 (3d Dept 1994) (substantial questions of fact as to adequacy of highway planning decisions and sufficiency of signs and need for guardrails at accident site, as well as whether Town's negligence, if any, was proximate cause of accident and decedent's death); *Kiamie v Huntington*, 193 AD2d 584, 597 NYS2d 156 (2d Dept 1993) (question of fact as to whether town unreasonably delayed execution of part of safety plan). Where there is no issue of fact with respect to the adequacy of the municipality's study and determination, the court can decide the issue as a matter of law, *Affleck v Buckley*, 96 NY2d 553, 732 NYS2d 625, 758 NE2d 651 (2001). If the negligence of the plaintiff or other parties is in dispute, the jury must be appropriately charged on these issues. See PJI 2:36, 2:275. For a discussion of the liability of a subcontractor who has agreed to perform work along the Thruway, see *Church ex rel. Smith v Callanan Industries, Inc.*, 99 NY2d 104, 752 NYS2d 254, 782 NE2d 50 (2002).

Adequate warning of existing conditions and hazards must be given by the municipality to highway users, *Rivero v New York*, 290 NY 204, 48 NE2d 486 (1943); *Humphrey v State*, 90 AD2d 901, 456 NYS2d 861 (3d Dept 1982), *aff'd*, 60 NY2d 742, 469 NYS2d 661, 457 NE2d 767 (1983); *Rohweller v State*, 90 AD2d 650, 456 NYS2d 262 (3d Dept 1982); *Bodner v Steinhardt*, 71 AD2d 702, 418 NYS2d 484 (3d Dept 1979); *Beardsley v State*, 57 AD2d 1061, 395 NYS2d 848 (4th Dept 1977). But there is no special duty to protect motorists from animals known to be at large on or near the highway, *Shinder v State*, 62 NY2d 945, 479 NYS2d 189, 468 NE2d 27 (1984); *Napolitano v Suffolk*, 61 NY2d 863, 474 NYS2d 461, 462 NE2d 1179 (1984). There is no requirement that permanent warning signs be placed unless such failure deviated from safety standards in existence at the time or unless the municipality had

notice of repeated occurrences from the same hazard, *Rooney v State*, 111 AD2d 159, 488 NYS2d 468 (2d Dept 1985); see *Brown v State*, 79 AD3d 1579, 914 NYS2d 512 (4th Dept 2010); see also *Nowlin v New York*, 182 AD2d 376, 582 NYS2d 669 (1st Dept 1992), *aff'd*, 81 NY2d 81, 595 NYS2d 927, 612 NE2d 285 (1993); *Posman v State*, 117 AD2d 915, 498 NYS2d 917 (3d Dept 1986) (number of prior accidents showed inadequacy of sign). Likewise, there is no duty to warn of transitory natural conditions that can be readily observed by motorists, *Nixon v State*, 108 AD2d 1046, 485 NYS2d 619 (3d Dept 1985). But standing water regularly left on a road following rains is not a transitory natural condition and must be corrected or the public given a warning, *Kelly v Islip*, 141 AD2d 611, 529 NYS2d 530 (2d Dept 1988).

Warning signs must be of appropriate design, unambiguous import, and be in a proper place, *Canepa v State*, 306 NY 272, 117 NE2d 550 (1954); *Sanchez v Lippincott*, 89 AD2d 372, 455 NYS2d 457 (4th Dept 1982); see VTL § 1682; see also *Miller v Tuchols*, 90 AD2d 957, 456 NYS2d 546 (4th Dept 1982) (respective duties of town, county and state for posting warning signs). If the sign fairly gives warning of the hazard to be apprehended or notice of the conduct to be followed, failure to place the sign in compliance with the Manual of Uniform Traffic Control Devices is not a proximate cause of the accident and the municipality is not liable, see *Lyle v State*, 44 AD2d 239, 354 NYS2d 35 (4th Dept 1974), *aff'd*, 38 NY2d 782, 381 NYS2d 866, 345 NE2d 338 (1975); see also *Tamm v State*, 29 AD2d 601, 285 NYS2d 753 (3d Dept 1967), *aff'd*, 26 NY2d 719, 308 NYS2d 878, 257 NE2d 55 (1970); *Proctor v State*, 67 AD2d 1051, 413 NYS2d 521 (3d Dept 1979). The posting of a warning sign does not necessarily protect the municipality against liability, see *Shambeau v Saratoga*, 70 AD2d 971, 417 NYS2d 133 (3d Dept 1979).

If it is undisputed that the driver was fully familiar with the highway and all obstructions, the failure of the municipality to post signs may not be a proximate cause of the accident as a matter of law, *Atkinson v Oneida*, 59 NY2d 840, 464 NYS2d 747, 451 NE2d 494 (1983); *Howard v Tylutki*, 305 AD2d 907, 760 NYS2d 257 (3d Dept 2003); see *Dalzell v Dutchess*, 258 AD2d 615, 685 NYS2d 749 (2d Dept 1999) (jury could have properly inferred that Town's negligence in failing to replace stop sign was proximate cause of accident where offending driver was unfamiliar with road and there was also missing warning sign); *Good v Sullivan*, 198 AD2d 706, 604 NYS2d 285 (3d Dept 1993); *Ramundo v Guilderland*, 142 AD2d 50, 534 NYS2d 543 (3d Dept 1988) (usually it is for the jury to decide whether driver was so familiar with road that absence of warning signs was not a proximate cause of accident). However, familiarity will not preclude liability where there is evidence that additional, binding traffic control devices would be appropriate and would have, if followed, prevent the accident, *O'Keefe v Wohl*, 184 AD3d 1046, 126 NYS3d 559 (3d Dept 2020) (where both drivers were familiar with intersection, conflicting expert opinions presented issue of fact as to whether stop sign and additional warning would have prevented accident); see *Bailey v Tioga*, 77 AD3d 1251, 910 NYS2d 230 (3d Dept 2010) (where both drivers were familiar with intersection, expert proof

that design of intersection and warnings were inadequate to prevent accident raised issue of fact). The absence of a warning sign can be excluded as a cause if the participants' awareness of the condition would have lead to the same course of conduct if the sign had been present, *Miller v Fenton*, 247 AD2d 740, 669 NYS2d 391 (3d Dept 1998); *Boucher v Candor*, 234 AD2d 669, 649 NYS2d 959 (3d Dept 1996); see *Iwaszkiewicz v Callanan Industries Inc.*, 258 AD2d 776, 685 NYS2d 827 (3d Dept 1999). Likewise, the absence of a warning sign is not a proximate cause of an accident resulting from the manner of operation of the vehicle, *Schichler v State*, 110 AD2d 959, 487 NYS2d 885 (3d Dept 1985), *aff'd*, 66 NY2d 954, 498 NYS2d 798, 489 NE2d 767 (1985); see *Belonzi v Brookhaven*, 227 AD2d 361, 641 NYS2d 892 (2d Dept 1996); *Demesmin v Islip*, 147 AD2d 519, 537 NYS2d 605 (2d Dept 1989), or of an accident resulting from the failure of a driver, in an alcoholic stupor, to respond to other warnings of danger, *Leyva v Levy*, 120 AD2d 444, 502 NYS2d 457 (1st Dept 1986), *aff'd*, 69 NY2d 847, 514 NYS2d 718, 507 NE2d 311 (1987). But liability may be imposed where the municipality posted only an advisory speed sign at a dangerous intersection after failing to conduct an adequate investigation and study, see *Scheemaker v State*, 70 NY2d 985, 526 NYS2d 420, 521 NE2d 427 (1988).

A municipality is not an insurer of the safety of its highways, *Tomassi v Union*, 46 NY2d 91, 412 NYS2d 842, 385 NE2d 581 (1978); *Russell v State*, 75 AD2d 907, 427 NYS2d 322 (3d Dept 1980), *aff'd* for reasons in AD opinion, 53 NY2d 986, 441 NYS2d 671, 424 NE2d 558 (1981); *Roque v State*, 199 AD3d 1092, 156 NYS3d 557 (3d Dept 2021); *Demesmin v Islip*, 147 AD2d 519, 537 NYS2d 605 (2d Dept 1989); *Epstein v State*, 124 AD2d 544, 507 NYS2d 689 (2d Dept 1986). Its duty is discharged if the highway is reasonably safe for those who exercise reasonable care, *Tomassi v Union*, *supra*; *Annino v Utica*, 276 NY 192, 11 NE2d 726 (1937); *Duger v Estate of Carey*, 295 AD2d 878, 744 NYS2d 262 (3d Dept 2002); *Alberti v Rydill*, 152 AD2d 520, 543 NYS2d 463 (2d Dept 1989). The state is not obligated to employ a constant vigilance over its highway network, but only to pursue reasonably plausible measures, *Johnson v State*, 265 AD2d 652, 696 NYS2d 286 (3d Dept 1999).

The duty also extends to pedestrians who travel alongside the highway, *Sanford v State*, 94 AD2d 857, 463 NYS2d 595 (3d Dept 1983), and to conditions on the roadway and conditions adjacent to or above the highway which may foreseeably cause injury to users, *Bottalico v State*, 59 NY2d 302, 464 NYS2d 707, 451 NE2d 454 (1983); *Johnson v State*, 151 AD3d 1672, 56 NYS3d 723 (4th Dept 2017) (2 to 4 inch drop off on shoulder unsafe); *Klimek v Ghent*, 134 AD2d 740, 521 NYS2d 558 (3d Dept 1987) (hole in shoulder); *Pellegrino v State*, 121 AD2d 612, 503 NYS2d 865 (2d Dept 1986) (center median identified only by reflecting delineators); *Fasano v State*, 113 AD2d 885, 493 NYS2d 805 (2d Dept 1985) (citing PJI) (paved shoulder); *Rooney v State*, 111 AD2d 159, 488 NYS2d 468 (2d Dept 1985); *Terwilliger v State*, 96 AD2d 688, 466 NYS2d 792 (3d Dept 1983); *Pontello v Onondaga*, 94 AD2d 427, 464 NYS2d 891 (4th Dept 1983); *Smart v Wozniak*, 58 AD2d 993, 397 NYS2d 489 (4th Dept 1977); see *Harris v East Hills*, 41 NY2d 446, 393 NYS2d

691, 362 NE2d 243 (1977); *Feldman v Port Authority of New York*, 194 AD3d 137, 144 NYS3d 701 (1st Dept 2021) (frequent suicides from bridge may give rise to duty to install suicide prevention barrier); *Perlov v Port Authority of New York and New Jersey*, 189 AD3d 1624, 139 NYS3d 324 (2d Dept 2020) (same); *Sabino v New York*, 80 AD2d 800, 437 NYS2d 92 (1st Dept 1981), *aff'd*, 54 NY2d 816, 443 NYS2d 653, 427 NE2d 950 (1981); *Protzman v State*, 80 AD2d 719, 437 NYS2d 147 (4th Dept 1981), *aff'd*, 56 NY2d 821, 452 NYS2d 570, 438 NE2d 103 (1982); *Leach v Yorktown*, 251 AD2d 630, 676 NYS2d 209 (2d Dept 1998) (duty respecting trees along the highway); *Fowle v State*, 187 AD2d 698, 590 NYS2d 280 (2d Dept 1992) (same); *Rittenhouse v State*, 134 AD2d 774, 521 NYS2d 824 (3d Dept 1987) (foreseeability); *Waddingham v State*, 90 AD2d 855, 456 NYS2d 843 (3d Dept 1982); *Diamond v State*, 53 AD2d 958, 385 NYS2d 827 (3d Dept 1976); *Reynolds v Sherburne*, 80 AD2d 652, 436 NYS2d 417 (3d Dept 1981) (foreseeability); *Rinaldi v State*, 49 AD2d 361, 374 NYS2d 788 (3d Dept 1975) (duty respecting trees along the highway); see also *Gray v State*, 159 AD3d 1166, 72 NYS3d 208 (3d Dept 2018).

Thus, if the state or governmental subdivision undertakes to provide a paved strip or shoulder alongside the roadway, it must maintain that shoulder in a reasonably safe condition for foreseeable uses, including those uses resulting from a driver's negligence or an emergency, *Stiuso v New York*, 87 NY2d 889, 639 NYS2d 1009, 663 NE2d 321 (1995); *Bottalico v State*, 59 NY2d 302, 464 NYS2d 707, 451 NE2d 454 (1983); *Roque v State*, 199 AD3d 1092, 156 NYS3d 557 (3d Dept 2021); *Carollo v Colden*, 27 AD3d 1077, 811 NYS2d 543 (4th Dept 2006). On the other hand, where the paved road surface is adequate for safe public passage, travel beyond those limits on unimproved land adjacent to the roadway is generally not contemplated or foreseeable and therefore the municipality is under no duty to maintain it for vehicular traffic, *Stiuso v New York*, *supra*; *Tomassi v Union*, 46 NY2d 91, 412 NYS2d 842, 385 NE2d 581 (1978); *Roque v State*, *supra*; *Mallon v Orange*, 45 AD3d 816, 847 NYS2d 124 (2d Dept 2007); *Sherman v Cortland*, 18 AD3d 908, 795 NYS2d 121 (3d Dept 2005); *Muller v State*, 240 AD2d 881, 658 NYS2d 727 (3d Dept 1997) (court erred in finding liability on part of state associated with slope of drainage ditch headwall lying beyond gravel shoulder of roadway); see *Ernest v Red Creek Cent. School Dist.*, 93 NY2d 664, 695 NYS2d 531, 717 NE2d 690 (1999); see also *Palloni v Attica*, 278 AD2d 788, 723 NYS2d 582 (4th Dept 2000) (no municipal liability for injuries resulting from use of ATV, specifically prohibited by statute, on seasonal dirt and gravel road). As to the duty beyond the traveled portion of the right of way, see *McKenna v Garcia*, 189 AD2d 756, 592 NYS2d 414 (2d Dept 1993) (defendant town had no duty to remove boulder on its property adjacent to roadway); *Young v New York Thruway Authority*, 76 AD2d 834, 428 NYS2d 314 (2d Dept 1980).

With respect to crosswalks, a municipality satisfies its burden to pedestrians by providing designated crosswalks, *Omer v Rodriguez*, 294 AD2d 202, 743 NYS2d 75 (1st Dept 2002). Thus, no liability arises

based upon a municipality's failure to erect a fence in a median to deter pedestrians from crossing in non-designated areas, id.

PJI 2:225C. Municipal Liability—Public Premises and Ways—Snow and Ice

A municipality must use reasonable care to keep its streets and sidewalks reasonably clear of snow and ice. The fact that someone falls on snow or ice and is injured does not of itself make the municipality liable. In this case, plaintiff must establish that the condition of the sidewalk upon which (he, she) fell was so different in character from the usual condition in that locality at the time plaintiff fell as to constitute an unusual danger to pedestrians. Plaintiff must further show that through its officials or employees the municipality knew of the unusually dangerous condition or that the condition had existed for so long before plaintiff fell that in the use of reasonable care the municipality should have known of it. Plaintiff must also show that after the municipality knew or should have known of the condition and before plaintiff fell, there was enough time for the municipality, using reasonable methods and reasonable care, to have corrected the condition, but it did not do so.

In determining whether [*name defendant*] was negligent, you should consider the length of time between the time the snow stopped falling and the time that plaintiff fell, how much snow fell during the storm, the total amount of snow on city streets and sidewalks requiring removal, the temperature and condition of the weather between the end of the snowfall and the time plaintiff fell, the number of workers and amount of equipment reasonably available to [*name defendant*] for removing snow, and the location of the particular street and sidewalk in relation to the order of priority in which snow is ordinarily removed from streets and sidewalks.

In order to find [*name defendant*] negligent, you must find that the condition of the sidewalk at the

point where plaintiff fell was unusually dangerous. If you find that it was not, you will proceed no further. If you find that the condition of the sidewalk at the point where plaintiff fell was unusually dangerous and either that [name defendant] knew of the unusually dangerous condition long enough before plaintiff's injury to have permitted [name defendant] in the use of reasonable care to have corrected it, or to take other suitable precautions, or to give adequate warning, and did not do so, or [name defendant] did not know of the unusually dangerous condition but in the use of reasonable care should have known of it and corrected it, or taken other suitable precautions, or given adequate warning, you will find that [name defendant] was negligent. If you find that the condition of the sidewalk at the point where plaintiff fell was not unusually dangerous or that [name defendant] did not know of the dangerous condition and that by the use of reasonable care [name defendant] would not have been able to discover and correct it, or if you find that [name defendant] knew of the unusually dangerous condition but took suitable precautions or gave plaintiff an adequate warning, you will find that [name defendant] was not negligent.

If you find that [name defendant] was negligent, you must next consider whether that negligence was a substantial factor in causing plaintiff's injury. An act or failure to act is a substantial factor in bringing about an injury if a reasonable person would regard it as a cause of the injury. If you find that [name defendant's] negligence was not a substantial factor in causing the injury, then plaintiff may not recover (on this claim). If you find that [name defendant's] negligence was a substantial factor in causing plaintiff's injury, you will proceed to consider [state next appropriate step, e.g. comparative negligence, damages, verdict].

Comment

[See also Introductory Statement to this division.]

Based upon *Soderstrom v New York*, 4 NY2d 784, 173 NYS2d 23,

149 NE2d 525 (1958); *Hofmann v New York*, 297 NY 735, 77 NE2d 26 (1947); *Williams v New York*, 214 NY 259, 108 NE 448 (1915); *Valentine v New York*, 86 AD2d 381, 449 NYS2d 991 (1st Dept 1982), *aff'd*, 57 NY2d 932, 457 NYS2d 240, 443 NE2d 488 (1982); *Smith v New York*, 282 App Div 495, 125 NYS2d 123 (1st Dept 1953), *aff'd*, 307 NY 843, 122 NE2d 335 (1954); *Rapoport v New York*, 281 App Div 33, 117 NYS2d 408 (1st Dept 1952), *aff'd*, 306 NY 636, 116 NE2d 244 (1953); *Dello v State*, 105 AD2d 571, 481 NYS2d 512 (3d Dept 1984); *Saez v New York*, 82 AD2d 782, 440 NYS2d 666 (1st Dept 1981); *Smart v Wozniak*, 58 AD2d 993, 397 NYS2d 489 (4th Dept 1977); *Cockfield v New York*, 283 App Div 806, 128 NYS2d 422 (2d Dept 1954); *Yonki v New York*, 276 App Div 407, 95 NYS2d 80 (1st Dept 1950); *Stapleton v Church of Pilgrims in City of Brooklyn*, 242 App Div 710, 272 NYS 910 (2d Dept 1934); *De Boulet v New York*, 192 App Div 359, 182 NYS 697 (1st Dept 1920); *Kortlang v Mt. Vernon*, 129 App Div 535, 114 NYS 252 (2d Dept 1908). Generally with respect to municipal liability in snow and ice cases, see 65 NYJur2d 316, Highways, Streets and Bridges §§ 481–492; 5C Warren, *Negligence* (1970 Edition) 1157. Snow, Ice, & Sleet § 4; 19 McQuillin, *Municipal Corporations* 358, §§ 54, 84 *et seq.*

The above charge should not be used where the action is against a governmental common carrier for injuries sustained due to a failure to clear snow and ice from the steps of a public conveyance, *Bracco v MABSTOA*, 117 AD2d 273, 502 NYS2d 158 (1st Dept 1986). Where a common carrier is involved, even one operated by a governmental entity, there is no requirement that plaintiff demonstrate the existence of an “unusually dangerous” condition, *id.* As to the proper charge where a common carrier is involved, see PJI 2:161 and 2:166.

The pattern charge assumes that there is no dispute concerning the fact that plaintiff fell on snow or ice. It is concerned with the issues relating to the municipality’s negligence: whether there was a condition of danger, whether the municipality had notice, actual or constructive, of the condition and an opportunity to correct it and whether the municipality exercised reasonable care. Unless there is no jury question on proximate cause and comparative negligence, the jury must be charged on those issues as well; as to proximate cause, see PJI 2:70 and this Comment; as to comparative negligence, see PJI 2:36 and PJI 2:45–2:49 and this Comment.

The duty to remove snow and ice from streets and walks is primarily that of the municipality, *Rochester v Campbell*, 123 NY 405, 25 NE 937 (1890); *Taylor v Yonkers*, 105 NY 202, 11 NE 642 (1887); *Schlausky v New York*, 41 AD2d 156, 341 NYS2d 548 (1st Dept 1973); *Kortlang v Mt. Vernon*, 129 App Div 535, 114 NYS 252 (2d Dept 1908). A county may not escape liability because it has subcontracted the job of cleaning the county highway to a town, *Smart v Wozniak*, 58 AD2d 993, 397 NYS2d 489 (4th Dept 1977). As one means of carrying out its duty a municipality may by ordinance or charter provision impose upon the abutting owner the duty to clear or to sand the sidewalk. Such a provision will not relieve the municipality of its primary duty, however,

Garricks v New York, 1 NY3d 22, 769 NYS2d 152, 801 NE2d 372 (2003) (citing PJI); Rochester v Campbell, *supra*; Taylor v Yonkers, *supra*; Russell v Canastota, 98 NY 496 (1885); Cockfield v New York, 283 App Div 806, 128 NYS2d 422 (2d Dept 1954); see Green v Green, 212 App Div 381, 208 NYS 689 (1st Dept 1925). In the absence of an express provision in the ordinance imposing civil liability, an abutting owner (as to which, see Comment to PJI 2:111) is not liable for a pedestrian's injuries either to the pedestrian, Rochester v Campbell, *supra*; Dalder v Rockville Centre, 116 AD3d 908, 983 NYS2d 835 (2d Dept 2014); O'Toole v Yonkers, 107 AD3d 866, 967 NYS2d 751 (2d Dept 2013); Taubenfeld v Starbucks Corp., 48 AD3d 310, 851 NYS2d 512 (1st Dept 2008); Norcott v Central Iron Metal Scraps, 214 AD2d 660, 625 NYS2d 260 (2d Dept 1995); Green v Green, *supra*; Connolly v Bursch, 149 App Div 772, 134 NYS 141 (2d Dept 1912), or to the municipality, Rochester v Campbell, *supra*.

Where a municipality has adopted a provision requiring abutting owners to clear or sand the sidewalk, evidence of the municipality's reliance on property owners to perform their duty to clear or sand the sidewalk and of the municipality's efforts to enforce the provision as part of its snow removal response plan is relevant and admissible on the question of whether the municipality breached its duty of care, Garricks v New York, 1 NY3d 22, 769 NYS2d 152, 801 NE2d 372 (2003) (citing PJI). Where such evidence has been admitted, the following charge should be inserted after the second full paragraph of PJI 2:225C.

PJI 2:225C.1

You should also consider [*identify ordinance*], which imposes a duty on the adjacent property owner to keep the sidewalk clear of snow and ice, [*name municipality*]'s reliance on the adjacent property owner and its efforts to enforce [*identify ordinance*] as part of its snow removal plan.

Note: As to accidents occurring on or after September 14, 2003, the New York City Administrative Code unambiguously imposes a duty upon owners of certain real property to maintain the sidewalk abutting their property in a reasonably safe condition, and provides that such owners are liable for personal injury that is proximately caused by that failure, Sangaray v West River Associates, LLC, 26 NY3d 793, 28 NYS3d 652, 48 NE3d 933 (2016); see Martinez v Khaimov, 74 AD3d 1031, 906 NYS2d 274 (2d Dept 2010). The legislation specifically absolves the City of liability for injuries caused by the negligent failure to maintain or clear sidewalks abutting privately owned real property, see Sangaray v West River Associates, LLC, *supra*. Section § 7-210 does not limit a landowner's liability to accidents that occur on its own abutting sidewalk where the landowner's failure to comply with its duty to maintain its sidewalk in a reasonably safe condition constitutes a

proximate cause of a plaintiff's injuries, *Sangaray v West River Associates, LLC*, *supra*. Thus, a landowner may be liable even though the defect on which the plaintiff tripped abutted a neighboring property owner's sidewalk, *id*.

The liability-shifting provision of the legislation does not apply to one-, two- or three-family residential property that is at least partially owner-occupied and used exclusively for residential purposes, *Coogan v New York*, 73 AD3d 613, 900 NYS2d 645 (1st Dept 2010). Since it is an enactment in derogation of common law, § 7-210 must be strictly construed, *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 860 NYS2d 429, 890 NE2d 191 (2008); *Staruch v 1328 Broadway Owners, LLC*, 111 AD3d 698, 974 NYS2d 796 (2d Dept 2013). Section 7-210 does not make an abutting property owner responsible for maintaining trees or tree wells set into the sidewalk, *Vucetovic v Epsom Downs, Inc.*, *supra*, sidewalk grates, *Hurley v Related Management Co.*, 74 AD3d 648, 904 NYS2d 41 (1st Dept 2010), pedestrian ramps connecting a sidewalk to the street, *Ortiz v New York*, 67 AD3d 21, 884 NYS2d 417 (1st Dept 2009), *rev'd on other grounds*, 14 NY3d 779, 898 NYS2d 544, 925 NE2d 582 (2010), barriers erected by police for crowd control purposes, *Staruch v 1328 Broadway Owners, LLC*, *supra*, covers and gratings and the area extending 12 inches outward from the perimeter of such hardware, *Torres v Sander's Furniture, Inc.*, 134 AD3d 803, 20 NYS3d 630 (2d Dept 2015), or the curb, *Garris v New York*, 65 AD3d 953, 885 NYS2d 491 (1st Dept 2009).

Comment

A dangerous condition does not necessarily result from the passage of time and it is, therefore, error to charge that if a sidewalk was covered with snow and ice for four days it was in a dangerous and unsafe condition, *De Boulet v New York*, 192 App Div 359, 182 NYS 697 (1st Dept 1920). In determining whether and when to clear snow and ice from a path, the municipality may consider not only the safety of persons using the path but also that of persons using adjoining areas, *Dello v State*, 105 AD2d 571, 481 NYS2d 512 (3d Dept 1984) (no liability for failing to clear snow from path that extended from a school exit and traversed a playground because clearing snow would create mounds dangerous for children and condition of path was clearly visible). In *Bacon v Mussaw*, 167 AD2d 741, 563 NYS2d 854 (3d Dept 1990), it was held that, as a matter of law, the municipality in a rural area was not under a duty to a jogger to clear snow and ice from a bicycle trail.

A dangerous condition must be unusual or exceptional as compared with conditions ordinarily existing during the winter in that locality, *Gaffney v New York*, 218 NY 225, 112 NE 725 (1916); *Williams v New York*, 214 NY 259, 108 NE 448 (1915); see *Dwyer v New York*, 18 AD2d 902, 237 NYS2d 836 (1st Dept 1963), *aff'd*, 13 NY2d 1055, 245 NYS2d 774, 195 NE2d 458 (1963); see *Rodriguez v Woods*, 121 AD3d 474, 994 NYS2d 583 (1st Dept 2014). Comparisons should be between the condition of the street or sidewalk causing the fall and the conditions ordinar-

ily existing in the municipality during the winter season. *Gaffney v New York*, supra; *Williams v New York*, supra; see *McQuillin, Municipal Corporations* 366, § 54—84.20. Whether a condition of unusual danger existed is sometimes a question of law, *Gaffney v New York*, supra (uneven snow and slush on sidewalk froze after sudden drop in temperature, not an unusual condition) and sometimes a question for the jury, *Williams v New York*, supra (snow and hard ice on sidewalk, packed down by people walking and about two inches thick); *Gonzalez v New York*, 148 AD2d 668, 539 NYS2d 418 (2d Dept 1989) (persistence of an icy condition on a primary route for 11 days); see *De Boulet v New York*, 192 App Div 359, 182 NYS 697 (1st Dept 1920).

Notice, actual or constructive, of the existence of the condition is essential, *Taylor v Yonkers*, 105 NY 202, 11 NE 642 (1887); *Valentino v State*, 62 AD2d 1086, 403 NYS2d 596 (3d Dept 1978); *Cruz v New York*, 265 App Div 831, 37 NYS2d 503 (2d Dept 1942); see *Smart v Wozniak*, 58 AD2d 993, 397 NYS2d 489 (4th Dept 1977); 65 NYJur2d 327—329, Highways, Streets, and Bridges § 487. However, the general awareness of the New York City Transit Authority that subway stairs and platform become wet during inclement weather is insufficient to constitute constructive knowledge of the specific condition of subway steps during and immediately after a storm, *Solazzo v New York City Transit Authority*, 6 NY3d 734, 810 NYS2d 121, 843 NE2d 748 (2005). There are cases holding that as a matter of law a lapse of less than forty-eight hours is not sufficient to charge a municipality such as the City of New York, with its thousands of miles of streets, with constructive notice, *Crawford v New York*, 68 App Div 107, 74 NYS 261 (1st Dept 1902), aff'd, 174 NY 518, 66 NE 1106 (1903); *Hawkins v Mayor of City of New York*, 54 App Div 258, 66 NYS 623 (1st Dept 1900); see *Martinez v Columbia Presbyterian Medical Center*, 238 AD2d 286, 656 NYS2d 271 (1st Dept 1997) (sidewalk), but the existence of any such hard and fast 48-hour rule is negated by *Janota v New York*, 297 NY 942, 80 NE2d 343 (1948), in which the city was held liable though less than forty-five hours had elapsed, see *Hamill v New York*, 78 AD2d 792, 433 NYS2d 20 (1st Dept 1980), aff'd, 52 NY2d 1045, 438 NYS2d 519, 420 NE2d 400 (1981); *Hudson v Union Free School Dist. No. 2, Town of Geddes and Town of Camillus*, 55 AD2d 1003, 391 NYS2d 487 (4th Dept 1977); see *Monahan v New York*, 31 AD2d 933, 298 NYS2d 822 (2d Dept 1969). In certain situations governed by Highway Law § 139(2), Town Law § 65-a, Second Class Cities Law § 244, Village Law § 6-628, CPLR 9804, or related local laws, constructive notice is insufficient and written notice must be shown, see comment to PJI 2:225; *Delcamp v Brocton*, 270 AD2d 842, 705 NYS2d 150 (4th Dept 2000); *Ritacco v Harrison*, 105 AD2d 834, 482 NYS2d 33 (2d Dept 1984) (conclusory allegation of failure to “properly” clean snow and ice from sidewalk insufficient to establish affirmative negligence and defeat summary judgment in favor of municipality on the basis that it had no prior notice of the condition); *Siddon v M. H. Fishman Co., Inc.*, 65 AD2d 832, 409 NYS2d 830 (3d Dept 1978) (written notice not required under Village Law if condition was created by the village); *Powell v Gates-Chili Central School Dist.*, 50 AD2d 1079, 376 NYS2d 332 (4th Dept 1975). As to liability to persons on the sidewalk, see PJI 2:111A.

Reasonable opportunity, after notice, actual or constructive, to remove or correct the dangerous condition must be shown before the municipality can be held negligent, *Harrington v Buffalo*, 121 NY 147, 24 NE 186 (1890), 65 NY Jur Highways, Streets, & Bridges § 484; 19 McQuillin, *Municipal Corporations* 334, § 54.114. There is no formula for determining liability on the basis of any ratio between the number of inches of snowfall and the time elapsed before the happening of an accident, *Crichton v Pitney*, *Hardin, Kipp & Szuch*, 255 AD2d 155, 679 NYS2d 392 (1st Dept 1998). Rather, reasonableness will usually require a factual evaluation of several factors impacting on the municipality's actual ability to have cleared the location of ice and snow given physical and climatic conditions and its capital and labor resources, *id.* In determining what is a reasonable time within which the municipality should act and whether it has acted with reasonable care under the circumstances, the circumstances to be considered include (1) the efforts made by the municipality to get the abutting owner to clean the sidewalk, *Smith v New York*, 282 App Div 495, 125 NYS2d 123 (1st Dept 1953), *aff'd*, 307 NY 843, 122 NE2d 335 (1954); *Cockfield v New York*, 283 App Div 806, 128 NYS2d 422 (2d Dept 1954), since the municipality has a reasonable time in which to compel the abutting owner to act, *Taylor v Yonkers*, 105 NY 202, 11 NE 642 (1887); *Yonki v New York*, 276 App Div 407, 95 NYS2d 80 (1st Dept 1950); *Winckler v New York*, 129 App Div 45, 113 NYS 412 (1st Dept 1908); *Foley v New York*, 95 App Div 374, 88 NYS 690 (1st Dept 1904), (2) when the snow stopped falling, for the municipality is not obligated to act until it stops, *Scheuer v State*, 198 AD3d 1225, 156 NYS3d 521 (3d Dept 2021); *Valentine v New York*, 86 AD2d 381, 449 NYS2d 991 (1st Dept 1982), *aff'd*, 57 NY2d 932, 457 NYS2d 240, 443 NE2d 488 (1982); *Morgen v New York*, 110 AD2d 501, 487 NYS2d 39 (1st Dept 1985); *Kortlang v Mt. Vernon*, 129 App Div 535, 114 NYS 252 (2d Dept 1908); see *Rodriguez v Woods*, 121 AD3d 474, 994 NYS2d 583 (1st Dept 2014), (3) the temperature since the snow ended because (a) it may be reasonable to await a thaw, *Winckler v New York*, 129 App Div 45, 113 NYS 412 (1st Dept 1908); *Foley v New York*, 95 App Div 374, 88 NYS 690 (1st Dept 1904), or (b) continuous freezing temperature may have made removal more difficult, *Reutlinger v New York*, 281 NY 592, 22 NE2d 165 (1939); *Rapoport v New York*, 281 App Div 33, 117 NYS2d 408 (1st Dept 1952), *aff'd*, 306 NY 636, 116 NE2d 244 (1953); *Kelly v New York*, 257 App Div 863, 12 NYS2d 623 (2d Dept 1939), and (4) the miles of sidewalk and street to be cleaned, the amount of snow to be removed, the equipment and workers available, the position of the area in question in the order of priority of the work to be done, *Crawford v New York*, 68 App Div 107, 74 NYS 261 (1st Dept 1902), *aff'd*, 174 NY 518, 66 NE 1106 (1903); *Cockfield v New York*, *supra*; *Reutlinger v New York*, *supra*; *Yonki v New York*, *supra*; see *Lapp v New York*, 19 NY2d 928, 281 NYS2d 336, 228 NE2d 394 (1967); *Martinez v Columbia Presbyterian Medical Center*, 238 AD2d 286, 656 NYS2d 271 (1st Dept 1997) (city under no obligation to remove snow and ice from sidewalk some 48 hours after last of two storms).

It is sometimes said that the municipality is only required to use

ordinary and reasonable means and methods, *De Boulet v New York*, 192 App Div 359, 182 NYS 697 (1st Dept 1920). The word "ordinary" with respect to means and methods of removal has not been used in the charge since it could lead jurors to believe that there is no obligation to hire extra workers and equipment, whereas in each case the question will be what was reasonable under all the circumstances, see *Tromblee v State*, 52 AD2d 666, 381 NYS2d 707 (3d Dept 1976); *Janota v New York*, 297 NY 942, 80 NE2d 343 (1948); *Smith v New York*, 282 App Div 495, 125 NYS2d 123 (1st Dept 1953), *aff'd*, 307 NY 843, 122 NE2d 335 (1954). When evidence of the magnitude of the work and efforts made by the municipality to clear the streets and sidewalks is introduced, it is often, although not always, held as a matter of law that negligence has not been shown, *Reutlinger v New York*, 281 NY 592, 22 NE2d 165 (1939) (7 days after end of storm); *Christenson v New York*, 31 AD2d 927, 298 NYS2d 771 (2d Dept 1969) (68 hours); *Cockfield v New York*, 283 App Div 806, 128 NYS2d 422 (2d Dept 1954) (10 days); *Thompson v Rose*, 283 App Div 735, 127 NYS2d 605 (2d Dept 1954) (3½ days); *Weisfeld v New York*, 282 App Div 739, 122 NYS2d 426 (2d Dept 1953) (5 days); *Rapoport v New York*, 281 App Div 33, 117 NYS2d 408 (1st Dept 1952), *aff'd*, 306 NY 636, 116 NE2d 244 (1953) (3¾ days). However, in cases of extraordinary danger or unusual delay, the question will be for the jury, *Brass v New York*, 280 NY 707, 21 NE2d 209 (1939) (old, rough, dirty ice 30 days after storm); *Williams v New York*, 214 NY 259, 108 NE 448 (1915) (rough, packed down snow on busy thoroughfare 6 days after storm); see *Smith v New York*, *supra* (6 days); *Hoening v Park Royal Owners, Inc.*, 260 AD2d 250, 688 NYS2d 531 (1st Dept 1999) (evidence that subject street had been covered with sheet of ice for days preceding accident raised triable issue of fact); *Rainone v New York*, 285 App Div 1078, 139 NYS2d 745 (2d Dept 1955) (icy condition in roadway 22 days after storm). What constitutes reasonable diligence in reacting to a particular condition on a particular highway depends on the circumstances of the case, *Cohen v New York*, 204 NY 424, 97 NE 866 (1912); see *Valentine v New York*, 86 AD2d 381, 449 NYS2d 991 (1st Dept 1982), *aff'd*, 57 NY2d 932, 457 NYS2d 240, 443 NE2d 488 (1982); *Quigley v State*, 281 App Div 185, 118 NYS2d 143 (3d Dept 1952), *aff'd*, 308 NY 846, 126 NE2d 180 (1955); *Scheuer v State*, 198 AD3d 1225, 156 NYS3d 521 (3d Dept 2021) (snowplow spot treatment of recurring snow condition on roadway found unreasonable given state's knowledge that area experienced blowing snow and snow drifts every year); *Candelier v New York*, 129 AD2d 145, 517 NYS2d 486 (1st Dept 1987); *Fuller v State*, 122 AD2d 551, 504 NYS2d 935 (4th Dept 1986); *Tromblee v State*, 52 AD2d 666, 381 NYS2d 707 (3d Dept 1976); *La Tournerie v State*, 1 AD2d 734, 147 NYS2d 138 (3d Dept 1955); see also *Slaughter v State*, 238 AD2d 770, 656 NYS2d 471 (3d Dept 1997) (state liable for icy condition that lasted three hours). The mere presence of a patch of ice and the fact that a driver lost control of her vehicle did not establish, without more, that the municipality was negligent, *Johnson v State*, 265 AD2d 652, 696 NYS2d 286 (3d Dept 1999) (state's maintenance practice was reasonable in responding to condition that caused claimant to lose control of vehicle).

Reasonable care requires greater diligence with respect to sidewalks

than with respect to crosswalks or streets, which are used by both pedestrians and vehicles, *Dupont v Port Chester*, 204 NY 351, 97 NE 735 (1912); *Lichtenstein v New York*, 159 NY 500, 54 NE 67 (1899); *Smith v New York*, 282 App Div 495, 125 NYS2d 123 (1st Dept 1953), *aff'd*, 307 NY 843, 122 NE2d 335 (1954); see *Staub v New York*, 295 NY 612, 64 NE2d 353 (1945). But a question for the jury is presented with respect to a crosswalk left in a slushy condition for 7 or 8 days before the accident which occurred some 14 days after the storm, *Cohen v New York*, 296 NY 814, 72 NE2d 11 (1947), and with respect to a roadway still in an icy condition 22 days after a storm, *Rainone v New York*, 285 App Div 1078, 139 NYS2d 745 (2d Dept 1955). Reasonable care does not require that all of the snow and ice be removed from a sidewalk or street, *Zysk v New York*, 300 NY 507, 89 NE2d 244 (1949); *Kolasky v New York*, 288 NY 523, 41 NE2d 929 (1942); *Lichtenstein v New York*, *supra*; *Winckler v New York*, 129 App Div 45, 113 NYS 412 (1st Dept 1908), and a municipality generally is not held liable for the existence of occasional patches of ice on the sidewalk, *Zysk v New York*, *supra*; *McKay v New York*, 269 App Div 760, 54 NYS2d 794 (2d Dept 1945); *Cruz v New York*, 265 App Div 831, 37 NYS2d 503 (2d Dept 1942), or because in plowing snow from the street it piles snow on the outer edge of the sidewalk, when a clear passage for pedestrians is left, *Davis v New York*, 296 NY 869, 72 NE2d 608 (1947); *Borkowski v New York*, 276 App Div 770, 92 NYS2d 545 (2d Dept 1949), *aff'd*, 301 NY 770, 95 NE2d 822 (1950).

Causal relation must be established, *Taylor v Yonkers*, 105 NY 202, 11 NE 642 (1887). When there is a second snowfall on top of an earlier dangerous condition and the municipality may be found negligent with respect to the first but not to the second snowfall, the jury will not be permitted to speculate over whether plaintiff fell on the earlier or the later accumulation and the complaint will be dismissed, *Bernstein v New York*, 69 NY2d 1020, 517 NYS2d 908, 511 NE2d 52 (1987); *Taylor v Yonkers*, *supra*; *Kelly v New York*, 257 App Div 863, 12 NYS2d 623 (2d Dept 1939); *Foley v New York*, 95 App Div 374, 88 NYS 690 (1st Dept 1904). When, however, there are two possible causes that may be found to be concurrent causes, the question will be for the jury, *Smith v New York*, 282 App Div 495, 125 NYS2d 123 (1st Dept 1953), *aff'd*, 307 NY 843, 122 NE2d 335 (1954); *Christenson v New York*, 31 AD2d 927, 298 NYS2d 771 (2d Dept 1969); see *Waller v New York*, 308 NY 820, 125 NE2d 872 (1955).

As to assumption of the risk, see PJI 2:55–2:56. Snow and ice cases involving an abutting owner's liability for sidewalk injuries are addressed in PJI 2:111A. Concerning the liability of a property owner or possessor for on-premises snow and ice injuries, see 86 NYJur2d 43, Premises Liability §§ 298–301; 5C Warren, Negligence (1970 Edition) 1157, Snow, Ice, and Sleet § 1.01.

b. UNSAFE EQUIPMENT

PJI 2:226. Municipal Liability—Unsafe Equipment

The defendant CD [identify municipality] must (provide, maintain) its equipment in a reasonably safe condition. If you find that its equipment was not (provided, maintained) in a reasonably safe condition and CD knew or by using reasonable care should have known that the equipment was not in a reasonably safe condition, then you will find that CD was negligent.

If you find that the equipment was in a reasonably safe condition or that even though not in a reasonably safe condition that CD did not know and by the use of reasonable care would not have known of such condition, then you will find that CD was not negligent.

Comment

[See also Introductory Statement preceding PJI 2:225]

Based on *Feustel v Hemphill Schools*, 3 NY2d 760, 163 NYS2d 988, 143 NE2d 530 (1957); *Edkins v Board of Education of City of New York*, 287 NY 505, 41 NE2d 75 (1942); *Collentine v New York*, 279 NY 119, 17 NE2d 792 (1938); *Herman v Board of Education of Union School Dist. No. 8, Town of Arcadia, Wayne County*, 234 NY 196, 137 NE 24 (1922); *Murphy v Board of Ed. of City of Utica, N.Y.*, 20 AD2d 53, 244 NYS2d 986 (4th Dept 1963); *Serbalik v State*, 283 App Div 1136, 131 NYS2d 550 (3d Dept 1954); *Van Dyke v Utica*, 203 App Div 26, 196 NYS 277 (4th Dept 1922).

Where plaintiff relied on a previous work order to establish notice, unless he/she identifies the particular equipment that caused his/her injury as having been the subject of that order, he/she cannot prove notice and therefore cannot recover, *Swiontek v New York*, 108 NYS2d 844 (Sup 1951), *aff'd*, 283 App Div 949, 130 NYS2d 882 (2d Dept 1954). The defect must be a proximate cause of plaintiff's injury. For a charge on proximate cause, see PJI 2:70.

PJI 2:226A. Municipal Liability—Unsafe Equipment—Failure to Maintain Stop Sign

The defendant CD [identify municipality] must maintain its stop signs in proper repair, alignment

and position. If a stop sign is (missing, obscured, out of position) so as not to be visible to drivers whose conduct would be controlled by the sign and such condition was caused by CD's employee or CD had actual or constructive notice of the condition for a period of time sufficient to permit (replacement of the sign, correction of the condition) and CD failed to (replace the sign, correct the condition), you will find that CD was negligent. CD had actual notice of such a condition if the condition was brought, orally or in writing, to the attention of one of CD's employees having a duty either to make the repair or to report the condition. CD had constructive notice of the condition if the condition continued for a sufficient period of time that CD in the use of reasonable care should have discovered it.

Comment

[See also Introductory Statement preceding PJI 2:225]

Based on *Gurevitch v State*, 309 NY 711, 128 NE2d 416 (1955) (sign lying on ground); *Applebee v State*, 308 NY 502, 127 NE2d 289 (1955) (sign knocked down by car); *Nuss v State*, 301 NY 768, 95 NE2d 822 (1950) (sign bent, twisted, obscured by vegetation, reflector buttons missing); *Murphy v DeRevere*, 279 App Div 929, 111 NYS2d 2 (2d Dept 1952), *aff'd*, 304 NY 922, 110 NE2d 740 (1953) (sign missing); *Granai v State*, 206 Misc 984, 136 NYS2d 238 (Ct Cl 1954), *aff'd*, 286 App Div 1145, 146 NYS2d 709 (4th Dept 1955) (sign obscured by weeds); *Richardson v State*, 28 Misc2d 607, 218 NYS2d 922 (Ct Cl 1961) (sign removed or caused to fall by maintenance crew); and see 65 NYJur2d, Highways, Streets and Bridges § 394; Annot: 34 ALR3d 1008.

The installation of a traffic control signal, where it had not previously existed, is a discretionary governmental function that does not give rise to municipal liability, *Cimino v New York*, 54 AD2d 843, 388 NYS2d 276 (1st Dept 1976), *aff'd*, 43 NY2d 966, 404 NYS2d 595, 375 NE2d 775 (1978); *Chang v New York*, 142 AD3d 401, 37 NYS3d 236 (1st Dept 2016). However, liability is imposed where there is a failure properly to maintain an already-established traffic control and where that failure was a proximate cause of the accident, *Cimino v New York*, *supra*; *Chang v New York*, *supra*.

Where two state roadways intersect, the statutory duty to maintain the roadways, as well as any traffic signal located thereon, falls upon the state, see *Vehicle & Traffic Law* § 1681; *Estate of Konstantatos v Konstantatos v Suffolk*, 208 AD2d 889, 618 NYS2d 90 (2d Dept 1994).

The fact that a county may regularly patrol state roadways for purposes of enforcing traffic regulations does not subject it to liability on the theory that it controls the roadways, *Estate of Konstantatos by Konstantatos v Suffolk*, supra. The state has jurisdiction over any highway intersecting a state highway for a distance not exceeding 100 feet from the intersection, *Cain v Pappalardo*, 225 AD2d 1005, 639 NYS2d 570 (3d Dept 1996). Unless the municipality assumes control of an intersection through repair or maintenance, the state's jurisdiction over the intersection continues and a municipality cannot be held liable for a dangerous condition at the intersection, *id* (placement of "stop ahead" sign insufficient to establish municipality's control).

The pattern charge assumes that the highway in question has been properly designated as a through highway and the erection of a stop sign ordered by the appropriate authority, see VTL § 1621 (state highways); VTL § 1640 (cities and villages), VTL § 1640-a (shopping centers in city, village or town); VTL 1651 (county roads outside cities and villages); *Rotey v Van Ooyen*, 73 AD2d 804, 423 NYS2d 729 (4th Dept 1979); VTL 1652-a (roads within city, town or village, when it consents to county acting); VTL 1660 (town boards as to county roads and town highways); VTL 1682 and 1683 (local authorities); *Sanchez v Lippincott*, 89 AD2d 372, 455 NYS2d 457 (4th Dept 1982). Note in this connection that each of the Vehicle and Traffic Law sections refers to uses permissive rather than mandatory language. The jury must also be charged on comparative negligence (see PJI 2:36), proximate cause (see PJI 2:70) and concurrent negligence (see PJI 2:71), when they are in issue.

Notice of the condition is not required when it was caused by the municipality, 65 NYJur2d, Highways, Streets and Bridges § 381, but otherwise notice, actual or constructive, is an element of liability. Actual notice exists when an employee having authority to make repairs, or who has a duty to report the defect to the division having authority to make repairs, *Cohen v New York*, 204 NY 424, 97 NE 866 (1912); *Sprague v Rochester*, 159 NY 20, 53 NE 697 (1899); see *Flansburg v Elbridge*, 205 NY 423, 98 NE 750 (1912); *Haynes v New York*, 259 App Div 837, 19 NYS2d 164 (2d Dept 1940), 65 NYJur2d, Highway, Streets and Bridges § 383, observes the defect or learns of it through written or oral statement, *Nuss v State*, 195 Misc 38, 87 NYS2d 592 (Ct Cl 1949), rev'd on other grounds, 276 App Div 300, 94 NYS2d 374 (4th Dept 1950), rev'd on other grounds, 301 NY 768, 95 NE2d 822 (1950). Constructive notice may be found when the sign was absent or damaged for more than a reasonable period of time before the accident, *Gurevitch v State*, 309 NY 711, 128 NE2d 416 (1955) (three days); see *Alexander v Eldred*, 63 NY2d 460, 483 NYS2d 168, 472 NE2d 996 (1984); *Van Tuyl v State*, 6 AD2d 209, 175 NYS2d 951 (4th Dept 1958), aff'd, 6 NY2d 912, 190 NYS2d 715, 161 NE2d 18 (1959); *Falkowski v State*, 26 Misc2d 367, 210 NYS2d 268 (Ct Cl 1961), aff'd, 15 AD2d 717, 223 NYS2d 833 (3d Dept 1962).

Reasonable care is the measure of the municipality's duty and,

therefore, it cannot be charged with negligence until the lapse of a reasonable time after knowledge or notice of the defect within which to correct it, see *Cohen v New York*, 204 NY 424, 97 NE 866 (1912). What is a reasonable time will depend in part upon whether the employee to whom notice is communicated has authority to repair or was simply under the duty to pass it along to those who did, id.

Causation must be found, *Applebee v State*, 308 NY 502, 127 NE2d 289 (1955), and where the driver was fully aware of a dangerous intersection and of the need to stop there can be no recovery, despite the existence of a defective stop sign or absence of such sign, id; *Robinson v State*, 38 Misc2d 229, 237 NYS2d 601 (Ct Cl 1962), aff'd, 19 AD2d 946, 245 NYS2d 329 (3d Dept 1963); see *Cimino v New York*, 54 AD2d 843, 388 NYS2d 276 (1st Dept 1976), aff'd, 43 NY2d 966, 404 NYS2d 595, 375 NE2d 775 (1978); *Chang v New York*, 142 AD3d 401, 37 NYS3d 236 (1st Dept 2016); *Dalzell v Dutchess*, 258 AD2d 615, 685 NYS2d 749 (2d Dept 1999) (jury could have properly inferred that Town's negligence in failing to replace stop sign was proximate cause of accident where offending driver was unfamiliar with road and there was also missing warning sign); *Good v Sullivan*, 198 AD2d 706, 604 NYS2d 285 (3d Dept 1993); *Plantikow v New York*, 189 AD2d 805, 592 NYS2d 755 (2d Dept 1993). In determining whether a driver was fully aware of a particular danger, the court should consider the driver's familiarity with the road and route, *Chang v New York*, supra; see *Nuss v State*, 301 NY 768, 95 NE2d 822 (1950); *Rose v State*, 19 AD3d 680, 800 NYS2d 26 (2d Dept 2005); *Dalzell v Dutchess*, supra. Absence of the sign may be found to be a proximate cause when the driver on the servient road proceeds into the intersection without stopping, *Applebee v State*, supra. It need not have been the sole cause, however, and the fact that one or both of the drivers was negligent, therefore, will not exonerate the municipality, *Gurevitch v State*, 309 NY 711, 128 NE2d 416 (1955); *Nuss v State*, 195 Misc 38, 87 NYS2d 592 (Ct Cl 1949), rev'd on other grounds, 276 App Div 300, 94 NYS2d 374 (4th Dept 1950), rev'd on other grounds, 301 NY 768, 95 NE2d 822 (1950). Proximate cause is a question for the court when the evidence is undisputed, *Tsitsera v Hudson Transit Corp. Transit Corp. v Nazzola*, 14 NY2d 855, 251 NYS2d 968, 200 NE2d 633 (1964), but otherwise is to be determined by the trier of fact, *Bolte v New York*, 22 NY2d 817, 292 NYS2d 912, 239 NE2d 653 (1968); *Hall v State*, 22 NY2d 754, 292 NYS2d 463, 239 NE2d 384 (1968).

A governmental body may be liable for a traffic planning decision only when its study is plainly inadequate or there is no reasonable basis for its plan, *Affleck v Buckley*, 96 NY2d 553, 732 NYS2d 625, 758 NE2d 651 (2001). Therefore, the design of traffic control devices installed at an intersection by the city's Board of Safety is a matter of judgment for which a municipality ordinarily cannot be held responsible, *Weiss v Fote*, 7 NY2d 579, 200 NYS2d 409, 167 NE2d 63 (1960); *Redcross v State*, 241 AD2d 787, 660 NYS2d 211 (3d Dept 1997), although liability may result from a breach of duty to review such a plan in the light of actual operations, *Eastman v State*, 303 NY 691, 103 NE2d 56 (1951) (as explained in *Weiss v Fote*, supra); see *Friedman v State*, 67 NY2d

271, 502 NYS2d 669, 493 NE2d 893 (1986); *Sangirardi v State*, 205 AD2d 603, 613 NYS2d 224 (2d Dept 1994); *Trautman v State*, 179 AD2d 635, 578 NYS2d 245 (2d Dept 1992); Introductory Statement preceding 2:225, Subdivision D, 2, g. The burden is on the governmental agency to show that its decision was the product of a deliberative decision-making process, *Holmes v Elmira*, 251 AD2d 844, 674 NYS2d 500 (3d Dept 1998); *Appelbaum v Sullivan*, 222 AD2d 987, 635 NYS2d 349 (3d Dept 1995); *Robinson v State*, 38 Misc2d 229, 237 NYS2d 601 (Ct Cl 1962), *aff'd*, 19 AD2d 946, 245 NYS2d 329 (3d Dept 1963) (negligence of state established by its removal of stop sign for unexplained reason). Where traffic safety matters are expressly committed by statute to the discretion of the municipality and the municipality exercises that discretion in accordance with the statute's terms, the municipality is protected against charges of negligence by the doctrine of qualified immunity so long as its traffic safety decision had a rational basis and was not plainly inadequate, *Belonzi v Brookhaven*, 227 AD2d 361, 641 NYS2d 892 (2d Dept 1996). Liability may be incurred for the improper placement of a sign, *Nowlin v New York*, 81 NY2d 81, 595 NYS2d 927, 612 NE2d 285 (1993); *Canepa v State*, 306 NY 272, 117 NE2d 550 (1954); *Tamm v State*, 29 AD2d 601, 285 NYS2d 753 (3d Dept 1967), *aff'd*, 26 NY2d 719, 308 NYS2d 878, 257 NE2d 55 (1970). A deviation from the standards set forth in the New York State Uniform Traffic Control Devices Manual may be a factor in determining negligence in the placement of a sign; however, the deviation alone is insufficient to establish negligence, *Poggiali v Babylon*, 219 AD2d 626, 631 NYS2d 415 (2d Dept 1995); *Price v Hampson*, 142 AD2d 974, 530 NYS2d 392 (4th Dept 1988). Under *Weiss v Fote*, *supra*, a municipal defendant has qualified immunity where a duly authorized public planning body has entertained and passed on the same question of risk as would ordinarily go to the jury, *Affleck v Buckley*, *supra*. However, where an accident arises out of a specific danger that was not the subject of a study conducted by a public planning body, qualified immunity will not apply, *Ernest v Red Creek Cent. School Dist.*, 93 NY2d 664, 695 NYS2d 531, 717 NE2d 690 (1999).

The posting of a deer crossing sign is a discretionary act for which a municipality has limited immunity, *Niles v Chautauqua*, 302 AD2d 1001, 755 NYS2d 157 (4th Dept 2003). A municipality that has failed to post such a sign at a particular location is insulated from liability absent a showing that the failure to post the sign was without any reasonable basis, *id.*

Something more than a choice between conflicting opinions of experts is required before a governmental body may be held liable for negligently performing its traffic planning function, *Affleck v Buckley*, 96 NY2d 553, 732 NYS2d 625, 758 NE2d 651 (2001); *Weiss v Fote*, 7 NY2d 579, 200 NYS2d 409, 167 NE2d 63 (1960). The plaintiff must show not merely that another option was available, but also that the plan adopted lacked a reasonable basis, *Affleck v Buckley*, *supra*; *Weiss v Fote*, *supra*.

As to the motorist's duty when a stop sign is missing or obscured,

and as to the liability of one who obscures a stop sign, see PJI 2:80B and Comment.

c. INADEQUATE SUPERVISION

PJI 2:227. Municipal Liability—Inadequate Supervision—Schools

The defendant Board of Education has a duty while pupils are under its control to provide adequate supervision and to use reasonable care for their safety.

The plaintiffs claim that the infant plaintiff (AB) was injured [*state claim, as:—*] (when, while waiting on the school grounds for a bus to take (him, her) home, (he, she) was struck by a bicycle ridden by another pupil). The plaintiffs contend that the Board had notice that (bicycles were being ridden into the area where young pupils gathered to wait for buses) and was negligent in failing to provide adequate supervision of the pupils. The Board claims that a supervisor was present, and denies that it had notice of any condition of danger requiring additional supervision.

The first question for you to consider, therefore, is whether (bicycles were being ridden into the area where young pupils gathered to wait for buses) before AB's injuries occurred. If you find that they were not, you will find that the Board was not negligent. If you find that (bicycles were being ridden into the area), you will next consider whether the Board had notice, actual or constructive, of that fact. Actual notice means that a member of the Board or one of its employees knew before AB's injuries that (bicycles were being ridden into that area). Constructive notice means that (bicycles had been ridden in that area) for such a length of time that the Board, in the use of reasonable care, should have discovered that fact, although, in fact, it had no actual knowledge of it. If you find that the Board had neither actual nor constructive notice of the fact that (bicycles were being ridden into the area), you will find that the Board was not negligent. If you find that the Board had either actual or constructive notice of the fact,

you will next consider whether the Board was negligent in failing to provide adequate supervision.

As concerns a Board of Education, negligence is the failure to use the same degree of care and supervision over the pupils under its control as a reasonably prudent parent would use under the same circumstances. Among the circumstances to be taken into consideration are (the age of the children waiting for the buses) and the well known habit of children to run about and play, the (age of the children who brought bicycles to school) and what instruction, if any, had been given to the pupils with respect to (riding bicycles on school grounds). If you find that a reasonably prudent parent would not have considered the (riding of bicycles in the same area in which young children waited for the buses) to require additional supervision, you will find that the Board was not negligent. If you find that a reasonably prudent parent would have considered that additional supervision was required under all of the circumstances, and that the Board had notice, actual or constructive, (that bicycles were being ridden into that area) for a sufficient length of time to permit it to provide additional supervision, your finding will be that the Board was negligent.

Comment

[See also Introductory Statement preceding PJI 2:225]

Caveat: This charge should not be used as to notice, actual or constructive, where the danger to the students is obvious and clear and general supervision is required as a matter of law, *Coon by Fontana v Board of Educ. of City of New York*, 160 AD2d 403, 554 NYS2d 110 (1st Dept 1990).

In addition to being given the foregoing charge, the jury must be charged, where appropriate, on proximate cause and comparative negligence and, in some cases, on foreseeability, see PJI 2:12 as to foreseeability, PJI 2:48 and 2:49 as to proximate cause.

The charge assumes that some supervision has been provided and that no regulations governing bicycle riding have been adopted. It

should be modified when the contrary is, or may be found by the jury to be, the fact. The charge also assumes that supervision is not mandated by statute. If supervision is mandated by statute, then notice is not a factor to be considered.

The illustrative fact situation of the pattern charge is suggested by *Selleck v Board of Educ. of Central School Dist. No. 1*, 276 App Div 263, 94 NYS2d 318 (3d Dept 1949). The charge is also based upon *Mirand v New York*, 84 NY2d 44, 614 NYS2d 372, 637 NE2d 263 (1994) (student assaulted at dismissal time at school's second-floor main entrance); *Spiegler v School Dist. of City of New Rochelle*, 17 NY2d 528, 267 NYS2d 908, 215 NE2d 165 (1966) (student bitten by dog running loose on school grounds); *Aranoff v Board of Educ. of City of New York*, 10 NY2d 828, 221 NYS2d 722, 178 NE2d 426 (1961) (student struck by shoe thrown by student in unsupervised locker room); *Decker v Dundee Cent. School Dist.*, 4 NY2d 462, 176 NYS2d 307, 151 NE2d 866 (1958) (student injured jumping from a five foot high bleacher with no teacher supervising play); *Miller v Board of Education, Union Free School Dist. No. 1, of Town of Albion*, 291 NY 25, 50 NE2d 529 (1943) (student injured during unsupervised play period on fire escape, the door to which was defective); *Lopez v New York*, 4 AD2d 48, 163 NYS2d 562 (2d Dept 1957), *aff'd*, 4 NY2d 738, 171 NYS2d 860, 148 NE2d 909 (1958) (young student struck by swing in playground during lunch recess at time when it was being used by many students and when playground supervisor temporarily away from post); *Guerriero v Sewanhaka Cent. High School Dist.*, 150 AD3d 831, 55 NYS3d 85 (2d Dept 2017) (student punched in face by classmate where same classmate previously pushed student's head up and down and slapped him in back of head); *Traficenti v Moore Catholic High School*, 282 AD2d 216, 724 NYS2d 24 (1st Dept 2001) (school may be liable where unsupervised cheerleader was dropped by spotter onto wooden gymnasium floor); *Pratt v Board of Co-op. Educ. Services*, 251 AD2d 949, 674 NYS2d 838 (3d Dept 1998) (citing PJI) (plaintiff injured while participating in vocational class designed to teach basic construction techniques when platform he was lifting unexpectedly fell on his ankle); *Maynard v Board of Educ. of Massena Cent. School Dist.*, 244 AD2d 622, 663 NYS2d 717 (3d Dept 1997) (board of education may be liable where young student is struck by pencil thrown by student with well known disciplinary record in art class with established pattern of undisciplined, disruptive and unruly behavior); *Garcia v New York*, 222 AD2d 192, 646 NYS2d 508 (1st Dept 1996) (sexual assault upon kindergarten student sent to bathroom alone and unsupervised); *Logan v New York*, 148 AD2d 167, 543 NYS2d 661 (1st Dept 1989) (student returning to unescorted classroom raped by other students); *Merkley v Palmyra-Macedon Cent. School Dist.*, 130 AD2d 937, 515 NYS2d 932 (4th Dept 1987) (students, unsupervised at the time, using a shot-put); *Alferoff v Casagrande by Casagrande*, 122 AD2d 183, 504 NYS2d 719 (2d Dept 1986) (eraser thrown by fellow student while teacher, aware of rowdy and disruptive behavior of students in his absence, temporarily absent from classroom); *Cavello v Sherburne-Earlville Cent. School Dist.*, 110 AD2d 253, 494 NYS2d 466 (3d Dept 1985) (failure to prevent harassment by other students); *Luis*

v Church of St. Angela Merici, 52 AD2d 352, 383 NYS2d 885 (1st Dept 1976) (student, unsupervised, tripped on stairway carrying containers of milk to cafeteria); Cioffi v Board of Ed. of City of New York, 27 AD2d 826, 278 NYS2d 249 (1st Dept 1967) (student injured by other students, unsupervised, throwing snowballs in schoolyard); Gonzalez v Mackler, 19 AD2d 229, 241 NYS2d 254 (1st Dept 1963) (student injured by pointer thrown by another student in classroom left unsupervised); see Bell v Board of Educ. of the City of New York, 90 NY2d 944, 665 NYS2d 42, 687 NE2d 1325 (1997) (board of education may be liable to plaintiff who was raped after her class left field trip at park without her and she began to walk home alone); see generally concerning supervision 62 NYJur2d 450, Government Tort Liability § 113; 2D Warren, Negligence 128, 3.01–3.12; Annot: 38 ALR3d 830; 35 ALR3d 758; 36 ALR3d 361; 37 ALR3d 712; 23 ALR5th 1.

A school's duty to supervise students is derived from the fact that the school is acting in loco parentis for the students, Williams v Weatherstone, 23 NY3d 384, 991 NYS2d 779, 15 NE3d 792 (2014); Mirand v New York, 84 NY2d 44, 614 NYS2d 372, 637 NE2d 263 (1994); Ferguson v New York, 118 AD3d 849, 988 NYS2d 207 (2d Dept 2014); Stinson v Roosevelt U.F.S.D., 61 AD3d 847, 877 NYS2d 400 (2d Dept 2009). Thus, the duty does not extend to adults on school premises, Stinson v Roosevelt U.F.S.D., supra; see Ferguson v New York, supra. As to injured adults, liability may be imposed only if a special duty and reliance are shown, Stinson v Roosevelt U.F.S.D., supra.

It would be inappropriate to use this charge in a case involving wholly voluntary participation in school sponsored extracurricular or intramural endeavors since, in such situations, the applicable standard is the "less demanding ordinary reasonable care standard," Benitez v New York City Bd. of Educ., 73 NY2d 650, 543 NYS2d 29, 541 NE2d 29 (1989); Hansen v Bath & Tennis Marina Corp., 73 AD3d 699, 900 NYS2d 365 (2d Dept 2010); Baker v Trinity-Pawling School, 21 AD3d 272, 800 NYS2d 10 (1st Dept 2005); see Nash v Port Washington Union Free School Dist., 83 AD3d 136, 922 NYS2d 408 (2d Dept 2011); Rawson v Massapequa Union Free School Dist., 251 AD2d 311, 674 NYS2d 388 (2d Dept 1998). This standard is defined as ordinary reasonable care to protect student athletes from unassumed, concealed or unreasonably increased risks, id; Barretto v New York, 229 AD2d 214, 655 NYS2d 484 (1st Dept 1997); see also Fintzi v New Jersey YMHA-YWHA Camps, 97 NY2d 669, 739 NYS2d 85, 765 NE2d 288 (2001) (allowing children to participate in relay races on wet grass not negligent supervision). Moreover, principles of assumption of risk may bar any recovery as a matter of law, see Benitez v New York City Bd. of Educ., supra; Barretto v New York, supra; Hunt v Skaneateles Cent. School Dist., 227 AD2d 939, 643 NYS2d 252 (4th Dept 1996); Kennedy v Rockville Centre Union Free School Dist., 186 AD2d 110, 587 NYS2d 442 (2d Dept 1992). If, however, there is evidence indicating that peer pressure or fear of a poor teacher evaluation induced plaintiff to participate in an activity in gym class, the school district should be held to the higher standard of care, Pike v Gouverneur Cent. School Dist., 249 AD2d 820, 671 NYS2d 872 (3d Dept 1998). As to assumption of risk, see PJI 2:55, 2:55A and 2:56.

The fourth paragraph of the pattern charge equating the Board of Education's duty towards its students with a reasonably prudent parent's duty towards its child was quoted with approval in *Logan v New York*, 148 AD2d 167, 543 NYS2d 661 (1st Dept 1989); see *Garcia v New York*, 222 AD2d 192, 646 NYS2d 508 (1st Dept 1996) (although it would be reasonable to allow high school students to go to public bathroom unaccompanied, the same practice would not be reasonable for five-year-old children). Similarly to Boards of Education, camps and providers of day care services owe their charges the same duty of care and supervision owed by a reasonably prudent parent, see *Phelps v Boy Scouts of America*, 305 AD2d 335, 762 NYS2d 32 (1st Dept 2003); *Colarusso v Dunne*, 286 AD2d 37, 732 NYS2d 424 (2d Dept 2001); *Kosok v Young Men's Christian Ass'n of Greater New York*, 24 AD2d 113, 264 NYS2d 123 (1st Dept 1965), *aff'd*, 19 NY2d 935, 281 NYS2d 341, 228 NE2d 398 (1967). The degree of supervision required depends largely on the surrounding circumstances, and very young campers will often require closer supervision than older campers, *Phelps v Boy Scouts of America*, *supra*; see *Arango v Vasquez*, 89 AD3d 875, 933 NYS2d 82 (2d Dept 2011). In contrast, constant supervision is not required for students at the high school level, *Rose ex rel. Rose v Onteora Cent. School Dist.*, 52 AD3d 1161, 861 NYS2d 442 (3d Dept 2008); *Johnsen v Carmel Cent. School Dist.*, 277 AD2d 354, 716 NYS2d 403 (2d Dept 2000); *Convey v City of Rye School Dist.*, 271 AD2d 154, 710 NYS2d 641 (2d Dept 2000); *Barretto v New York*, 229 AD2d 214, 655 NYS2d 484 (1st Dept 1997).

The Board of Education has the same duty towards students as is owed by a reasonably prudent parent, *Lisa P. v Attica Cent. School Dist.*, 27 AD3d 1080, 810 NYS2d 772 (4th Dept 2006); *Toure by Toure v Board of Educ. of City of New York*, 127 AD2d 759, 512 NYS2d 150 (2d Dept 1987). The standard for determining whether the duty was breached is whether a parent of ordinary prudence placed in an identical situation and armed with the same information would invariably have provided greater supervision, *Murray v Research Foundation of State University of New York*, 283 AD2d 995, 723 NYS2d 805 (4th Dept 2001); see *Lisa P. v Attica Cent. School Dist.*, *supra*; see also *D.T. v Rich*, 24 NY3d 1103, 2 NYS3d 405, 26 NE3d 233 (2014), *rev'g* 100 AD3d 1300, 955 NYS2d 665 (3d Dept 2012) (residential facility for neglected children owes its children duty of care of reasonably prudent parent); *Fernandez v MercyFirst*, 205 AD3d 476, 168 NYS3d 61 (1st Dept 2022) (residential facility for children). The standard of care applicable to dormitory safety at boarding schools is measured by a school's duty to supervise rather than by a landlord's duty to its tenants, *Wienclawski v New York School for Deaf*, 300 AD2d 652, 753 NYS2d 95 (2d Dept 2002) (citing *Mirand v New York*, 84 NY2d 44, 614 NYS2d 372, 637 NE2d 263 (1994)).

It should be further noted that colleges and universities, in contrast to school districts, are not generally under a duty to protect students from the dangerous acts of other students, *Eiseman v State*, 70 NY2d 175, 518 NYS2d 608, 511 NE2d 1128 (1987); *Pasquaretto v Long Island*

University, 106 AD3d 794, 964 NYS2d 599 (2d Dept 2013); *Talbot v New York Institute of Technology*, 225 AD2d 611, 639 NYS2d 135 (2d Dept 1996). Therefore, colleges generally have no legal duty to shield their students from their own dangerous activity that creates a risk of harm to themselves, *Rothbard v Colgate University*, 235 AD2d 675, 652 NYS2d 146 (3d Dept 1997). A college has no obligation to supervise a student's health care following an accident, *McNeil v Wagner College*, 246 AD2d 516, 667 NYS2d 397 (2d Dept 1998). However, an adult educational rehabilitation program assisting students who are mentally deficient and incapable of caring for themselves and making independent decisions owes a duty to adequately supervise the students and is liable for foreseeable injuries caused by the absence of adequate supervision, *Rydzynski v North Shore University Hosp.*, 262 AD2d 630, 692 NYS2d 694 (2d Dept 1999). Further, a duty may be imposed where a college has encouraged its students to participate in an activity and taken affirmative steps to supervise and control the activity, *Pasquaretto v Long Island University*, *supra* (recognizing principle but holding it inapplicable where plaintiff failed to specifically allege university's involvement in fraternity initiation to a degree sufficient to give rise to duty).

Liability of a Board of Education on the basis of respondeat superior must be viewed in its historical perspective. While such Boards have long been held liable for their own negligence, they were held for the negligence of their employees only with respect to the condition of premises and equipment, the care of which they entrusted to employees, *Lessin v Board of Education of City of New York*, 247 NY 503, 161 NE 160 (1928); *Graff v Board of Ed. of City of New York*, 258 App Div 813, 15 NYS2d 941 (2d Dept 1939), *aff'd*, 283 NY 574, 27 NE2d 438 (1940). It was not until 1937 with respect to New York City schools and 1962 with respect to schools outside New York City that respondeat superior was applied to hold a Board of Education for the negligence of a teacher or supervisor, *Domino v Mercurio*, 17 AD2d 342, 234 NYS2d 1011 (4th Dept 1962), *aff'd*, 13 NY2d 922, 244 NYS2d 69, 193 NE2d 893 (1963). While the Court of Appeals affirmed in *Domino* without reaching the respondeat superior point, the principle is now generally applied, *Shaw v Hempstead*, 20 AD2d 663, 246 NYS2d 557 (2d Dept 1964); *Cianci v Board of Ed. of City School Dist. of City of Rye*, 18 AD2d 930, 238 NYS2d 547 (2d Dept 1963).

Before respondeat superior was recognized as being applicable, however, Boards of Education, although not vicariously responsible for the acts of teachers or supervisors, were held liable for failure to adopt or enforce rules or regulations governing curriculum or personnel or pupil activities, *Govel v Board of Ed. of City of Albany*, 267 App Div 621, 48 NYS2d 299 (3d Dept 1944), *aff'd*, 293 NY 928, 60 NE2d 133 (1944); see *Berner v Board of Education, Union Free School Dist. No. 1, North Tonawanda*, 286 NY 174, 36 NE2d 100 (1941); Education Law 1604(9), 1709(2), 1804(1), 1903, 2503(1) and (2), 2554(1) and (13); see also *Murray v Research Foundation of State University of New York*, 283 AD2d 995, 723 NYS2d 805 (4th Dept 2001); or for failure to select

competent employees, *Lopez v New York*, 4 AD2d 48, 163 NYS2d 562 (2d Dept 1957), *aff'd*, 4 NY2d 738, 171 NYS2d 860, 148 NE2d 909 (1958); *Garber v Central School Dist. No. 1 of Town of Sharon, Schoharie County*, 251 App Div 214, 295 NYS 850 (3d Dept 1937). For a charge on respondeat superior, see PJI 2:229; for a charge on failure to select competent employees, PJI 2:240 may be adapted.

With respect to the failure to adopt or enforce rules, the limited wording of the statutes imposing the duty to make rules (e.g. Education L. § 1709(2) “rules and regulations concerning . . . order and discipline”) and the problems involved in establishing causal relationship make recovery on that ground quite difficult, see *Lawes v Board of Ed. of City of New York*, 16 NY2d 302, 266 NYS2d 364, 213 NE2d 667 (1965); *Ohman v Board of Education of City of New York*, 300 NY 306, 90 NE2d 474 (1949); *Hoose v Drumm*, 281 NY 54, 22 NE2d 233 (1939) (holding, in part, that the statutory direction “[t]o establish rules for the government and discipline of the schools” did not cover situation where student, during recess, struck another in the eye with a goldenrod stalk on school property); *Luce v Board of Ed. of Village of Johnson City*, 2 AD2d 502, 157 NYS2d 123 (3d Dept 1956), *aff'd*, 3 NY2d 792, 164 NYS2d 43, 143 NE2d 797 (1957); *Ferguson v Payne*, 279 App Div 968, 111 NYS2d 531 (4th Dept 1952), *aff'd*, 306 NY 590, 115 NE2d 687 (1953); *Brown v Board of Ed. of City of New York*, 37 AD2d 836, 326 NYS2d 9 (2d Dept 1971); *Ostrowski v Board of Ed. of Cossackie-Athens Central School Dist.*, 31 AD2d 571, 294 NYS2d 871 (3d Dept 1968); but see *Dworzanski v Niagara-Wheatfield Cent. School Dist.*, 89 AD3d 1378, 932 NYS2d 285 (4th Dept 2011) (question of fact whether defendant board was negligent in failing to enforce playground rules prohibiting students from playing “tag”); *Rivera v Board of Educ. of City of Yonkers*, 19 AD3d 394, 796 NYS2d 182 (2d Dept 2005) (question of fact as to whether defendant board was negligent in failing to enforce alleged rule prohibiting first graders from playing on monkey bars and, if so, whether failure was proximate cause of accident). A not-for-profit state athletic organization that performs administrative tasks related to high school athletic events is not liable for failing to promulgate rules concerning injuries sustained by participants, *Serrell v Connetquot Cent. High School Dist. of Islip*, 280 AD2d 663, 721 NYS2d 107 (2d Dept 2001). Now that respondeat superior is applied as to all employees of all Boards of Education, the other bases of Board responsibility are of lesser significance, although they still remain of importance in situations in which the jury may find that the teacher or other employee was not negligent but that the injury resulted from the Board’s failure to carry out its duties. In reading cases concerning the liability of a Board of Education, the foregoing history must be kept in mind.

Supervision is a mandatory and unqualified duty of a union free school district, Education L. § 1709(16); *Decker v Dundee Cent. School Dist.*, 4 NY2d 462, 176 NYS2d 307, 151 NE2d 866 (1958); *Tashjian v North Colonie Central School Dist. No. 5*, 50 AD2d 691, 375 NYS2d 467 (3d Dept 1975); of a central school district, Education L. § 1804(1); of a central high school district, Education L. § 1903; of a school district in

cities of less than 125,000, Education L. § 2503(1), see also subd (5); and of a school district in cities of 125,000 or more, Education L. § 2554(1), (2). Further, a municipality may be held liable for inadequate supervision where it has entered into an agreement with the Board of Education to provide school security personnel, *Speigh v New York*, 309 AD2d 501, 765 NYS2d 28 (1st Dept 2003). As to common school districts, *Decker v Dundee Cent. School Dist.*, supra, indicates that the duty is qualified, but the qualification relates to athletic, playground or social center activities and is determined by whether such activities have been “authorized by a vote of a district meeting,” Education L. § 1604(8); see *Hoose v Drumm*, 281 NY 54, 22 NE2d 233 (1939). When they have authorized such activities, or with respect to regular school activities that require no such authorization, the duty to provide supervision should likewise be mandatory.

Where custody and control of a student has passed from a school district to BOCES (Board of Cooperative Educational Services), BOCES is responsible for supervising the student and the school district is not liable in the absence of negligence in allowing the student to participate in the BOCES program or a showing that the school district otherwise assumed a special obligation towards the student, *Kennedy v Waterville Cent. School Dist.*, 172 AD2d 1019, 569 NYS2d 278 (4th Dept 1991); see also *Gahan v Mineola Union Free School Dist.*, 241 AD2d 439, 660 NYS2d 144 (2d Dept 1997). A school district may be held liable where it has placed a student, whose progress it continued to monitor, in the BOCES program pursuant to an individual education plan as mandated by article 89 of the Education Law, *Troy v North Collins Cent. School Dist.*, 267 AD2d 1023, 701 NYS2d 199 (4th Dept 1999), see *Gahan v Mineola Union Free School Dist.*, 241 AD2d 439, 660 NYS2d 144 (2d Dept 1997) (since injured plaintiff passed from custody and control of one school district to custody and control of another when she entered ninth grade, and there was no evidence that prior school district undertook any special obligation to plaintiff, former school district cannot be held liable to injured plaintiff); see also *Williams v Weatherstone*, 23 NY3d 384, 991 NYS2d 779, 15 NE3d 792 (2014) (defendant owed no duty to child to protect her while she waited for bus by virtue of her status as a special education student with an individualized education program (IEP); child’s IEP required only that defendant provide transportation to school and did not call for aide or escort to wait with child).

Time and place may limit the duty of supervision. The duty of a school district exists only so long as a student is in its care and custody during school hours and terminates when the student has departed from the school’s custody, *Pratt v Robinson*, 39 NY2d 554, 384 NYS2d 749, 349 NE2d 849 (1976); *Diaz v Brentwood Union Free School Dist.*, 141 AD3d 556, 36 NYS3d 161 (2d Dept 2016); *Hansen v Bath & Tennis Marina Corp.*, 73 AD3d 699, 900 NYS2d 365 (2d Dept 2010); *Winter v Board of Educ. of City of New York*, 270 AD2d 343, 704 NYS2d 142 (2d Dept 2000); *Norton v Canandaigua City School Dist.*, 208 AD2d 282, 624 NYS2d 695 (4th Dept 1995); see *Williams v Weatherstone*, 23 NY3d

384, 991 NYS2d 779, 15 NE3d 792 (2014) (busing); *Stephenson v New York*, 19 NY3d 1031, 954 NYS2d 782, 978 NE2d 1251 (2012) (generally duty of care does not extend beyond school premises); see also *Duffy v Long Beach City School Dist.*, 134 AD3d 761, 22 NYS3d 88 (2d Dept 2015) (football player injured on practice field prior to after-school practice). The pupils must be within the Board's "area of responsibility," *Lawes v Board of Ed. of City of New York*, 16 NY2d 302, 266 NYS2d 364, 213 NE2d 667 (1965), which they are when they are on the school grounds, including when they are on the way to attend school or returning after lunch recess, *Spiegler v School Dist. of City of New Rochelle*, 17 NY2d 528, 267 NYS2d 908, 215 NE2d 165 (1966); *Lawes v Board of Ed. of City of New York*, supra; *Cioffi v Board of Ed. of City of New York*, 27 AD2d 826, 278 NYS2d 249 (1st Dept 1967), or during other school recess periods, *Hoose v Drumm*, 281 NY 54, 22 NE2d 233 (1939). Although a school district's duty of care toward a student generally ends when it relinquishes custody of the student, the duty continues when the student is released into a potentially hazardous situation, particularly when the hazard is partly of the school district's own making, *Ernest v Red Creek Cent. School Dist.*, 93 NY2d 664, 695 NYS2d 531, 717 NE2d 690 (1999); *Cruz v New York*, 183 AD3d 466, 124 NYS3d 22 (1st Dept 2020) (question of fact as to whether plaintiff, who was struck by vehicle after being released from after-school-program, was released into foreseeably hazardous situation); see *Martinez v New York*, 90 AD3d 718, 935 NYS2d 45 (2d Dept 2011). Furthermore, a question of fact existed as to the school's liability for injuries resulting from an assault that occurred off school grounds where an eyewitness averred that several teachers and a safety officer were present during an earlier assault on school grounds and did nothing to intervene, since a jury could find that timely intervention might have averted the second assault, *Anglero v New York City Bd. of Educ.*, 2 NY3d 784, 780 NYS2d 506, 813 NE2d 586 (2004); see *Stephenson v New York*, 19 NY3d 1031, 954 NYS2d 782, 978 NE2d 1251 (2012) (school entitled to summary judgment where student was involved in prior altercation with another student on school grounds and was injured in a subsequent altercation with same student that took place off school grounds before school hours; school adequately supervised plaintiff at school and addressed the altercation by punishing both students, and second altercation occurred when plaintiff was out of orbit of school's authority); but see *Diaz v Brentwood Union Free School District*, supra.

Where children have disembarked from a bus in a safe spot, the school district bears no further duty to the child, *Pratt v Robinson*, 39 NY2d 554, 384 NYS2d 749, 349 NE2d 849 (1976); see *Williams v Weatherstone*, 23 NY3d 384, 991 NYS2d 779, 15 NE3d 792 (2014). While a school has no duty to prevent injury to school children released in a safe and anticipated manner, *Cerni ex rel. Cerni v Zambrana*, 271 AD2d 566, 706 NYS2d 153 (2d Dept 2000), the school breaches a duty when it releases a child without further supervision into a foreseeably hazardous setting it had a hand in creating, *Ernest v Red Creek Cent. School Dist.*, 93 NY2d 664, 695 NYS2d 531, 717 NE2d 690 (1999); *David XX v Saint Catherine's Center for Children*, 267 AD2d 813, 699 NYS2d 827

(3d Dept 1999); see *McDonald v Central School Dist. No. 3 of Towns of Romulus, Varick and Fayette, Seneca County*, 179 Misc 333, 39 NYS2d 103 (Sup 1941), *aff'd* without opinion, 264 App Div 943, 36 NYS2d 438 (4th Dept 1942), *aff'd* without opinion, 289 NY 800, 47 NE2d 50 (1943). Ernest and its progeny mark a narrow exception to the general rule that a school's duty of care does not extend beyond school premises, and is limited to injury that occurred shortly after school hours upon the student's departure from the school, *Williams v Weatherstone*, *supra*. Thus, a school district does not owe a duty to a sixteen-year-old plaintiff to prevent her from going home in a fellow student's car instead of embarking on a school bus, *Cerni ex rel. Cerni v Zambrana*, *supra*. Similarly, no duty was owed to a high school student injured in an automobile accident that occurred while the student was driving his father's motor vehicle to a bowling alley where the student's first class of the day was to be conducted, *Ramo v Serrano*, 301 AD2d 640, 754 NYS2d 336 (2d Dept 2003). In *Williams v Weatherstone*, *supra*, the student was injured when a vehicle struck her while she was crossing the road from her bus stop to the opposite side of the road. The student was crossing the road in an effort to catch the bus, which had passed her stop, turned around and was approaching the stop from the opposite side of the road. The Court concluded that defendant owed no duty to the child because she was never in defendant's physical custody.

As a matter of common sense, an appropriate level of supervision must be provided when large numbers of students gather to enter the school building at the beginning of the school day, *Speigh v New York*, 309 AD2d 501, 765 NYS2d 28 (1st Dept 2003). Supervision is not required, however, at luncheon recess before a given hour when there is a rule against pupils returning before that hour, *Shanahan v St. James Roman Catholic Church*, 11 AD2d 584, 200 NYS2d 798 (3d Dept 1960), *aff'd*, 10 NY2d 906, 223 NYS2d 519, 179 NE2d 519 (1961) (but note that the parochial school involved in that case was not governed by the Education Law), or for after-school playground users, *Bennett v Board of Ed. of City of New York*, 16 AD2d 651, 226 NYS2d 593 (2d Dept 1962), *aff'd*, 13 NY2d 1104, 246 NYS2d 634, 196 NE2d 268 (1963); *Orsini v Guilderland Central School Dist. No. 2 of Towns of Guilderland Et Al., Albany County*, 46 AD2d 700, 360 NYS2d 288 (3d Dept 1974); see *Tannenbaum v Board of Ed., Central High School Dist. No. 3, Town of Hempstead*, 22 AD2d 924, 255 NYS2d 522 (2d Dept 1964), *aff'd*, 17 NY2d 499, 267 NYS2d 217, 214 NE2d 378 (1966); see also *Dukes v Bethlehem Cent. School Dist.*, 216 AD2d 838, 629 NYS2d 97 (3d Dept 1995). But a board of education or municipality, aware that a public park or playground is being used for an unlawful purpose, e.g. discharge of fireworks, is liable for resulting injuries if it fails to take appropriate preventative measures, *Nicholson v Board of Educ. of City of New York*, 36 NY2d 798, 369 NYS2d 703, 330 NE2d 651 (1975); see *Rhabb v New York City Housing Authority*, 41 NY2d 200, 391 NYS2d 540, 359 NE2d 1335 (1976) (dog that chased children attempting to bite them).

Schools will not be responsible for acts of sexual abuse that did not

occur while the student was in the custody and control of school officials and where the threatened harm posed by the continued acts of a third party did not involve foreseeable conduct that could occur while the child was in the custody and control of school officials, *Kimberly S.M. by Mariann D.M. v Bradford Cent. School*, 226 AD2d 85, 649 NYS2d 588 (4th Dept 1996). Therefore, there is no common law duty to report in such circumstances, *id*; see *Stephenson v New York*, 19 NY3d 1031, 954 NYS2d 782, 978 NE2d 1251 (2012) (no duty to inform parent of generalized threat of harm to student made by third party on school grounds; school owes no duty to inform parent of generalized threat made at school and case did not involve threatened conduct that would occur while student was in orbit of school's authority).

Schools are under a duty to supervise students adequately and can be liable for a foreseeable injury proximately related to the lack of adequate supervision, *Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 907 NYS2d 735, 934 NE2d 304 (2010); *Mirand v City of New York*, 84 NY2d 44, 614 NYS2d 372, 637 NE2d 263 (1994); *Ismahan A. v Williamsville Board of Education*, 200 AD3d 1667, 161 NYS3d 582 (4th Dept 2021); *Charles D.J. v Buffalo*, 185 AD3d 1488, 128 NYS3d 394 (4th Dept 2020); *Hale v Holley Central School District*, 159 AD3d 1509, 72 NYS3d 700 (4th Dept 2018); *Rivera v Board of Educ. of City of Yonkers*, 19 AD3d 394, 796 NYS2d 182 (2d Dept 2005); *Walsh v City School Dist. of Albany*, 237 AD2d 811, 654 NYS2d 859 (3d Dept 1997); *Garcia v New York*, 222 AD2d 192, 646 NYS2d 508 (1st Dept 1996). In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that the school authorities had sufficiently specific knowledge or notice of the dangerous conduct that caused the injury, that is, that the fellow student's acts could reasonably have been anticipated, *Brandy B. v Eden Cent. School Dist.*, *supra*; *Mirand v New York*, *supra*; *Lawes v Board of Ed. of City of New York*, 16 NY2d 302, 266 NYS2d 364, 213 NE2d 667 (1965); *Ismahan A. v Williamsville Board of Education*, *supra*; *Charles D.J. v Buffalo*, *supra*; *Hale v Holly Central School District*, *supra*; *Geywits ex rel. Geywits v Charlotte Valley Cent. School Dist.*, 98 AD3d 804, 949 NYS2d 834 (3d Dept 2012); *Baker v Trinity-Pawling School*, 21 AD3d 272, 800 NYS2d 10 (1st Dept 2005); *Busby v Ticonderoga Cent. School Dist.*, 258 AD2d 762, 684 NYS2d 709 (3d Dept 1999); *Swaitkowski v Board of Ed. of City of Buffalo*, 36 AD2d 685, 319 NYS2d 783 (4th Dept 1971); see *Michele M. v Board of Educ. of City of New York*, 3 AD3d 370, 771 NYS2d 89 (1st Dept 2004). Notice to the school of prior similar conduct is generally required because school personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place among students daily, *Mirand v New York*, *supra*; *Ismahan A. v Williamsville Board of Education*, *supra*; *Charles D.J. v Buffalo*, *supra*. Negligence requires proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act, *Mirand v New York*, *supra*; *Charles D.J. v Buffalo*, *supra*.

Courts have also invoked the notice requirement in cases other

than those involving third-party acts, see *Gatty v Scarsdale Union Free School Dist. No. 1*, 152 AD2d 650, 543 NYS2d 732 (2d Dept 1989); *Ehlinger v Board of Educ. of New Hartford Cent. School Dist.*, 96 AD2d 708, 465 NYS2d 378 (4th Dept 1983); *Luis v Church of St. Angela Merici*, 52 AD2d 352, 383 NYS2d 885 (1st Dept 1976).

Notice may be inferred from the continuance of the particular danger for such a period of time that had there been supervision the danger would have been discovered, *Decker v Dundee Cent. School Dist.*, 4 NY2d 462, 176 NYS2d 307, 151 NE2d 866 (1958); *Hanley by Hanley v Hornbeck*, 127 AD2d 905, 512 NYS2d 262 (3d Dept 1987) (school not liable for failure to prevent fight between boys during a game at gym class where school had no forewarning that one boy might assault the other); see *Ismahan A. v Williamsville Board of Education*, 200 AD3d 1667, 161 NYS3d 582 (4th Dept 2021) (issue of fact whether defendant had notice of danger given testimony from physical education teacher that on the day before the subject touch football collision between two students a similar collision occurred); *Nizen-Jacobellis v Lindenhurst Union Free School District*, 191 AD3d 1007, 143 NYS3d 368 (2d Dept 2021) (issue of fact where injured plaintiff testified at deposition that, prior to assault, assailant made seven or eight serious threatening comments to him, that teacher witnessed assailant make closed fist motion towards plaintiff and heard him threaten to stab plaintiff, and that teacher did not take any action after he complained to her); *Hale v Holley Central School District*, 159 AD3d 1509, 72 NYS3d 700 (4th Dept 2018) (where infant plaintiff injured by other student putting him in unexpected choke hold, aggressor's involvement in violent incidents three years prior, and isolated incident of consensual choking between two different students not sufficient to place school district on notice); *Geywits ex rel. Geywits v Charlotte Valley Cent. School Dist.*, 98 AD3d 804, 949 NYS2d 834 (3d Dept 2012) (fact that three students returned late to class on two or three occasions insufficient to place school on notice that three students were being sexually abused by fellow student in particular bathroom at school, especially since the students explained lateness by saying that the group stopped at the bathroom); *Busby v Ticonderoga Cent. School Dist.*, 258 AD2d 762, 684 NYS2d 709 (3d Dept 1999) (school not liable for consequences of sudden, impulsive, unanticipated acts of other students); but see *Clark v Susquehanna Valley Cent. School Dist.*, 19 AD3d 926, 797 NYS2d 608 (3d Dept 2005) (issue of fact presented whether gym class scooter collision could have been prevented had physical education instructors taken reasonable steps to prevent accident); *Shoemaker v Whitney Point Cent. School Dist.*, 299 AD2d 719, 750 NYS2d 355 (3d Dept 2002) (where there was no monitor in school playground at time of incident and incident lasted longer than "a few moments," question of fact existed as to whether injury might have been prevented if school personnel had been in position to intercede).

In the context of an injury sustained by one student as a result of the conduct of another student, notice may arise from relevant entries in a student's disciplinary record, or from previous disputes between the

students involved in the altercation, *Wilson ex rel. Wilson v Vestal Cent. School Dist.*, 34 AD3d 999, 825 NYS2d 159 (3d Dept 2006); *McLeod v New York*, 32 AD3d 907, 822 NYS2d 562 (2d Dept 2006); *Wood v Watervliet City School Dist.*, 30 AD3d 663, 815 NYS2d 360 (3d Dept 2006); *Morman v Ossining Union Free School Dist.*, 297 AD2d 788, 747 NYS2d 586 (2d Dept 2002); see *Velez v Freeport Union Free School Dist.*, 292 AD2d 595, 740 NYS2d 364 (2d Dept 2002); *Convey v City of Rye School Dist.*, 271 AD2d 154, 710 NYS2d 641 (2d Dept 2000). When asked about prior instances of sexual assault, an assistant principal's deposition testimony that "no specific instance come to mind" was insufficient to eliminate triable issues of fact on the issue of notice, *Charles D.J. v Buffalo*, 185 AD3d 1488, 128 NYS3d 394 (4th Dept 2020).

What is reasonable care under the standard of care of a reasonably prudent parent varies with the age, *Phelps v Boy Scouts of America*, 305 AD2d 335, 762 NYS2d 32 (1st Dept 2003); *Kosok v Young Men's Christian Ass'n of Greater New York*, 24 AD2d 113, 264 NYS2d 123 (1st Dept 1965), *aff'd*, 19 NY2d 935, 281 NYS2d 341, 228 NE2d 398 (1967); *Garcia v New York*, 222 AD2d 192, 646 NYS2d 508 (1st Dept 1996) (five-year-old kindergarten student sent by teacher to public bathroom unescorted), and mental capacity, *Gonzalez v Mackler*, 19 AD2d 229, 241 NYS2d 254 (1st Dept 1963); see *Arango v Vasquez*, 89 AD3d 875, 933 NYS2d 82 (2d Dept 2011), of the children, as well as the existence or absence of rules or regulations relative to the condition, see *Selleck v Board of Educ. of Central School Dist. No. 1*, 276 App Div 263, 94 NYS2d 318 (3d Dept 1949); *Snyder v Morristown Cent. School Dist. No. 1*, 167 AD2d 678, 563 NYS2d 258 (3d Dept 1990) (no breach of duty in conducting coeducational touch football game in outdoor gym class where no regulation prohibited it and a regulation did permit co-educational participation in the same interschool football game); *Tashjian v North Colonie Central School Dist. No. 5*, 50 AD2d 691, 375 NYS2d 467 (3d Dept 1975); *Gattyan v Scarsdale Union Free School Dist. No. 1*, 152 AD2d 650, 543 NYS2d 732 (2d Dept 1989) (existence of regulation prohibiting activity not probative where regulation existed only for purpose of preventing classroom distractions), the necessity of an explanation and demonstration of an athletic activity for students' own safety, *Darrow v West Genesee Cent. School Dist.*, 41 AD2d 897, 342 NYS2d 611 (4th Dept 1973); see *Dworzanski v Niagara-Wheatfield Cent. School Dist.*, 89 AD3d 1378, 932 NYS2d 285 (4th Dept 2011) (district has duty to provide adequate instructions to students) (citing PJI), and the existence or absence of prior similar accidents, see PJI 2:12. In determining what reasonable care requires under all the circumstances, the jury may "take into consideration the well-known propensities of children to climb about and play," *Collentine v New York*, 279 NY 119, 17 NE2d 792 (1938); *Cappel v Board of Ed. Union Free School Dist. No. 4, Northport*, 40 AD2d 848, 337 NYS2d 836 (2d Dept 1972); *Hetzel v Buffalo Cemetery Ass'n*, 16 AD2d 581, 229 NYS2d 960 (4th Dept 1962), or as it has otherwise been put, "childish proclivities and comprehension of danger," *Garber v Central School Dist. No. 1 of Town of Sharon, Schoharie County*, 251 App Div 214, 295 NYS 850 (3d Dept 1937).

When supervision is required, the adequacy of the supervision is

measured by “reasonable care such as a parent of ordinary prudence would exercise under comparable circumstances,” *Ohman v Board of Education of City of New York*, 300 NY 306, 90 NE2d 474 (1949); see *Wexler v Vodaath*, 226 AD2d 206, 640 NYS2d 555 (1st Dept 1996); *Lewis v Board of Educ. of Lansingburgh Cent. School Dist.*, 137 AD3d 1521, 28 NYS3d 493 (3d Dept 2016) (citing PJI), and this includes all of the factors referred to in the preceding paragraph. Reasonable supervision under all the circumstances, not constant scrutiny, is what is required, *Thompson v Board of Education of City of New York*, 280 NY 92, 19 NE2d 796 (1939); *Totan v Board of Educ. of City of New York*, 133 AD2d 366, 519 NYS2d 374 (2d Dept 1987); *Passafaro v Board of Ed. of City of New York*, 43 AD2d 918, 353 NYS2d 178 (1st Dept 1974). A school board is not the insurer of the safety of its students, *Stephenson v New York*, 19 NY3d 1031, 954 NYS2d 782, 978 NE2d 1251 (2012); *Gatty v Scarsdale Union Free School Dist. No. 1*, 152 AD2d 650, 543 NYS2d 732 (2d Dept 1989); *Swaitkowski v Board of Ed. of City of Buffalo*, 36 AD2d 685, 319 NYS2d 783 (4th Dept 1971). With respect to athletic equipment supplied by a school in connection with a physical education class, a school will generally satisfy its duty of care where its instructor has explained how to use the equipment, demonstrated proper techniques and in close proximity observed a student’s use of the device, *David v Suffolk*, 1 NY3d 525, 775 NYS2d 229, 807 NE2d 278 (2003); see *Bello v Fieldhouse at Chelsea Piers*, 18 AD3d 272, 795 NYS2d 24 (1st Dept 2005); see also *Clark v Susquehanna Valley Cent. School Dist.*, 19 AD3d 926, 797 NYS2d 608 (3d Dept 2005). A school that is aware of a student’s particular disability that makes him or her more susceptible to injury is required to exercise care commensurate with such disability, *Jaquin v Canastota Central School District*, 175 AD3d 1647, 108 NYS3d 213 (3d Dept 2019); *Lewis v Board of Educ. of Lansingburgh Cent. School Dist.*, *supra* (citing PJI).

While it has been held that the Board’s duty “is fulfilled when it provides for adequate supervision in the person of one or more competent teachers,” *Miller v Board of Education, Union Free School Dist. No. 1, of Town of Albion*, 291 NY 25, 50 NE2d 529 (1943); *Graff v Board of Ed. of City of New York*, 258 App Div 813, 15 NYS2d 941 (2d Dept 1939), *aff’d*, 283 NY 574, 27 NE2d 438 (1940), that statement was predicated on the inapplicability of respondeat superior principles for the individual negligence of a teacher and is not authority on what constitutes adequate supervision. The circumstances of a particular case may present a jury question concerning the adequacy of the supervision provided, *Ferrill v Board of Ed., Central School Dist. No. 1*, 6 AD2d 690, 174 NYS2d 91 (2d Dept 1958) (2 instructors for 125 to 150 children ranging in age from 6 to 12 years); *Silverman v New York*, 28 Misc2d 20, 211 NYS2d 560 (AppT 1961), *aff’d*, 15 AD2d 810, 225 NYS2d 77 (2d Dept 1962) (1 teacher for 250 children including known troublemakers; teacher away attending to other chores at the time of assault); see *Cherry v State*, 42 AD2d 671, 344 NYS2d 545 (4th Dept 1973), *aff’d*, 34 NY2d 872, 359 NYS2d 276, 316 NE2d 713 (1974) (claim against state dismissed, one camper’s aide sufficient to supervise 5 boys); *Diamond v Board of Ed. of City of New York*, 12 Misc2d 47, 171 NYS2d 703 (NY

City Ct 1958) (4 supervisors for 300 students, school had established regulations governing student conduct, complaint dismissed). In the context of an elementary school gym class, a teacher has no duty to sit the children down and review the formal rules of play before commencing a kickball game, *Lizardo v Board of Educ. of City of New York*, 77 AD3d 437, 908 NYS2d 395 (1st Dept 2010).

Causal relationship between the injury and the absence or insufficiency of supervision must be shown, *Mirand v New York*, 84 NY2d 44, 614 NYS2d 372, 637 NE2d 263 (1994); *Ward v Newfield Central School District Number One*, 66 AD2d 968, 412 NYS2d 57 (3d Dept 1978); *O'Bryan v O'Connor*, 59 AD2d 219, 399 NYS2d 272 (3d Dept 1977); *Brady v Buffalo*, 34 AD2d 878, 312 NYS2d 446 (4th Dept 1970), *aff'd*, 29 NY2d 776, 326 NYS2d 842, 276 NE2d 926 (1971); *Ferguson v Payne*, 279 App Div 968, 111 NYS2d 531 (4th Dept 1952), *aff'd*, 306 NY 590, 115 NE2d 687 (1953); *Chmela v Board of Ed. of City of New York*, 17 AD2d 826, 233 NYS2d 56 (2d Dept 1962); see *Baker v Eastman Kodak Company*, 28 NY2d 636, 320 NYS2d 247, 269 NE2d 36 (1971). Thus, as a matter of law, the Board is not liable where the injury results from the unforeseeable intervening act of a third party, *Ohman v Board of Education of City of New York*, 300 NY 306, 90 NE2d 474 (1949) (fellow pupil throwing pencil); *Lizardo v Board of Educ. of City of New York*, 77 AD3d 437, 908 NYS2d 395 (1st Dept 2010) (student spontaneously running directly into fellow student during a kickball game); *Pollard v Board of Ed., Barker Central School Dist.*, 280 App Div 1033, 117 NYS2d 184 (4th Dept 1952), *aff'd*, 309 NY 841, 130 NE2d 623 (1955) (fellow pupil raising wire over which plaintiff attempting to step); *Capotosto v Roman Catholic Diocese of Rockville Centre*, 2 AD3d 384, 767 NYS2d 857 (2d Dept 2003) (collision between elementary students playing touch football at recess was spontaneous and unforeseeable act that could not have been prevented by even the most intense supervision); *Ceglia by Ceglia v Portledge School*, 187 AD2d 550, 590 NYS2d 228 (2d Dept 1992) (pupil tripped in hallway by another pupil); *Hauser v North Rockland Cent. School Dist. No. 1*, 166 AD2d 553, 560 NYS2d 835 (2d Dept 1990) (pupil throwing rock at another pupil during lunch recess); *McLoughlin v Holy Cross High School*, 135 AD2d 513, 521 NYS2d 744 (2d Dept 1987) (pupil, not a member of plaintiff's class, entering classroom in absence of teacher and assaulting plaintiff); *Swaitkowski v Board of Ed. of City of Buffalo*, 36 AD2d 685, 319 NYS2d 783 (4th Dept 1971) (fellow pupil placing pencil point on seat); see *Summer H. v New York City Dept. of Educ.*, 19 NY3d 1030, 954 NYS2d 1, 978 NE2d 593 (2012) (classmate's action of stepping backwards and falling on to plaintiff constituted thoughtless or careless act not preventable by reasonable supervision).

However, there is a question for the jury when the intervening act may reasonably be foreseen, see *Fernandez v MercyFirst*, 205 AD3d 476, 168 NYS3d 61 (1st Dept 2022) (issue of fact whether defendant residential facility's alleged inadequate supervision was proximate cause of minor's injuries where minor absconded from facility and returned to sexual abuser); *Alferoff by Alferoff v Casagrande by Casagrande*, 122

AD2d 183, 504 NYS2d 719 (2d Dept 1986) (eraser thrown by fellow student while teacher was absent from classroom and teacher was aware of disruptive behavior regularly taking place in his absence); *Gonzalez v Mackler*, 19 AD2d 229, 241 NYS2d 254 (1st Dept 1963) (mentally retarded child throwing a pointer); or where there is an issue as to whether failure to follow Board's own safety regulations was the proximate cause of the death of plaintiff's son, *Brown v Board of Ed. of City of New York*, 37 AD2d 836, 326 NYS2d 9 (2d Dept 1971); see PJI 2:72. If the manner in which plaintiff's injuries occurred could have happened even if plaintiff had been supervised, liability will not be imposed, *Foster v New Berlin Cent. School Dist.*, 246 AD2d 880, 667 NYS2d 994 (3d Dept 1998); *Walsh v City School Dist. of Albany*, 237 AD2d 811, 654 NYS2d 859 (3d Dept 1997); see *Pratt v Board of Co-op. Educ. Services*, 251 AD2d 949, 674 NYS2d 838 (3d Dept 1998). Similarly, where an accident occurred in so short a time span that even the most intense supervision would not have prevented it, any lack of supervision could not be a proximate cause of the injury, *Ismahan A. v Williamsville Board of Education*, 200 AD3d 1667, 161 NYS3d 582 (4th Dept 2021) (issue of fact whether touch football collision between students was foreseeable consequence of lack of proper supervision or a spontaneous and accidental collision that even most careful supervision could not prevent); *Scavelli v Carmel*, 131 AD3d 688, 15 NYS3d 214 (2d Dept 2015); *Nash v Port Washington Union Free School Dist.*, 83 AD3d 136, 922 NYS2d 408 (2d Dept 2011); *Reardon v Carle Place Union Free School Dist.*, 27 AD3d 635, 813 NYS2d 150 (2d Dept 2006); *Lopez v Freeport Union Free School Dist.*, 288 AD2d 355, 734 NYS2d 97 (2d Dept 2001); *Convey v City of Rye School Dist.*, 271 AD2d 154, 710 NYS2d 641 (2d Dept 2000); see *Elbadwi ex rel. Green v Saugerties Cent. School Dist.*, 141 AD3d 805, 36 NYS3d 266 (3d Dept 2016).

A school safety officer who witnesses a fight has an obligation to take energetic steps to intervene in time to prevent a child from being injured, *McLeod v New York*, 32 AD3d 907, 822 NYS2d 562 (2d Dept 2006). Where an injury is the result of an assault by a child with a known history of fighting, bullying and other physical misbehavior both in general and toward the particular injured child, the fact that the assault happened quickly does not necessarily absolve the school from liability, *Wood v Watervliet City School Dist.*, 30 AD3d 663, 815 NYS2d 360 (3d Dept 2006). Even if an assault by one student upon another is sudden, a school may be deemed to have proximately caused the injuries where there were prior recent physical altercations between those students and the school failed to comply with its own security plan and counseling practices, *Walley v Bivins*, 81 AD3d 1286, 917 NYS2d 461 (4th Dept 2011). As to fights between students that occur off school grounds, see generally *Stephenson v New York*, 19 NY3d 1031, 954 NYS2d 782, 978 NE2d 1251 (2012) (school entitled to summary judgment where student, who was involved in prior altercation with another student on school grounds, was injured in subsequent altercation with same student that took place off school grounds before school hours, and school adequately supervised plaintiff at school and addressed the altercation by punishing both students); *Diaz v Brentwood Union Free School Dist.*, 141 AD3d 556, 36 NYS3d 161 (2d Dept 2016).

A school is not liable for injuries resulting from fights between students if the injured student voluntarily entered into the fight, *McLeod v New York*, 32 AD3d 907, 822 NYS2d 562 (2d Dept 2006); *Williams v New York*, 41 AD3d 468, 837 NYS2d 300 (2d Dept 2007); *De Munda v Niagara Wheatfield Bd. of Educ.*, 213 AD2d 975, 625 NYS2d 764 (4th Dept 1995). In such situations, any inadequate supervision by school authorities is not considered a cause of the injury, *Ruggerio v Board of Ed. of City of Jamestown*, 31 AD2d 884, 298 NYS2d 149 (4th Dept 1969), *aff'd*, 26 NY2d 849, 309 NYS2d 596, 258 NE2d 92 (1970); *Williams v New York*, *supra*; *McKinnon v Bell Sec.*, 268 AD2d 220, 700 NYS2d 469 (1st Dept 2000); see *Borelli v Board of Educ. of Highland School Dist.*, 156 AD2d 903, 550 NYS2d 120 (3d Dept 1989) (injured student's actions in resuming fight after school authorities intervened was "intervening act" that caused his injury); see also *Pitner v Brentwood Union Free School Dist.*, 254 AD2d 340, 678 NYS2d 665 (2d Dept 1998) (student who voluntarily participated in fight "assumed the risk" of injury). *Legette v New York*, 38 AD3d 853, 832 NYS2d 669 (2d Dept 2007).

Notwithstanding the adoption of comparative fault, liability for injury caused by a fight between students cannot be predicated upon supervisory negligence if plaintiff's voluntary entry into fight is the proximate cause of his injuries, *Borelli v Board of Educ. of Highland School Dist.*, 156 AD2d 903, 550 NYS2d 120 (3d Dept 1989); see *Ruggerio v Board of Ed. of City of Jamestown*, 31 AD2d 884, 298 NYS2d 149 (4th Dept 1969), *aff'd*, 26 NY2d 849, 309 NYS2d 596, 258 NE2d 92 (1970).

Questions of notice, foreseeability of danger, necessity for and adequacy of supervision, and causation are, generally, for the jury, *Motta ex rel. Motta v Eldred Cent. School Dist.*, 141 AD3d 819, 36 NYS3d 239 (3d Dept 2016); *Garcia v New York*, 222 AD2d 192, 646 NYS2d 508 (1st Dept 1996); *Merkley v Palmyra-Macedon Cent. School Dist.*, 130 AD2d 937, 515 NYS2d 932 (4th Dept 1987); *Lauricella v Board of Ed. of City of Buffalo*, 52 AD2d 710, 381 NYS2d 566 (4th Dept 1976); *Hunt v Board of Ed. of Schenectady*, 43 AD2d 397, 352 NYS2d 237 (3d Dept 1974); *Cianci v Board of Ed. of City School Dist. of City of Rye*, 18 AD2d 930, 238 NYS2d 547 (2d Dept 1963); *Rivera v Board of Ed. of City of New York*, 11 AD2d 7, 201 NYS2d 372 (1st Dept 1960); *Ferrill v Board of Ed., Central School Dist. No. 1*, 6 AD2d 690, 174 NYS2d 91 (2d Dept 1958). The issue of notice, however, may be decided as a matter of law, *Coon by Fontana v Board of Educ. of City of New York*, 160 AD2d 403, 554 NYS2d 110 (1st Dept 1990).

If a school district determines that a student is not to be allowed to participate in a sports program by reason of physical impairment, the student may petition the Supreme Court for an order enjoining the school district from barring his participation, Education L., § 3208-a. The school district may not be found negligent if the student is allowed to participate upon court order, Education L. § 3208-a(4), or for its failure to employ any special preventive measure or devices needed to protect the student, Education L. § 3208-a(7).

The Dignity for All Students Act (Education Law § 10, et seq.), which was intended to foster the creation and implementation of school board policies designed to afford all students in public schools an environment free of discrimination and harassment caused by incidents of bullying, taunting or intimidation through training of personnel, certain instruction for students, and reporting requirements, does not provide a private right of action against a school, *Eskenazi-McGibney v Connetquot Central School District*, 169 AD3d 8, 89 NYS3d 295 (2d Dept 2018); *Motta ex rel. Motta v Eldred Cent. School Dist.*, 141 AD3d 819, 36 NYS3d 239 (3d Dept 2016). However, evidence regarding the Dignity for All Students Act may be admissible in an action sounding in negligent supervision to show that a school did not adequately supervise its students, *Motta by Motta v Eldred Central School District*, 172 AD3d 1575, 101 NYS3d 472 (3d Dept 2019).

Statutory Duties to Disabled Students

In an action alleging defendant school district entities and employees failed to provide plaintiff student with an appropriate mode of transportation to his special education school, the First Department held that the trial court erred when it dismissed plaintiff's statutory discrimination claims under section 504 of the Rehabilitation Act (29 USC § 794 [a]), the Americans with Disabilities Act (42 USC § 12131 *et seq.*) (ADA), section 296 (2) (a) of the New York State Human Rights Law and section 8-107 of the Administrative Code of the City of New York (Human Rights Law), *I.M. by L.M. v New York*, 178 AD3d 126, 111 NYS3d 273 (1st Dept 2019). A plaintiff may assert a Rehabilitation Act and ADA claim, in conjunction with an Individuals with Disabilities Education Act (IDEA) claim, on the theory that the disabled student has been denied access to a free and appropriate public education (FAPE) as guaranteed under the IDEA and a disabled student can plead a claim under the Rehabilitation Act or ADA by showing that the defendant acted in bad faith or with gross misjudgment when administering disability services, *id.* In *I.M. by L.M. v New York*, *supra*, although defendants had already determined that given plaintiff's challenges, he required minibus transportation as a related service in order to meaningfully access his FAPE and benefit from his special education, due to a computer coding error he was placed on a full-sized school bus, causing plaintiff to act out and impairing his access to a FAPE, *id.* While the original coding error was arguably the product of simple bureaucratic negligence, the court held that a reasonable jury could have concluded that defendants' inaction, in the face of reports and family complaints, escalated into a violation of the Rehabilitation Act, the ADA, and the State and City Human Rights Laws, *id.* Thus, issues of fact existed as to whether defendants violated the discrimination statutes by acting with bad faith, gross misjudgment, or deliberate indifference to plaintiff's rights to be transported by minibus, thereby depriving him of a FAPE, *id.*

Duty To Report Child Abuse

Social Services Law § 415 requires all mandated reporters, includ-

ing teachers, to make an oral report of suspected child abuse or maltreatment immediately to an appropriate agency and to file a written report with that agency within 48 hours, *Kimberly S.M. by Mariann D.M. v Bradford Cent. School*, 226 AD2d 85, 649 NYS2d 588 (4th Dept 1996). The written report must include, among other things, the names and addresses of the child and the child's parents or other persons responsible for the child's care, if known, and the name of the person or persons alleged to be responsible for causing the injury, abuse or maltreatment, if known, Social Services Law § 415. School officials are required by statute "to report or cause a report to be made [to the statewide central register of child abuse and maltreatment or, where appropriate, to a local child protective service] when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child," Social Services Law § 413(1); see *Kimberly S.M. by Mariann D.M. v Bradford Cent. School*, *supra*; see also Social Services Law § 415. Civil liability for a willful failure to report cases of suspected abuse is imposed by Social Services Law § 420(2). Under § 1012(e) of the Family Court Act, an "abused child" is one whose parent or other person responsible for the child's care "commits, or allows to be committed, a sex offense against such child." Thus, under the statutory scheme, an "abuser" could be any person allowed by a parent or other person responsible for the care of the child to commit a sex offense against the child, *Kimberly S.M. by Mariann D.M. v Bradford Cent. School*, *supra*. The mandated reporter is required to report even though he or she may not know the identity of the person legally responsible or the identity of the abuser, *Kimberly S.M. by Mariann D.M. v Bradford Cent. School*, *supra*.

Whether a teacher is required to report a suspected case of child sexual abuse under the statute is determined by the facts and circumstances known to the teacher at the time the teacher learns of the abuse, *Kimberly S.M. by Mariann D.M. v Bradford Cent. School* 226 AD2d 85, 649 NYS2d 588 (4th Dept 1996). If the teacher or any other mandated reporter has reasonable cause to suspect that a child has been sexually abused, the reporter must report it immediately and it is the duty of the investigating agency to determine whether the report was founded, *Kimberly S.M. by Mariann D.M. v Bradford Cent. School*, *supra*.

When a school has actual or constructive notice that a student has been sexually abused during school hours on school grounds, it owes the student a common law duty to notify law enforcement or other appropriate legal authorities, see *BL Doe 3 v Female Academy of the Sacred Heart*, 199 AD3d 1419, 158 NYS3d 474 (4th Dept 2021). A common law failure to report cause of action derives from the school's common law duty to adequately supervise its students, and is not subsumed by the statutory reporting requirements contained in Social Services Law article 6, *BL Doe 3 v Female Academy of the Sacred Heart*, *supra*. However, as the court held in *Kimberly S.M. by Mariann D.M. v Bradford Cent. School*, 226 AD2d 85, 649 NYS2d 588 (4th Dept 1996), there is no common law duty to report acts of sexual abuse that did not occur while the student was in the custody and control of school officials.

PJI 2:228. Municipal Liability—Inadequate Supervision—Parks

The City [County, Town, Village] had the duty to provide general supervision to protect plaintiff from ultrahazardous and illegal activity of which it had knowledge or which was foreseeable. You must first decide whether the *[state the activity]* occurred. If you find that it did not occur, proceed no further (on this issue). If you find that it did occur, then you must decide under all of the circumstances: (1) whether the City [County, Town, Village] was aware of or should have foreseen the danger from the *[state the activity]* and whether the City [County, Town, Village] exercised reasonable care in providing supervision with respect to *[state the activity]*.

Comment

Based upon *Benjamin by Benjamin v New York*, 64 NY2d 44, 484 NYS2d 525, 473 NE2d 753 (1984), which held that the duty to supervise activity in a park arises only where the activity is “ultrahazardous and criminal.” The determination as to whether a particular activity is illegal and ultrahazardous is a matter of law for the court to decide. The jury’s function is thus limited to deciding whether the activity occurred, whether the municipality breached the duty to provide adequate supervision it owed to the plaintiff to prevent the injury, and whether the breach of duty was a proximate cause of the plaintiff’s injury. *Benjamin* was distinguished in *Mesick v State*, 118 AD2d 214, 504 NYS2d 279 (3d Dept 1986), where the state was held liable for injuries sustained by a person using state property to swim, though swimming was not permitted, where the state knew that swimmers were attaching ropes to the tree and swinging out over sharp, jagged rocks, into the water. Activities that have been held not to be ultrahazardous or criminal include, bicycle riding on a busy promenade, *Solomon by Solomon v New York*, 66 NY2d 1026, 499 NYS2d 392, 489 NE2d 1294 (1985), occasional rubbish fires, *Benjamin by Benjamin v New York*, supra, throwing a frisbee on a crowded beach, *Marino v State*, 16 AD3d 386, 790 NYS2d 553 (2d Dept 2005), skate boarding, *Plante v Hinton*, 271 AD2d 781, 706 NYS2d 215 (3d Dept 2000), dirt-bike riding, *Muzich v Bonomolo*, 209 AD2d 387, 618 NYS2d 437 (2d Dept 1994), and children pushing other children off of a slide, *Rosario by Vasquez v New York*, 157 AD2d 467, 549 NYS2d 661 (1st Dept 1990); but see *Griffin v Orange*, 210 AD2d 585, 619 NYS2d 814 (3d Dept 1994) (municipality potentially liable for inadequate supervision at public swimming pool); *Seideman by Seideman v Monroe*, 185 AD2d 640, 585 NYS2d 909 (4th Dept 1992) (municipality potentially liable for failure to provide adequate supervision for sledding in a park open for that purpose).

The scope of the duty to supervise varies according to the circumstances, but in the operation of recreational areas, it does not extend to protecting patrons from "the dangers inherent in the sport so far as they are obvious and necessary," *Heard v New York*, 82 NY2d 66, 603 NYS2d 414, 623 NE2d 541 (1993); *Curcio v New York*, 275 NY 20, 9 NE2d 760 (1937). Even when an agent of the municipality expressly authorizes swimming in a location where a municipality has banned it, the swimmer continues to assume the obvious and necessary risks unless a representation as to safety has been given, *Heard v New York*, supra. A municipality's duty to provide adequate general supervision does not extend to providing "strict or immediate supervision" to protect users of a beach from obvious risks, *id.* Thus, where plaintiff was seriously injured when he dove off a jetty into shallow water at Rockaway Beach, plaintiff's claim based upon the failure of the municipality to supervise was properly dismissed, *id.*

The lack of supervision must be the proximate cause of the occurrence, *Overton v New York*, 89 NY2d 850, 653 NYS2d 273, 675 NE2d 1225 (1996) (although there were fewer lifeguards than required by New York State Sanitary Code and New York City Health Code, plaintiff failed to establish that violation of these provisions was proximate cause of infant's drowning); *Baker v Eastman Kodak Company*, 28 NY2d 636, 320 NYS2d 247, 269 NE2d 36 (1971); *Shields v Watervliet*, 41 AD2d 170, 341 NYS2d 699 (3d Dept 1973); *Brady v Buffalo*, 34 AD2d 878, 312 NYS2d 446 (4th Dept 1970), *aff'd*, 29 NY2d 776, 326 NYS2d 842, 276 NE2d 926 (1971); *Diaz v New York*, 25 AD2d 430, 266 NYS2d 532 (1st Dept 1966), *aff'd*, 23 NY2d 748, 296 NYS2d 796, 244 NE2d 267 (1968); *Niblo v New York*, 45 AD2d 1022, 358 NYS2d 42 (2d Dept 1974). For a charge on proximate cause, see PJI 2:70.

Notice, actual or constructive, of a condition not created by the municipality must exist before a duty to supervise arises, *Rhabb v New York City Housing Authority*, 41 NY2d 200, 391 NYS2d 540, 359 NE2d 1335 (1976); *Nicholson v Board of Educ. of City of New York*, 36 NY2d 798, 369 NYS2d 703, 330 NE2d 651 (1975); *Lineal v Great Neck Estates*, 28 AD2d 896, 281 NYS2d 920 (2d Dept 1967), *aff'd*, 23 NY2d 733, 296 NYS2d 566, 244 NE2d 81 (1968).

GOL § 9-103 limits the duty owed by an uncompensated owner or possessor of land to hunters, trappers, fisherman, hikers, horseback riders, bicyclists, snowmobile operators, dog trainers, canoeists, hang gliders, cross country skiers, tobogganners, sledders, spelunkers or operators of motorized vehicles, see *Schoonmaker v Ridge Runners Club 99, Inc.*, 119 AD2d 858, 500 NYS2d 562 (3d Dept 1986). Under GOL § 9-103, the owner/possessor's liability is restricted to those instances where there is a wilful or malicious failure to warn of a dangerous condition, GOL § 9-103(2)(a); *Rock v Concrete Materials, Inc.*, 46 AD2d 300, 362 NYS2d 258 (3d Dept 1974); see *Merriman v Baker*, 34 NY2d 330, 357 NYS2d 473, 313 NE2d 773 (1974); *Mattison v Hudson Falls Central School Dist.*, 91 AD2d 1133, 458 NYS2d 726 (3d Dept 1983); *Curtiss v Chemung*, 78 AD2d 908, 433 NYS2d 514 (3d Dept 1980).

Manifestly, at least some of the activities embraced within GOL § 9-103 are activities which take place in many municipal parks. *Sega v State*, 60 NY2d 183, 469 NYS2d 51, 456 NE2d 1174 (1983), held that GOL § 9-103 was applicable to claims or injuries occurring on State-owned lands. But *Sena v Greenfield*, 91 NY2d 611, 673 NYS2d 984, 696 NE2d 996 (1998) (sledding in supervised public park) and *Ferres v New Rochelle*, 68 NY2d 446, 510 NYS2d 57, 502 NE2d 972 (1986) (bicycle riding in developed city park), held that GOL § 9-103 does not limit the duty of a municipality as respects activity taking place in a supervised public park and recreational facility, see *Rashford v Utica*, 23 AD3d 1000, 803 NYS2d 453 (4th Dept 2005); *Bush v Saugerties*, 114 AD2d 176, 498 NYS2d 563 (3d Dept 1986) (citing PJI) (bicycle riding in municipal park); *O'Keefe v State*, 104 AD2d 43, 481 NYS2d 920 (4th Dept 1984) (State not insulated from liability based on claim that State was negligent in operating a marina). The *Ferres* Court reasoned that the provisions of GOL § 9-103 were intended to give incentives to property owners to give permission to use their property more freely and that it would serve no purpose to apply the statute to public parks which the public is encouraged to use, see *Sena v Greenfield*, *supra*. But where public land, though open for recreational use, is largely undeveloped with limited improvements, the limitations imposed by GOL § 9-103 are applicable to the undeveloped areas, *Wilkins v State*, 165 AD2d 514, 568 NYS2d 236 (3d Dept 1991); see *Sega v State*, *supra*; *Clark v State*, 178 AD2d 908, 577 NYS2d 946 (3d Dept 1991). Where there is insufficient proof of supervision on a par with that provided by municipal parks, the statute will apply, *McCarthy v New York State Canal Corp.*, 244 AD2d 57, 675 NYS2d 254 (3d Dept 1998). Therefore the statute does limit the liability of the State with respect to cross-country skiing taking place on a golf course, where the park's multipurpose trails are not maintained in the winter and are neither groomed nor routinely inspected for skiing, *Stento v State*, 245 AD2d 771, 665 NYS2d 471 (3d Dept 1997). In such circumstances, the State's role as a landowner changes so dramatically in the winter that it cannot reasonably be said to operate, maintain or supervise public recreational facilities at that time of year, *id.*

For a charge and further discussion with respect to GOL § 9-103, see PJI 2:90A.

As to inadequate supervision in schools, see PJI 2:227.

d. RESPONDEAT SUPERIOR

PJI 2:229. Municipal Liability—Respondeat Superior—Schools

The Board of Education is responsible for the acts of a teacher employed by it when such acts are performed within the scope of the teacher's employment. It is not disputed that the defendant (CD) was acting within the scope of (his, her) employment when the infant plaintiff (AB) was injured. Therefore, whether the defendant Board of Education (EF) will be liable for AB's injuries depends upon whether CD was negligent.

It is the duty of a teacher to use the same degree of care over the pupils in (his, her) charge as a parent of ordinary prudence would use under the same circumstances. The plaintiffs claim that (CD) was negligent [*state basis of claim, as:*] (in requiring AB to participate in a wrestling match against an opponent), who was much taller and heavier than AB). CD and the Board of Education deny that CD was negligent. If you find that a parent of ordinary prudence would have (allowed AB to participate in the wrestling match notwithstanding the difference in size and weight between AB and (his/her) opponent), your finding will be that (CD) was not negligent. If you find that a parent of ordinary prudence would not have (allowed AB to participate in a wrestling match against an opponent of such size and weight), your finding will be that CD was negligent.

Comment

[See also *Introductory Statement preceding PJI 2:225*]

Caveat: The charge also assumes that there is no issue concerning scope of employment. When there is, the pattern must be modified by the addition of PJI 2:235.

Based, as to respondeat superior, upon *Domino v Mercurio*, 17 AD2d 342, 234 NYS2d 1011 (4th Dept 1962), *aff'd*, 13 NY2d 922, 244 NYS2d 69, 193 NE2d 893 (1963); *Rodriguez v Board of Educ. of City of New York*, 104 AD2d 978, 480 NYS2d 901 (2d Dept 1984); *Shaw v Hempstead*,

20 AD2d 663, 246 NYS2d 557 (2d Dept 1964); *Cianci v Board of Ed. of City School Dist. of City of Rye*, 18 AD2d 930, 238 NYS2d 547 (2d Dept 1963); as to standard of care, upon *Lawes v Board of Ed. of City of New York*, 16 NY2d 302, 266 NYS2d 364, 213 NE2d 667 (1965); *Hoose v Drumm*, 281 NY 54, 22 NE2d 233 (1939); as to assignment of a student to physical activities beyond his or her capacity, upon *Brooks v Board of Ed. of City of New York*, 12 NY2d 971, 238 NYS2d 963, 189 NE2d 497 (1963); *Govel v Board of Ed. of City of Albany*, 267 App Div 621, 48 NYS2d 299 (3d Dept 1944), *aff'd*, 293 NY 928, 60 NE2d 133 (1944); see *Lindaman ex rel. Lindaman v Vestal Cent. School Dist.*, 12 AD3d 916, 785 NYS2d 549 (3d Dept 2004).

Generally, as to liability of school boards, see Annot: 33 ALR3d 703; 34 ALR3d 1166; 23 ALR5th 1; 35 ALR3d 725; 35 ALR3d 758; 62 NYJur2d, Government Tort Liability 118, 119; 2D Warren, Negligence, Chap 101 5, and, as to the personal liability of teachers, see 2D Warren, Negligence, Chapter 116; Annot: 34 ALR4th 228.

The pattern charge assumes that both the teacher and the Board have been sued by the injured child and parent. Since respondeat superior applies and Education Law §§ 2560, 2561 and 3023 require the Board to hold harmless its teachers and certain other employees (subject under § 3023 to the employee's delivery of the summons or other process to the Board), it will seldom be of significance whether only the Board or only the employee has been served, see *Cherney v Board of Ed. of City School Dist. of City of White Plains*, 31 AD2d 764, 297 NYS2d 668 (2d Dept 1969). But if that is the case, the charge must be modified to indicate that only one of them is a party. The jury must be charged on proximate cause and comparative negligence and in some cases on foreseeability, see PJI 2:12 as to foreseeability, PJI 2:48 and 2:49 as to comparative negligence of an infant, and PJI 2:70 as to proximate cause. As to the development of the law of respondeat superior in relation to schools, see Comment to PJI 2:227.

Statutory provisions may modify the common-law standards. For example, Vehicle and Traffic Law § 1174(b), which requires that a school bus driver instruct pupils to cross in front of the bus and keep the bus halted with red signal lights flashing until the pupils have reached the opposite side of the highway, was enacted for the protection of school children who ride school buses, *Chainani by Chainani v Board of Educ. of City of New York*, 87 NY2d 370, 639 NYS2d 971, 663 NE2d 283 (1995); *Keiser v Elmer*, 225 AD2d 589, 639 NYS2d 118 (2d Dept 1996). Therefore, a violation by the driver gives rise to absolute liability on the part of the school district, as to which comparative negligence is not an issue, see *Van Gaasbeck v Webatuck Central School Dist. No. 1*, 21 NY2d 239, 287 NYS2d 77, 234 NE2d 243 (1967). The duty imposed by Vehicle and Traffic Law § 1174(b) extends to protect children from dangers posed by cross traffic if the bus stops near an intersection and the vehicle striking the child is proceeding on the intersecting highway, *Sewar v Gagliardi Bros. Service*, 69 AD2d 281, 418 NYS2d 704 (4th Dept 1979), *aff'd*, 51 NY2d 752, 432 NYS2d 367, 411 NE2d 786 (1980);

see also *Smith v Sherwood*, 16 NY3d 130, 919 NYS2d 102, 944 NE2d 637 (2011) (owner and operator of private bus used to transport school children discharged their duty to injured student by stopping at place where student could safely disembark bus and leave area; owner and operator of private bus owed no “special duty” to student to afford him protections of VTL § 1174(b), which apply to public, yellow school buses). The statute does not apply to a child who is not boarding or alighting from the particular school bus, *Keiser v Elmer*, 225 AD2d 589, 639 NYS2d 118 (2d Dept 1996). The statute does not impose direct or vicarious liability upon schools for a school bus driver’s violation of the statute where the Board of Education has contracted for transportation services with an independent bus company, *Chainani by Chainani v Board of Educ. of City of New York*, supra. In addition, courts have refused to hold a school district liable for injuries incurred by students while traveling between home and their bus stop, *Pratt v Robinson*, 39 NY2d 554, 384 NYS2d 749, 349 NE2d 849 (1976); *Norton v Canandaigua City School Dist.*, 208 AD2d 282, 624 NYS2d 695 (4th Dept 1995). Therefore, Vehicle and Traffic Law § 1174(b) is not applicable to an accident occurring before the bus arrived to pick up the student, *Norton v Canandaigua City School Dist.*, supra.

Query, whether Education Law § 807, which requires fire drills, § 807-a, which requires an annual fire inspection, or § 409-a, which requires use of eye-safety devices in certain kinds of shop or laboratory work, are statutes that create absolute liability, or simply statutes, the violation of which constitutes negligence per se, in which event comparative negligence would be a defense, see *Van Gaasbeck v Webatuck Central School Dist. No. 1*, 21 NY2d 239, 287 NYS2d 77, 234 NE2d 243 (1967). On the other hand, a statute may relieve the school district and its personnel of liability, see Education L. § 806(3) with respect to the organization, maintenance or operation of a school safety patrol.

e. SPECIAL DUTY

PJI 2:229A. Municipal Liability—Special Duty—Police Departments

As you have heard, the plaintiff AB claims [*state AB's contentions, such as: that (he, she) requested help from a police officer, that (he, she) called the 911 emergency telephone service maintained by the defendant CD (identify municipality), that (he, she) told the (officer, 911 operator) that (he, she) needed immediate help, that CD's (officer, 911 operator) told (him, her) that the help would be coming immediately and that (he, she) should remain where (he, she) was*]. AB further claims that (he, she) did not take additional steps to protect (himself, herself) because (he, she) reasonably relied on the (officer's, 911 operator's) assurances of police (protection, assistance).

CD claims [*state CD's contentions, such as: it did not receive a 911 call from AB, the (officer, 911 operator) did not give AB a promise of immediate assistance, AB did not reasonably refrain from taking additional steps to protect (himself, herself) in reliance on the 911 operator's promise(s)*].

As a general rule, a [*identify municipality*] such as CD is not responsible for injuries that result from the failure to provide police (protection, assistance) to a person. However, CD may be held responsible if there was a special relationship between AB and CD.

In order to prove that there was a special relationship between AB and CD, AB must show (1) that there was direct contact between AB and CD [*where appropriate add or substitute: EF (a person with a legally sufficient close personal relationship to AB)*]; (2) that through promise(s) or conduct CD assumed a duty to (protect, assist) AB; (3) that CD knew that AB could suffer harm if CD did not take timely action to (protect, assist) (him, her); and (4) that AB [*where appropriate add or substitute: EF*] did not take

additional steps to protect (himself, herself) because (he, she) reasonably relied on CD's promise(s) that CD would (protect, assist) (him, her). You will be given a series of written questions and your answers will be your verdict.

I will be giving you a verdict sheet containing 5 questions on this issue.

Question 1 is: Was there direct contact between AB [*where appropriate add or substitute: EF*] and CD's (officer, 911 operator)?

Question 2 is: Did CD's (officer, 911 operator) give AB [*where appropriate add or substitute: EF*] (a promise, promises) of prompt (protection, assistance)?

Question 3 is: Did CD's (officer, 911 operator) know that AB could be harmed if timely action was not taken to (protect, assist) (him, her)?

Question 4 is: Did AB [*where appropriate add or substitute: EF*] decide not to take steps to protect (himself, herself) [*where appropriate, substitute: AB*] or take other action because (he, she) relied on the promise(s) of CD's (officer, 911 operator) that prompt (protection, assistance) would be provided?

Question 5 is: Was AB's [*where appropriate add or substitute: EF's*] reliance on the promise(s) of CD's (officer, 911 operator) reasonable?

Comment

Caveat 1: The pattern charge addresses one situation in which the police have allegedly negligently performed a special duty to protect a person from harm. Cases involving orders of protection are a special class and, in such case, PJI 2:229A.1, *infra*, should be used. The pattern charge also does not address when a special duty arises from taking positive control of a known and dangerous condition, such as when police plan and execute a no-knock search warrant, see *Ferreira v Binghamton*, 2022 NY Slip Op 01953 (NY 2022).

Caveat 2: In *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011), the Court of Appeals, relying principally on *McLean v*

New York, 12 NY3d 194, 878 NYS2d 238, 905 NE2d 1167 (2009), established the principle that, regardless of whether or not a special duty existed, a governmental entity can be held liable to an individual for negligence only in cases where the government allegedly performed a ministerial duty negligently or failed to exercise its discretion, see also *Matter of World Trade Center Bombing Litigation* [Steering Committee v Port Authority of New York and New Jersey], 17 NY3d 428, 933 NYS2d 164, 957 NE2d 733 (2011); *Lauer v New York*, 95 NY2d 95, 711 NYS2d 112, 733 NE2d 184 (2000). Under *Valdez*, the common-law doctrine of governmental immunity shields public entities from liability for their performance of discretionary acts, even where the elements of a special duty may be established. While the *Valdez* Court declined to “accept the premise” that police action (or inaction) will always be deemed discretionary rather than ministerial, the Court’s opinion appears to represent a significant narrowing of the situations in which municipalities may be held liable for police officers’ negligence, even where a “special relationship” is shown to have existed, see also *Signature Health Center, LLC v State*, 92 AD3d 11, 935 NYS2d 357 (3d Dept 2011) (noting that *McLean v New York*, *supra*, “clarified and arguably changed the law with respect to governmental immunity for ministerial and discretionary acts”).

Accordingly, the instances in which PJI 2:229A will apply are narrow. For a discussion of the general principles governing the distinction between discretionary and ministerial acts, see PJI 2:225, *Introductory Comment*.

Based on *Coleson v New York*, 24 NY3d 476, 999 NYS2d 810, 24 NE3d 1074 (2014); *Laratro v New York*, 8 NY3d 79, 828 NYS2d 280, 861 NE2d 95 (2006); *Mastroianni v Suffolk*, 91 NY2d 198, 668 NYS2d 542, 691 NE2d 613 (1997); *Kircher v Jamestown*, 74 NY2d 251, 544 NYS2d 995, 543 NE2d 443 (1989); *Cuffy v New York*, 69 NY2d 255, 513 NYS2d 372, 505 NE2d 937 (1987); *Grieshaber v Albany*, 279 AD2d 232, 720 NYS2d 214 (3d Dept 2001).

In *De Long v Erie*, 60 NY2d 296, 469 NYS2d 611, 457 NE2d 717 (1983), the Court of Appeals held that a decision by a municipality to provide a special 911 emergency service as a substitute for the local police’s general phone number constituted a voluntary assumption of a duty that could create a “special relationship” and give rise to liability in a proper case, provided that the requisite element of reliance is established. Although (as stated in *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011)) *DeLong* did not contain a meaningful analysis of the “justifiable reliance” element, its basic principle has been refined and elaborated in subsequent cases. Under the case law, the four elements of a “special relationship” are (a) the assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the injured party; (b) knowledge on the part of the municipality that inaction could lead to harm; (c) some form of direct contact between the municipality and the injured party; and (d) justifiable reliance by the injured party on the municipality’s affirmative undertaking, *Coleson v New York*, 24 NY3d 476, 999 NYS2d

810, 24 NE3d 1074 (2014); *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 972 NYS2d 169, 995 NE2d 131 (2013); *Laratro v New York*, 8 NY3d 79, 828 NYS2d 280, 861 NE2d 95 (2006); *Santaiti v Ramapo*, 197 AD3d 1191, 153 NYS3d 554 (2d Dept 2021); *Grieshaber v Albany*, 279 AD2d 232, 720 NYS2d 214 (3d Dept 2001); see *Pelaez v Seide*, 2 NY3d 186, 778 NYS2d 111, 810 NE2d 393 (2004).

Under certain circumstances, if there is an issue as to whether the justifiable reliance is related to the incident that resulted in injury, the charge should be followed by a charge on proximate cause, see PJI 2:70; *Mastroianni v Suffolk*, 91 NY2d 198, 668 NYS2d 542, 691 NE2d 613 (1997); *Cuffy v New York*, 69 NY2d 255, 513 NYS2d 372, 505 NE2d 937 (1987). As to voluntarily assumed duty generally, see PJI 2:70.

Ordinarily a municipality is not liable under the common law for failure to undertake the “sovereign” function of providing police protection to members of the public, *Napolitano v Suffolk*, 61 NY2d 863, 474 NYS2d 461, 462 NE2d 1179 (1984); *Bardavid v New York City Transit Authority*, 61 NY2d 986, 475 NYS2d 364, 463 NE2d 1216 (1984); *Weiner v Metropolitan Transp. Authority*, 55 NY2d 175, 448 NYS2d 141, 433 NE2d 124 (1982); *Riss v New York*, 22 NY2d 579, 293 NYS2d 897, 240 NE2d 860 (1968); see *Keselman v New York*, 95 AD3d 1278, 944 NYS2d 763 (2d Dept 2012) (decision whether to arrest). Likewise, the due-process clause of the Fourteenth Amendment is ordinarily not implicated in cases involving an alleged failure by municipal entities to protect citizens from harm arising from the actions of private actors, *DeShaney v Winnebago County Dept. of Social Services*, 489 US 189, 109 SCt 998 (1989); *Chavis v New York*, 94 AD3d 440, 941 NYS2d 582 (1st Dept 2012). Thus, there is ordinarily no liability under 42 U.S.C. § 1983 for such failures, *Chavis v New York*, *supra*. However, the Second Circuit has held that the state may owe a constitutional obligation to the victim of private violence if it had a “special relationship” with the victim or assisted in creating or increasing the danger to the victim, *Matican v New York*, 524 F3d 151 (2d Cir 2008); see *Chavis v New York*, *supra*. Liability under this principle is limited to situations in which the actions or inactions of the police were egregious enough to “shock the conscience,” *Chavis v New York*, *supra*. Mere negligence is “categorically” beneath the conduct required for liability, while culpability within the middle range, i.e., “‘something more than negligence but less than intentional conduct, such as recklessness or gross negligence, is a matter for closer calls,’” *id.*, quoting *Sacramento v Lewis*, 523 US 833, 118 SCt 1708 (1998). Although deliberate indifference may, under some circumstances, give rise to liability under 42 U.S.C. § 1983, liability will be rare in situations involving time-sensitive emergencies or that are “subject to the pull of competing obligations,” *Lombardi v Whitman*, 485 F3d 73 (2d Cir 2007); see *Chavis v New York*, *supra*.

The principle that a municipality is not ordinarily liable for failures to provide police protection is true for failures to provide security in homeless shelters, *Stora v New York*, 117 AD3d 557, 986 NYS2d 81 (1st Dept 2014), or in public schools for individuals other than students,

Bonner v New York, 73 NY2d 930, 539 NYS2d 728, 536 NE2d 1147 (1989); *Vitale v New York*, 60 NY2d 861, 470 NYS2d 358, 458 NE2d 817 (1983); *Marilyn S. v New York*, 134 AD2d 583, 521 NYS2d 485 (2d Dept 1987), *aff'd*, 73 NY2d 910, 539 NYS2d 293, 536 NE2d 622 (1989); *Glick v New York*, 53 AD2d 528, 384 NYS2d 184 (1st Dept 1976), *aff'd*, 42 NY2d 831, 397 NYS2d 382, 366 NE2d 83 (1977); *Feinsilver v New York*, 277 AD2d 199, 715 NYS2d 441 (2d Dept 2000); *Johnson v New York City Bd. of Educ.*, 249 AD2d 370, 671 NYS2d 112 (2d Dept 1998); see *Rashed v State*, 232 AD2d 394, 648 NYS2d 131 (2d Dept 1996) (breach of security at concert at college campus) although schools have a duty of supervision toward students that could encompass the duty to keep them safe, *Mirand v New York*, 84 NY2d 44, 614 NYS2d 372, 637 NE2d 263 (1994); *Stinson v Roosevelt U.F.S.D.*, 61 AD3d 847, 877 NYS2d 400 (2d Dept 2009). The mere implementation of security measures at a high school does not give rise to a special duty to protect any particular student, *Weisbecker v West Islip Union Free School Dist.*, 109 AD3d 657, 970 NYS2d 824 (2d Dept 2013); *Dickerson v New York*, 258 AD2d 433, 684 NYS2d 584 (2d Dept 1999); *Logan v New York*, 148 AD2d 167, 543 NYS2d 661 (1st Dept 1989). For a charge and Comment on the duty of schools to provide supervision and security for students, see PJI 2:227.

No duty arises merely because an individual is likely to be exposed to a known criminal activity, see *Riss v New York*, 22 NY2d 579, 293 NYS2d 897, 240 NE2d 860 (1968); see also *Satiro v New Rochelle*, 102 AD2d 821, 476 NYS2d 377 (2d Dept 1984), *aff'd*, 64 NY2d 614, 485 NYS2d 47, 474 NE2d 255 (1984); *Yearwood v Brighton*, 101 AD2d 498, 475 NYS2d 958 (4th Dept 1984), *aff'd*, 64 NY2d 667, 485 NYS2d 252, 474 NE2d 612 (1984). Thus, absent a “special duty,” no liability flows from decisions on how to allocate the limited resources available for police protection, *Mastroianni v Suffolk*, 91 NY2d 198, 668 NYS2d 542, 691 NE2d 613 (1997); *Sorichetti by Sorichetti v New York*, 65 NY2d 461, 492 NYS2d 591, 482 NE2d 70 (1985), or from a failure to provide police protection, *Kircher v Jamestown*, 74 NY2d 251, 544 NYS2d 995, 543 NE2d 443 (1989); *Cuffy v New York*, 69 NY2d 255, 513 NYS2d 372, 505 NE2d 937 (1987); see *Halpin v Lancaster*, 7 NY3d 827, 822 NYS2d 754, 855 NE2d 1169 (2006) (absent special duty, police officers not expected to anticipate or prevent irrational behavior in domestic disputes); *Cavigliano v Livingston*, 254 AD2d 817, 678 NYS2d 186 (4th Dept 1998) (no liability for police failure to detain intoxicated driver absent special duty to injured person). For a detailed discussion of the special duty doctrine, see PJI 2:225, Introductory Comment.

Even where a special duty exists, liability can be imposed only for the negligent performance of police ministerial duties or for an officer’s failure to exercise his or her discretion, *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011); see *Santaiti v Ramapo*, 197 AD3d 1191, 153 NYS3d 554 (2d Dept 2021); *Feeney v Delaware*, 150 AD3d 1355, 55 NYS3d 737 (3d Dept 2017); *Badillo v New York*, 35 AD3d 307, 827 NYS2d 133 (1st Dept 2006). Once a special duty exists in a matter involving ministerial obligations, the municipality is

required only to exercise reasonable care and is not required to guarantee plaintiff's safety, *Axon v New York City Transit Authority*, 120 AD2d 475, 502 NYS2d 31 (2d Dept 1986). Although not expressly enumerated in the opinion, *Cuffy v New York*, 69 NY2d 255, 513 NYS2d 372, 505 NE2d 937 (1987), nevertheless also requires plaintiff to establish that his or her justifiable reliance is causally related to the event that resulted in injury.

With respect to the requirement of direct contact between the municipality and the injured party, *Cuffy v New York*, 69 NY2d 255, 513 NYS2d 372, 505 NE2d 937 (1987), stated that this aspect of the rule is not to be rigidly applied. However, in *Laratro v New York*, 8 NY3d 79, 828 NYS2d 280, 861 NE2d 95 (2006), the Court of Appeals noted that its prior cases accepted direct contact by someone other than the injured plaintiff only where the person making contact was acting on behalf of his or her immediate family member. While the Court stopped short of requiring an immediate familial relationship, it held that no special duty arose where the person having direct contact with the municipality was a longtime friend and co-worker of the injured plaintiff and was also in close physical proximity to plaintiff at the time she made the 911 call, see *Kircher v Jamestown*, 74 NY2d 251, 544 NYS2d 995, 543 NE2d 443 (1989) (no special duty where concerned bystanders were deflected from attempting rescue of kidnapped plaintiff by municipal assurances of which plaintiff was unaware); *Baez v New York*, 309 AD2d 679, 765 NYS2d 875 (1st Dept 2003) (direct contact not established where individuals who made 911 calls were disinterested volunteers who did not act at direction of either plaintiff or decedent); *D'Ambra v Di Donna*, 305 AD2d 958, 761 NYS2d 129 (3d Dept 2003); *Harris v New York City Housing Authority*, 187 AD2d 362, 589 NYS2d 883 (1st Dept 1992); see also *Kovit v Estate of Hallums*, 4 NY3d 499, 797 NYS2d 20, 829 NE2d 1188 (2005) (contacts between municipality and strangers to plaintiff insufficient).

Since the basis for most special duty exceptions is the unfairness of precluding recovery where the municipality's actions lulled the injured party into a false sense of security, plaintiff must establish that the injured party justifiably relied upon the municipality's promises or actions and that the justifiable reliance is causally related to the incident that resulted in injury, *Coleson v New York*, 24 NY3d 476, 999 NYS2d 810, 24 NE3d 1074 (2014); *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011); *Cuffy v New York*, 69 NY2d 255, 513 NYS2d 372, 505 NE2d 937 (1987); see *Merced v New York*, 75 NY2d 798, 552 NYS2d 96, 551 NE2d 589 (1990); *Tarter v State*, 68 NY2d 511, 510 NYS2d 528, 503 NE2d 84 (1986); but see *Boland v State*, 218 AD2d 235, 638 NYS2d 500 (3d Dept 1996) (elements of contact and reliance satisfied by statute requiring action).

Absent reliance on plaintiff's part on specific assurances of protection, no special duty exists, *Merced v New York*, 75 NY2d 798, 552 NYS2d 96, 551 NE2d 589 (1990); *Tarter v State*, 68 NY2d 511, 510 NYS2d 528, 503 NE2d 84 (1986); *Badillo v New York*, 35 AD3d 307, 827

NYS2d 133 (1st Dept 2006); see *Ewadi v New York*, 117 AD3d 439, 985 NYS2d 233 (1st Dept 2014) (firefighters' statements to woman trapped in building to "[h]old on" insufficient to manifest assumption of duty beyond duty owed to general public); *Grieshaber v Albany*, 279 AD2d 232, 720 NYS2d 214 (3d Dept 2001). To establish the requisite justifiable reliance, plaintiff must show not only that the injured party had a reasonable expectation that help was on the way, but also that the injured party acted on that expectation to his or her detriment such that he or she was placed in a worse position than he or she would have been in absent the municipality's affirmative undertaking or assurances. An assurance that help is on the way is not alone sufficient to establish reliance, since the contrary rule would conflate the separate elements of assurance and reliance, *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011); *Bawa v New York*, 94 AD3d 926, 942 NYS2d 191 (2d Dept 2012). Moreover, where the conduct of defendant's police officers did not lull plaintiff into a false sense of security, and the limited assurance of police protection did not increase the risk of harm to plaintiff, plaintiff's claim was dismissed, *Clark v Ticonderoga*, 291 AD2d 597, 737 NYS2d 412 (3d Dept 2002); *Ritenour v Cheektowaga*, 192 AD2d 1078, 596 NYS2d 236 (4th Dept 1993). To the extent that *Bawa v New York*, *supra*, and other cited cases are inconsistent with *De Long v Erie*, 60 NY2d 296, 469 NYS2d 611, 457 NE2d 717 (1983), the more recent cases should be followed, since the Court of Appeals stated in *Valdez v New York*, *supra*, that *De Long* did not include a meaningful analysis of the "justifiable reliance" element.

In *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011), the Court of Appeals held that, even where the police gave plaintiff assurances that they would act to enforce a protective order by making an arrest "immediately," any expectation by plaintiff that the police had made the arrest after 24 hours had passed was not reasonable, since the location of the person posing the threat was not even known at the time the assurances were given. Moreover, from her prior experience, plaintiff knew that the police would call her once an arrest had been made and, thus, her decision to relax her vigilance before receiving such a call was not justifiable, *id.* In so ruling, the Valdez Court distinguished *Mastroianni v Suffolk*, 91 NY2d 198, 668 NYS2d 542, 691 NE2d 613 (1997), in which the police had assured the injured wife that they would assist her in the event of an attack by her husband and remained across the street from her home, thereby permitting her to reasonably believe that she could relax her vigilance. The Valdez Court also distinguished *Sorichetti* by *Sorichetti v New York*, 65 NY2d 461, 492 NYS2d 591, 482 NE2d 70 (1985), on its facts and noted that the case should not be cited as precedent for an analysis of the reliance element, since "it is not clear that the [Sorichetti] Court applied the 'justifiable reliance' element as it is currently constituted."

Subsequent to its decision in *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011), the Court of Appeals determined that a triable issue of fact existed as to whether a woman who was assaulted by her husband had justifiably relied on certain statements allegedly made to her by police officers regarding her safety, *Coleson v*

New York, 24 NY3d 476, 999 NYS2d 810, 24 NE3d 1074 (2014). The wife had been told by a police officer that her husband was in jail—for threatening her—and that he would be in jail for “a while.” An officer also told the wife that the officer “was going to keep in contact with [the wife].” These assurances would permit a jury to conclude that it was reasonable for the wife to believe that her husband would be imprisoned for the foreseeable future, and that the police would contact her if that turned out not to be the case. The Coleson Court characterized the conduct of the police as more substantial, involved, and interactive than the police conduct in Valdez.

Factual issues may be present as to whether reliance upon assurances of protection was justifiable in light of the lapse of time between the making of the assurances and the injury to plaintiff, see *Harris by Harris v New York*, 147 AD2d 186, 542 NYS2d 550 (1st Dept 1989). Where factual issues exist regarding whether justifiable reliance was established, the court must instruct the jury as to that requirement, *Carole A. v New York*, 143 AD2d 242, 532 NYS2d 163 (2d Dept 1988).

In the following pre-Valdez cases, the courts found that the elements of a special duty in connection with police services had been established: *De Long v Erie*, 60 NY2d 296, 469 NYS2d 611, 457 NE2d 717 (1983) (special duty arising from provision of 911 service); *Schuster v New York*, 5 NY2d 75, 180 NYS2d 265, 154 NE2d 534 (1958) (informants); *Hanna v St. Lawrence*, 34 AD3d 1146, 825 NYS2d 798 (3d Dept 2006) (woman who previously had been assaulted by live-in boyfriend relied on repeated assurances by municipal authorities that measures had been taken to ensure her safety upon assailant’s release from jail); *Kubecka v State*, 249 AD2d 513, 672 NYS2d 122 (2d Dept 1998) (victims/informants); *Julmis v New York*, 194 AD2d 522, 598 NYS2d 312 (2d Dept 1993) (uniformed police officers promised to protect plaintiff against off-duty police officer); *Harris by Harris v New York*, 147 AD2d 186, 542 NYS2d 550 (1st Dept 1989) (victim/informant; no requirement that police officers’ assurances of protection be formally authorized by superiors); *Bloom v New York*, 123 AD2d 594, 507 NYS2d 13 (2d Dept 1986) (municipal security guard who accompanied plaintiff to scene of altercation but failed to take action to protect plaintiff from an assault).

In contrast, the following pre-Valdez decisions rejected claims that a special duty existed: *Hynes v Cornwall*, 234 AD2d 423, 651 NYS2d 147 (2d Dept 1996) (police dispatcher’s cautionary advice to decedent concerning use of road); *Hamill v Dewitt*, 162 AD2d 1012, 557 NYS2d 217 (4th Dept 1990) (unsuccessful police efforts to find assailant); *Pascarella v New York*, 146 AD2d 61, 538 NYS2d 815 (1st Dept 1989) (no special duty based on internal police manual which recommended certain police procedures be followed in event of bomb threat); *Isaksson v Rulffes*, 135 AD2d 611, 522 NYS2d 189 (2d Dept 1987) (no special duty arose based on police department regulations requiring securing of an accident scene); *Labriola v New York*, 129 AD2d 505, 514 NYS2d 345 (1st Dept 1987) (police direction that plaintiff move onto a sidewalk

during fireworks display); see *Kenyon v Van Vorce*, 144 AD2d 925, 534 NYS2d 244 (4th Dept 1988) (jury question where sheriff's deputies, who were awaiting arrival of firefighters, prevented third party from using his equipment to rescue plaintiff from burning car).

In *Matican v New York*, 94 AD3d 826, 941 NYS2d 698 (2d Dept 2012), a post-Valdez case, the court upheld the imposition of liability after finding a special relationship between the police and a confidential informer. In another post-Valdez case, the Court of Appeals determined that a triable issue of fact existed as to whether a special relationship existed between the police and a woman who was abused by her husband, *Coleson v New York*, 24 NY3d 476, 999 NYS2d 810, 24 NE3d 1074 (2014) (police provided definite assurances to wife regarding her safety from physically abusive husband, and fact issue existed as to whether she justifiably relied on those assurances). In *Santaiti v Ramapo*, 197 AD3d 1191, 153 NYS3d 554 (2d Dept 2021), triable issues of fact existed as to whether Town owed a special duty to decedent where police officers confiscated husband's gun after responding to decedent's report of assault by husband, whether return of gun to husband caused foreseeable harm to decedent, and whether decedent justifiably relied upon continued withholding of gun.

General Municipal Law § 71-a imposes absolute liability on a municipality for damages arising from the personal injury or death of persons killed or injured while aiding police officers at their direction in making arrests, *Schuster v New York*, 5 NY2d 75, 180 NYS2d 265, 154 NE2d 534 (1958) (addressing former Penal Law § 1848, predecessor to General Municipal Law § 71-a); *Fredericks v Elmira*, 228 AD2d 911, 644 NYS2d 822 (3d Dept 1996). General Municipal Law § 71-a applies only if (1) the plaintiff was lawfully commanded to aid a police officer in effectuating or securing an arrest, and (2) the plaintiff's injury arises out of and in the course of aiding such officer. No precise words of command are required so long as the direction for assistance is evident, *Schiaroli v Ellenville*, 111 AD2d 947, 490 NYS2d 43 (3d Dept 1985). Where plaintiff was not assisting police officers in effectuating or securing an arrest, the statute is inapplicable, *Fredericks v Elmira*, *supra* (statute not applicable where officers did not know fugitive's whereabouts when they sought plaintiff's assistance, plaintiff's assistance was being provided at the investigatory stage, and matter had not proceeded to stage where officers were effectuating or securing an arrest). However, even without regard to General Municipal Law § 71-a, the police may owe a duty of care to ensure that a person complying with a request for assistance in capturing fleeing suspects is not exposed to a reasonably foreseeable risk of harm, *Ast v State*, 66 NY2d 998, 499 NYS2d 384, 489 NE2d 1286 (1985); see *Mohan v State*, 131 AD2d 737, 516 NYS2d 787 (2d Dept 1987).

The applicability of the special-duty inquiry in cases involving the enforcement of judicially-issued orders of protection was discussed in dictum in *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011). In the past the Court of Appeals appeared to proceed on the

assumption that only the special duty inquiry contemplated by PJI 2:229A was required for the imposition of liability for negligence, see *Mastroianni v Suffolk*, 91 NY2d 198, 668 NYS2d 542, 691 NE2d 613 (1997); see also *Sorichetti by Sorichetti v New York*, 65 NY2d 461, 492 NYS2d 591, 482 NE2d 70 (1985). However, in *Valdez*, the Court made clear that the existence of a special duty may give rise to liability only if the activities that were allegedly negligently performed were ministerial in nature, see *Signature Health Center, LLC v State*, 92 AD3d 11, 935 NYS2d 357 (3d Dept 2011) (*McLean v New York*, 12 NY3d 194, 878 NYS2d 238, 905 NE2d 1167 (2009), and *Dinardo v New York*, 13 NY3d 872, 893 NYS2d 818, 921 NE2d 585 (2009), “clarified and arguably changed the law with respect to governmental immunity for ministerial and discretionary actions”). The Court’s opinion in *Valdez* suggests that even the duty of the police to enforce orders of protection pursuant to CPL 140.10(4) (and pursuant to the judicially-created obligation “to respond and investigate in some manner”) has both discretionary and nondiscretionary components, *Valdez v New York*, *supra*. Indeed, while declining to resolve the issue of whether the police officers’ particular failure to act in *Valdez* was “a discretionary act,” the Court stated that “the obligations imposed on police to investigate or take other action upon receipt of [a report of an order-of-protection violation] would be integral to determining the scope of a police officer’s discretionary authority, which may well be circumscribed,” *Valdez v New York*, *supra*. It thus remains unclear when and under what circumstances police negligence in enforcing orders of protection may give rise to liability when coupled with a showing of a special duty toward the injured person.

In cases where the court has determined that a ministerial duty is at issue or that there was a failure to exercise discretion, the following charge should be given instead of PJI 2:229A.

PJI 2:229A.1

As you have heard, after several assaults on the plaintiff AB by CD, AB obtained an order of protection from [identify issuing court] on [state date]. The order of protection stated [set forth material provisions]. The order was then delivered to the police department of defendant EF [name municipality]. AB claims [state AB’s claim, such as: when (he, she) learned that CD was coming to (state location) on (state date), (he, she) called the police department, asked for protection, was told that a police car was on the way, was told to remain at (state location), and (he, she) relied on that instruction; however the police did not arrive]. EF claims [state EF’s claims, such as: its police department did not receive any call from AB on (state date)].

CD did come to [state location] on [state date] and [state occurrence, e.g., stabbed, beat, shot AB]. AB claims that EF is responsible for (his, her) injuries and (he, she) seeks to recover from EF for those injuries.

As a general rule, a [identify municipality, i.e., county, city, town, village] is not responsible for injuries that result from a failure to provide police protection to a particular person. If, however, there is what is called a special relationship between the [identify municipality] and the injured person, the [identify municipality] may be held responsible for the injuries.

In order to prove that (he, she) had a special relationship with EF, AB must show (1) that through promises or conduct, EF's police assumed a duty to act to protect (him, her); (2) EF's police knew that if they took no action, there could be harm to AB; (3) there was some form of direct contact between EF's police department and AB [where appropriate add or substitute: GH (a person who was in the same household as plaintiff and whose interests were closely related to plaintiff's interests)]; and (4) AB [where appropriate add or substitute: GH] reasonably relied on the promises or actions of the police to protect AB from harm.

The requirements that the police had a duty to protect AB and that they knew that there could be harm to AB if they took no action have been satisfied because the court issued an order of protection to AB and the order was given to EF's police. But that is not enough under the law to prove a special relationship and to make EF responsible for AB's injuries. AB must also show that there was direct contact between (him, her) [where appropriate add or substitute: GH] and EF's police, that AB [where appropriate add or substitute: GH] told the police that CD was coming to the house, that AB [where appropriate add or substitute: GH] was told that a police car was on the way to the house and that AB should stay there and, finally, that, as a result, AB reasonably decided to stay in the house.

I will be giving you a verdict sheet containing 4 questions on this issue.

Question 1 is: Was there direct contact between AB [where appropriate add or substitute: GH] and EF's (officer, 911 operator)?

Question 2 is: Did EF's (officer, 911 operator) give AB [where appropriate add or substitute: GH] (a promise, promises) of prompt (protection, assistance)?

Question 3 is: Did AB [where appropriate add or substitute: GH] decide not to take steps to protect (himself, herself) [where appropriate substitute AB] or take other action because (he, she) relied on the promise(s) of EF's (officer, 911 operator) that prompt (protection, assistance) would be provided?

Question 4 is: Was AB's [where appropriate add or substitute: GH's] reliance on the promise(s) of EF's (officer, 911 operator) reasonable?

H. LIABILITY FOR THE CONDUCT OF ANOTHER

1. EMPLOYER-EMPLOYEE

**PJI 2:235. Liability for the Conduct of Another—
Employer-Employee—Scope of Employment**

An employer is responsible for the act of (his, her, its) employee if the act is in furtherance of the employer's business and is within the scope of the employee's authority. An act is within the scope of an employee's authority if it is performed while the employee is engaged generally in the performance of his or her assigned duties or if the act is reasonably necessary or incidental to the employment. The employer need not have authorized the specific act in question.

Among the factors you may consider in deciding whether AB was acting within the furtherance of CD's business and within the scope of (his, her) authority, you may include [*here list relevant factors on which evidence has been submitted, such as:*] the connection between the time, place and occasion for the act; the history of the relationship between CD and AB as spelled out in actual practice; whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance and whether the specific act was one that CD could reasonably have anticipated. If you find AB negligently caused injury to the plaintiff while acting within the scope of (his, her) authority and in furtherance of CD's business, then CD is legally responsible for AB's conduct.

Comment

Based upon *Riviello v Waldron*, 47 NY2d 297, 418 NYS2d 300, 391 NE2d 1278 (1979); *Johnson v Daily News, Inc.*, 34 NY2d 33, 356 NYS2d 1, 312 NE2d 148 (1974); *Irwin v Klein*, 271 NY 477, 3 NE2d 601 (1936); *Ford v Grand Union Co.*, 268 NY 243, 197 NE 266 (1935); *Grant v Knepper*, 245 NY 158, 156 NE 650 (1927); *Nalli v Peters*, 241 NY 177, 149 NE 343 (1925); *Schultze v McGuire*, 241 NY 460, 150 NE 516 (1926); *Baker v Allen & Arnink Auto Renting Co.*, 231 NY 8, 131 NE 551 (1921); *Riley v Standard Oil Co.*, 231 NY 301, 132 NE 97 (1921); see *N.X. v*

Cabrini Medical Center, 97 NY2d 247, 739 NYS2d 348, 765 NE2d 844 (2002); *Adams v New York City Transit Authority*, 88 NY2d 116, 643 NYS2d 511, 666 NE2d 216 (1996); 52 NYJur2d, *Employment Relations* §§ 322–348; Restatement, 2d, Torts, Agency § 229.

The employer's liability rests upon the doctrine of respondeat superior, *Irwin v Klein*, 271 NY 477, 3 NE2d 601 (1936); *Ramsey v New York Cent. R. Co.*, 269 NY 219, 199 NE 65 (1935); *Bank v Rebold*, 69 AD2d 481, 419 NYS2d 135 (2d Dept 1979); and the employer, therefore, is not liable if the employee is not liable, *Pangburn v Buick Motor Co.*, 211 NY 228, 105 NE 423 (1914). However, liability "is not dependent upon the strict relationship of master and servant, but upon relationship of similar nature, where one acts for another, at his request, express or implied, for his benefit, and under his direction. Under such circumstances the negligence of the agent is the negligence of the master or the principal" *Nalli v Peters*, 241 NY 177, 149 NE 343 (1925); see *Miles v R & M Appliance Sales, Inc.*, 26 NY2d 451, 311 NYS2d 491, 259 NE2d 913 (1970); *Amendolace v New York*, 2 AD3d 659, 768 NYS2d 642 (2d Dept 2003); *Barker v Saltzman*, 124 AD2d 617, 507 NYS2d 878 (2d Dept 1986); *Chase Manhattan Bank, N.A. v Perla*, 65 AD2d 207, 411 NYS2d 66 (4th Dept 1978); Annot: 82 ALR3d 1213; see also *Taylor v Point at Saranac Lake, Inc.*, 135 AD3d 1147, 23 NYS3d 682 (3d Dept 2016) (ostensible agency). Thus, a building owner may be held vicariously liable for the negligence of a maintenance company that sometimes performed snow removal on the sidewalk in front of the premises as a favor, *Amendolace v New York*, supra. The doctrine of respondeat superior is premised upon the notion that an employer is justly held responsible when its servant through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another, *De Wald v Seidenberg*, 297 NY 335, 79 NE2d 430 (1948); *Ramos v Jake Realty Co.*, 21 AD3d 744, 801 NYS2d 566 (1st Dept 2005).

Generally speaking, the relation of master and servant or employer and employee arises through express or implied contract, *Ferro v Leopold Sinsheimer Estate*, 256 NY 398, 176 NE 817 (1931); *Bell v Perrino*, 112 AD2d 124, 490 NYS2d 821 (2d Dept 1985), *aff'd*, 67 NY2d 751, 500 NYS2d 101, 490 NE2d 1227 (1986). But liability may exist irrespective of a contract of hiring, *Nalli v Peters*, 241 NY 177, 149 NE 343 (1925), and may exist even though the actor who injures plaintiff is a commission salesman, using his own car, *Regan v Bellows*, 11 AD2d 586, 200 NYS2d 575 (3d Dept 1960); see Annot: 53 ALR2d 183; and even though the actor is not being paid by defendant, *Parke-Bernet Galleries, Inc. v Franklin*, 26 NY2d 13, 308 NYS2d 337, 256 NE2d 506 (1970). The pattern charge assumes the existence of an employer-employee relationship and deals with scope of authority. Where the facts pose a question as to whether the actor is an employee or an independent contractor, see PJI 2:255.

As a general rule, employers are held vicariously liable for their

employees' torts only to the extent that the underlying acts are within the scope of the employment, *Rivera v State*, 34 NY3d 383, 119 NYS3d 749, 142 NE3d 641 (2019); *Adams v New York City Transit Authority*, 88 NY2d 116, 643 NYS2d 511, 666 NE2d 216 (1996); *Llorente v Wnorowski*, 204 AD3d 656, 163 NYS3d 825 (2d Dept 2022); *Norwood v Simon Property Group, Inc.*, 200 AD3d 891, 159 NYS3d 482 (2d Dept 2021); *Gehrke v Mustang Sally's Spirits and Grill, Inc.*, 179 AD3d 1476, 117 NYS3d 408 (4th Dept 2020); *Williams v J. Luke Construction Co., LLC*, 172 AD3d 1509, 99 NYS3d 460 (3d Dept 2019); *Hendricks v 333 Bayville Ave. Restaurant Corp.*, 260 AD2d 545, 688 NYS2d 593 (2d Dept 1999); see *Kawoya v Pet Pantry Warehouse, Inc.*, 3 AD3d 368, 771 NYS2d 86 (1st Dept 2004). The employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment, *Rivera v State*, supra; *Summors v Port Authority of New York and New Jersey*, 203 AD3d 558, 165 NYS3d 497 (1st Dept 2022). Whether the employee was acting within the scope of his or her authority is ordinarily a jury question, *Frazier by Weston v State*, 64 NY2d 802, 486 NYS2d 919, 476 NE2d 318 (1985); *Riviello v Waldron*, 47 NY2d 297, 418 NYS2d 300, 391 NE2d 1278 (1979); see *Rivera v State*, supra; *Llorente v Wnorowski*, supra; *Kouri v Eataly N.Y. LLC*, 199 AD3d 416, 157 NYS3d 413 (1st Dept 2021); *Williams v J. Luke Construction Co., LLC*, supra; *Polak v Schenectady*, 181 AD2d 233, 585 NYS2d 844 (3d Dept 1992) (public employee); *Bazan v Bohne*, 144 AD2d 168, 534 NYS2d 496 (3d Dept 1988). The question whether one is acting within the scope of employment is a question of law when there is no conflicting evidence or the facts are undisputed, *Rivera v State*, supra; *Summors v Port Authority of New York and New Jersey*, supra; *Montague v Shun Lee Palace Restaurant, Inc.*, 198 AD3d 511, 152 NYS3d 795 (1st Dept 2021) (evidence that restaurant employee's negligence occurred while returning to restaurant to hand in receipts from food deliveries established that employee was acting within scope of employment); *Crawford v Westcott Steel Co. Inc.*, 188 AD2d 731, 590 NYS2d 593 (3d Dept 1992); *Overton v Ebert*, 180 AD2d 955, 580 NYS2d 508 (3d Dept 1992); *Swartzlander v Forms-Rite Business Forms & Printing Service, Inc.*, 174 AD2d 971, 572 NYS2d 537 (4th Dept 1991), *aff'd*, 78 NY2d 1060, 576 NYS2d 214, 582 NE2d 597 (1991); *Hall v Danforth*, 172 AD2d 906, 567 NYS2d 958 (3d Dept 1991); *Fuller v Yonkers*, 100 AD2d 926, 474 NYS2d 813 (2d Dept 1984); *Stavitz v New York*, 98 AD2d 529, 471 NYS2d 272 (1st Dept 1984).

It has long been recognized that a sexual assault perpetrated by a hospital employee is not in furtherance of hospital business and is a clear departure from the scope of employment, having been committed for wholly personal motives, *N.X. v Cabrini Medical Center*, 97 NY2d 247, 739 NYS2d 348, 765 NE2d 844 (2002); see *Doe v Heckerroth Plumbing & Heating of Woodstock, Inc.*, 192 AD3d 1236, 144 NYS3d 462 (3d Dept 2021); *Bowman v State*, 10 AD3d 315, 781 NYS2d 103 (1st Dept 2004); *Steinborn v Himmel*, 9 AD3d 531, 780 NYS2d 412 (3d Dept 2004). Nor is a medical corporation liable under a breach-of-fiduciary-duty theory for a nurse's unauthorized disclosure of a patient's confidential

medical information, where the disclosure was made for personal reasons having nothing to do with the nurse's employment duties, *Doe v Guthrie Clinic, Ltd.*, 22 NY3d 480, 982 NYS2d 431, 5 NE3d 578 (2014) (rejecting *Doe v Community Health Plan-Kaiser Corp.*, 268 AD2d 183, 709 NYS2d 215 (3d Dept 2000), to the extent it is inconsistent).

To invoke the doctrine of respondeat superior, the plaintiff has the burden of establishing by a fair preponderance of the credible evidence that the act complained of occurred while the employee was acting within the scope of his or her employment, *Hacker v New York*, 26 AD2d 400, 275 NYS2d 146 (1st Dept 1966), *aff'd*, 20 NY2d 722, 283 NYS2d 46, 229 NE2d 613 (1967); *Pekarsky v New York*, 240 AD2d 645, 659 NYS2d 496 (2d Dept 1997) (defendant was not acting in official capacity on police matter when he approached plaintiff's vehicle and was not acting in furtherance of his duties as police officer when he fired his gun). In *Riviello*, the court suggested that "[a]mong the factors to be weighed are: the connection between the time, place and occasion for the act; the history of the relationship between employer and employee as spelled out in actual practice; whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance; and whether the specific act was one that the employer could reasonably have anticipated . . .," 46 NY2d at 303; see *Rivera v State*, 34 NY3d 383, 119 NYS3d 749, 142 NE3d 641 (2019); *Voorhis v Consolidated Rail Corporation*, 92 AD2d 501, 460 NYS2d 282 (1st Dept 1983), *aff'd*, 60 NY2d 878, 470 NYS2d 364, 458 NE2d 823 (1983); *Ramos v Jake Realty Co.*, 21 AD3d 744, 801 NYS2d 566 (1st Dept 2005); *Murray v Watervliet City School Dist.*, 130 AD2d 830, 515 NYS2d 150 (3d Dept 1987); *O'Boyle v Avis Rent-A-Car System, Inc.*, 78 AD2d 431, 435 NYS2d 296 (2d Dept 1981).

The employer cannot be held liable if at the time of the injury the employee was not in its service, *Ramsey v New York Cent. R. Co.*, 269 NY 219, 199 NE 65 (1935); *L. B. Smith, Inc. v Mar-Van Equipment, Inc.*, 67 AD2d 751, 412 NYS2d 216 (3d Dept 1979). "An employer may not be held accountable to third persons for the conduct of employees who, while ostensibly acting for their employer, in fact totally abandon the employer's interests and act entirely for their own or other purposes," *Prudential-Bache Securities, Inc. v Citibank, N.A.*, 73 NY2d 263, 539 NYS2d 699, 536 NE2d 1118 (1989); see *Rivera v State*, 34 NY3d 383, 119 NYS3d 749, 142 NE3d 641 (2019); *N.X. v Cabrini Medical Center*, 97 NY2d 247, 739 NYS2d 348, 765 NE2d 844 (2002); *Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 693 NYS2d 67, 715 NE2d 95 (1999); *Mayo v New York City Transit Authority*, 124 AD3d 606, 3 NYS3d 36 (2d Dept 2015), unless the master ratifies the tortious conduct by subsequent conduct, see *Chase Manhattan Bank, N.A. v Perla*, 65 AD2d 207, 411 NYS2d 66 (4th Dept 1978). Whether or not the employee is engaged in the employer's business and within the scope of the employment depends upon the facts in the particular case, *Norwood v Simon Property Group, Inc.*, 200 AD3d 891, 159 NYS3d 482 (2d Dept 2021); *Savarese v City of New York Housing Authority*, 172 AD2d 506, 567 NYS2d 855 (2d Dept 1991); *Stavitz v New York*, 98 AD2d 529, 471

NYS2d 272 (1st Dept 1984), including any regulations issued by the employer relating to the particular situation, *Brown v Great Atlantic & Pac. Tea Co.*, 275 App Div 304, 89 NYS2d 247 (1st Dept 1949); see *Rausman v Baugh*, 248 AD2d 8, 682 NYS2d 42 (2d Dept 1998) (reviewing factors to determine whether employee is engaged in employer's business); Annot: 31 ALR3d 705.

One factor to be considered is whether the task committed to the servant involves the exercise of judgment and discretion concerning the means to be employed, *Moritz v Pines Hotel, Inc.*, 52 AD2d 1020, 383 NYS2d 704 (3d Dept 1976). If so, it is a question for the jury whether the means employed come within the scope of employment, *Sims v Bergamo*, 3 NY2d 531, 169 NYS2d 449, 147 NE2d 1 (1957) (assault by bartender seeking to maintain order); *De Wald v Seidenberg*, 297 NY 335, 79 NE2d 430 (1948) (assault on tenant by building superintendent seeking to enforce landlord's rule); *Ramos v Jake Realty Co.*, 21 AD3d 744, 801 NYS2d 566 (1st Dept 2005) (assault on tenant by building superintendent during rent strike).

In cases involving the use of force, whether an employee is acting within the scope of employment requires consideration of whether the employee was authorized to use force to effectuate the goals and duties of the employment, *Rivera v State*, 34 NY3d 383, 119 NYS3d 749, 142 NE3d 641 (2019). When businesses hire security guards or bouncers to maintain order, the physical force used by the security guards or bouncers may be within the scope of their employment, *Fauntleroy v EMM Group Holdings LLC*, 133 AD3d 452, 20 NYS3d 22 (1st Dept 2015); see *Kouri v Eataly N.Y. LLC*, 199 AD3d 416, 157 NYS3d 413 (1st Dept 2021). Where a tortfeasor's occupation is one for which some physical contact with others is permissible or even expected, it may be difficult to determine, on a motion for summary judgment, whether particular conduct falls far enough outside the boundaries attendant to the employment relationship such that the employee should be solely responsible for their tortious conduct, *id.* In those cases, where the question may be one of degree and not kind, the issue of the employer's vicarious liability should be left for the jury, *id.*; see *Kouri v Eataly N.Y. LLC*, *supra*; *Fauntleroy v EMM Group Holdings LLC*, *supra*; see *Norwood v Simon Property Group, Inc.*, 200 AD3d 891, 159 NYS3d 482 (2d Dept 2021) (triable issue of fact whether theater manager, whose duties included facilitating removal of disruptive and potentially violent customers, acted within scope of his employment when he brandished pellet gun at unruly customers).

Thus, although corrections officers are permitted to use physical force in certain situations, in *Rivera v State*, 34 NY3d 383, 119 NYS3d 749, 142 NE3d 641 (2019), a corrections officer's gratuitous and utterly unauthorized use of force on a medically-vulnerable inmate was so egregious and constituted such a significant departure from the normal methods of performance of the officer's duties, that the State was entitled to summary judgment on the issue of its vicarious liability. Similarly, where a residential rehabilitation assistant allegedly

responded to a confrontation with a nonverbal autistic resident by burning him with a heated metal potato masher, the conduct was held, as a matter of law, to be outside the scope of employment, *Sandoval v Leake and Watts Services, Inc.*, 192 AD3d 91, 136 NYS3d 306 (1st Dept 2020) (employer granted summary judgment where beyond dispute that use of force was outside scope of employment).

Case law imposing strict liability upon common carriers, hospitals, and hotel and restaurant owners for the wrongful acts of their employees, has been overruled by *Adams v New York City Transit Authority*, 88 NY2d 116, 643 NYS2d 511, 666 NE2d 216 (1996). Although the holding applied only to common carriers, the court stated that “. . . [i]t is doubtful that a court today would hold the proprietor of these classes of enterprises [hotels, hospitals and restaurant owners] absolutely liable for an employee’s intentional torts solely because of the existence of those conditions.”

Additional factors to be considered are whether the employee’s acts were at the request of the employer, in furtherance of the employer’s business, or an isolated matter, and whether the employee acted within the direction and control of the employer, *Johnson v Daily News, Inc.*, 34 NY2d 33, 356 NYS2d 1, 312 NE2d 148 (1974); *Lundberg v State*, 25 NY2d 467, 306 NYS2d 947, 255 NE2d 177 (1969); *Irwin v Klein*, 271 NY 477, 3 NE2d 601 (1936); *Kelly v Major Brand Gasoline Corp.*, 63 AD2d 861, 406 NYS2d 211 (4th Dept 1978); *Garcia v Herald Tribune Fresh Air Fund, Inc.*, 51 AD2d 897, 380 NYS2d 676 (1st Dept 1976); see *Llorente v Wnorowski*, 204 AD3d 656, 163 NYS3d 825 (2d Dept 2022) (act within scope of employment when employee engaged generally in business of employer or where employee’s act necessary or incidental to employment); *Kawoya v Pet Pantry Warehouse, Inc.*, 3 AD3d 368, 771 NYS2d 86 (1st Dept 2004). Acting within the general scope of the employment means while engaged in the employer’s business, and not that the employee was authorized to do the particular act which occasioned the injury, *Makoske v Lombardy*, 47 AD2d 284, 366 NYS2d 475 (3d Dept 1975), *aff’d*, 39 NY2d 773, 385 NYS2d 31, 350 NE2d 408 (1976); *Moritz v Pines Hotel, Inc.*, 52 AD2d 1020, 383 NYS2d 704 (3d Dept 1976). An employer is not liable as a matter of law under the theory of respondeat superior if the employee was acting solely for personal motives unrelated to the furtherance of the employer’s business, *Llorente v Wnorowski*, *supra*; see *Summors v Port Authority of New York and New Jersey*, 203 AD3d 558, 165 NYS3d 497 (1st Dept 2022) (off-duty airline employee who allegedly assaulted airport maintenance worker in bathroom not acting within scope of employment); *Norwood v Simon Property Group, Inc.*, 200 AD3d 891, 159 NYS3d 482 (2d Dept 2021); *Gehrke v Mustang Sally’s Spirits and Grill, Inc.*, 179 AD3d 1476, 117 NYS3d 408 (4th Dept 2020) (strip club employee who injured patron during impromptu arm wrestling activity was not acting within scope of employment).

Generally, an employee driving to or from his or her place of employment is not within the control of the employer and, therefore, is not act-

ing within the scope of his or her employment, *D'Amico v Christie*, 71 NY2d 76, 524 NYS2d 1, 518 NE2d 896 (1987) (employer who directed intoxicated employee to leave work not liable to person struck by employee's automobile); *Lundberg v State*, 25 NY2d 467, 306 NYS2d 947, 255 NE2d 177 (1969); *Llorente v Wnorowski*, 204 AD3d 656, 163 NYS3d 825 (2d Dept 2022) (issue of fact whether off-duty police officer returning home from work acted within scope of employment by attempting to pull over plaintiff); *Howard v Hilton*, 244 AD2d 912, 665 NYS2d 194 (4th Dept 1997); *Pugsley v Seneca Foods Corp.*, 145 AD2d 953, 536 NYS2d 324 (4th Dept 1988); *Bazan v Bohne*, 144 AD2d 168, 534 NYS2d 496 (3d Dept 1988) (jury question as to whether employee, who used his own car to run errands for employer and then made a purely personal stop, was still acting in course of employment); *Joly v Northway Motor Car Corp.*, 132 AD2d 790, 517 NYS2d 595 (3d Dept 1987); *Greer v Ferrizz*, 118 AD2d 536, 499 NYS2d 758 (2d Dept 1986); *Ehlenfield v State*, 62 AD2d 1151, 404 NYS2d 175 (4th Dept 1978). But if it is shown that the employer derived a special benefit from the employee's use of the employee's vehicle to go to and from work, a finding that the employee was then acting in the scope of the employment is justified, *Baguma v Walker*, 195 AD2d 263, 599 NYS2d 603 (1st Dept 1993); *Clark v Hoff Bros. Refuse Corp.*, 72 AD2d 936, 422 NYS2d 219 (4th Dept 1979); *Fitzgerald v Lyons*, 39 AD2d 473, 336 NYS2d 940 (4th Dept 1972); see *Williams v J. Luke Construction Co., LLC*, *supra* (questions of fact as to whether employer derived special benefit from employee's use of employer's car to go to and from work).

Employees who use their cars in furtherance of their work are acting within the scope of employment while driving home from their last business appointments, since such employees are under their employers' control from the time they leave their homes in the morning until they return at night, *Lundberg v State*, 25 NY2d 467, 306 NYS2d 947, 255 NE2d 177 (1969); see *Swierczynski v O'Neill*, 41 AD3d 1145, 840 NYS2d 855 (4th Dept 2007). However, this principle applies only when the employee is under the employer's control from the time the employee enters his or her vehicle at the start of the workday to the time the employee exits at the end of the workday. Traveling sales personnel and repairpersons are examples of this class of employees, *Swierczynski v O'Neill*, *supra*. Employees who leave for field appointments only after arriving at their offices in the morning and who are generally expected to sign out from their offices at the end of their workdays are not within that category, *id.* Under the related "dual purpose doctrine," an employer may be held liable for an employee's conduct while the employee is traveling for both business and personal reasons simultaneously, *Swierczynski v O'Neill*, *supra*; see *Davis v Larhette*, 39 AD3d 693, 834 NYS2d 280 (2d Dept 2007) (employee's activities in stopping for dinner and driving back to motel during business trip were incidental to and in furtherance of employer's business interest). The applicability of this doctrine depends on whether the employment created the necessity for travel, *id.*; *Cicatello v Sobierajski*, 295 AD2d 974, 743 NYS2d 781 (4th Dept 2002). Since the dual purpose doctrine is available only if the travel had both business and personal purposes, an

employee who has received special permission to go directly home from his or her last field appointment is not within the doctrine while traveling home even though he or she was traveling on a route different from the route he or she would ordinarily take from the office, *Swierczynski v O'Neill*, supra. The fact that a driver was reimbursed for travel expenses by defendant did not make the driver an employee of defendant who could be held liable under the doctrine of respondeat superior, *Wood v Brownlee*, 188 AD3d 1713, 135 NYS3d 742 (4th Dept 2020); *Gorea v Glover*, 249 AD2d 887, 672 NYS2d 582 (4th Dept 1998); see *Lundberg v State*, 25 NY2d 467, 306 NYS2d 947, 255 NE2d 177 (1969).

Even if the employee is on a constant “on-call” duty status, in the event his or her services are needed, the employer, as a matter of law, is not liable for injuries resulting from an accident occurring while the employee was pursuing a personal errand on a regular day off, *Johnson v Daily News, Inc.*, 34 NY2d 33, 356 NYS2d 1, 312 NE2d 148 (1974). Nor is an employer liable where an employee negligently drives a personally-owned vehicle for personal reasons after normal working hours, *Vangersky v Moogan*, 128 AD2d 699, 513 NYS2d 199 (2d Dept 1987), or for purely personal reasons during working hours, *Swartzlander v Forms-Rite Business Forms & Printing Service, Inc.*, 174 AD2d 971, 572 NYS2d 537 (4th Dept 1991), aff’d, 78 NY2d 1060, 576 NYS2d 214, 582 NE2d 597 (1991). An outside employee who works from no fixed location may be considered to be in the course of employment from the time he or she leaves home until he or she returns, see *McBride v Schenectady*, 110 AD2d 1000, 488 NYS2d 288 (3d Dept 1985).

When the employee is acting upon personal business, *Doe v Guthrie Clinic, Ltd.*, 22 NY3d 480, 982 NYS2d 431, 5 NE3d 578 (2014); *Reilly v Connable*, 214 NY 586, 108 NE 853 (1915); *Baker v Lisconish*, 156 AD3d 1324, 68 NYS3d 233 (4th Dept 2017); *Lucey v State*, 73 AD2d 998, 424 NYS2d 38 (3d Dept 1980); see *Kawoya v Pet Pantry Warehouse, Inc.*, 3 AD3d 368, 771 NYS2d 86 (1st Dept 2004), or having embarked on the employer’s business, abandons it before the injury occurs, *Sauter v New York Tribune*, 305 NY 442, 113 NE2d 790 (1953), the employer is not liable for the employee’s conduct, *Kelleher v State Mut. Life Assur. Co. of America*, 51 AD2d 872, 380 NYS2d 146 (4th Dept 1976); *Rappaport v International Playtex Corp.*, 43 AD2d 393, 352 NYS2d 241 (3d Dept 1974). Where, however, after such an abandonment, the employee is in the act of returning to the employer’s business when an injury occurs, the employer is responsible, *Schultze v McGuire*, 241 NY 460, 150 NE 516 (1926); *Riley v Standard Oil Co.*, 231 NY 301, 132 NE 97 (1921); *James v Eber Bros. Wine & Liquor Corp.*, 153 AD2d 329, 550 NYS2d 972 (4th Dept 1990). If there has been a departure from the designated activity, consideration is to be given to the foreseeability of the occurrence arising from the deviation and employer responsibility in this area is broad particularly where employee activity may be regarded as incidental to the furtherance of the employer’s interest, *Margolis v Volkswagen of America, Inc.*, 77 AD3d 1317, 908 NYS2d 479 (4th Dept 2010); see *Norwood v Simon Property Group, Inc.*, 200 AD3d 891, 159 NYS3d 482 (2d Dept 2021).

For an analysis of the cases holding that the employee was or was not acting within the scope of his or her employment, see 2A-Part 1, Warren's Negligence, Master and Servant, §§ 5.11 and 5.12 (4th Ed.) for typical cases on the question, see also *Nero v Ris Paper Co., Inc.*, 60 AD2d 340, 400 NYS2d 825 (1st Dept 1978), *aff'd*, 46 NY2d 967, 415 NYS2d 828, 389 NE2d 141 (1979); *Makoske v Lombardy*, 47 AD2d 284, 366 NYS2d 475 (3d Dept 1975), *aff'd*, 39 NY2d 773, 385 NYS2d 31, 350 NE2d 408 (1976); *Rausman v Baugh*, 248 AD2d 8, 682 NYS2d 42 (2d Dept 1998) (employer may not be held liable under respondeat superior for subordinate employee's allegedly false accusation of sexual harassment against subordinate supervisor when the employee used written corporate policy); *O'Boyle v Avis Rent-A-Car System, Inc.*, 78 AD2d 431, 435 NYS2d 296 (2d Dept 1981).

Several cases have addressed the doctrine of respondeat superior in situations where an employee has perpetrated a sexual assault. In *N.X. v Cabrini Medical Center*, 97 NY2d 247, 739 NYS2d 348, 765 NE2d 844 (2002), the Court held that a sexual assault committed by a hospital employee is not in furtherance of hospital business and is a clear departure from the scope of employment, having been committed for wholly personal motives. Therefore, the Court held that the hospital could not be held responsible for an unauthorized "examination" of plaintiff by a doctor who was not charged with plaintiff's care. In *Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 693 NYS2d 67, 715 NE2d 95 (1999), the Court rejected a claim of vicarious liability where an orderly assigned to bathe a patient sexually abused her while doing so. The Court held that the employee "departed from his duties for solely personal motives unrelated to the furtherance of the Hospital's business," *id*; see *Doe v Rohan*, 17 AD3d 509, 793 NYS2d 170 (2d Dept 2005) (sexual molestation by school bus driver outside scope of employment); see also *Mayo v New York City Transit Authority*, 124 AD3d 606, 3 NYS3d 36 (2d Dept 2015) (public authority not vicariously liable for employee's assault of child participating in public authority's community service program); *Koren v Weihs*, 190 AD2d 560, 593 NYS2d 222 (1st Dept 1993) (hospital not liable for physician's having sexual relations with patient after patient's discharge); *Noto v St. Vincent's Hosp. and Medical Center of New York*, 160 AD2d 656, 559 NYS2d 510 (1st Dept 1990) (same). A Catholic diocese is not vicariously liable under the theory of respondeat superior for a priest's alleged sexual abuse of infants because the conduct does not fall within the scope of the priest's employment, *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 654 NYS2d 791 (2d Dept 1997).

A hospital is vicariously liable for the negligence of an independent contractor emergency-room physician where the patient enters the emergency room seeking treatment from the hospital rather than a specific physician of the patient's own choosing, *Schiavone v Victory Memorial Hosp.*, 292 AD2d 365, 738 NYS2d 87 (2d Dept 2002). Further, under the agency-by-estoppel principle, a hospital may be liable for the negligence of a private attending physician or independent contractor utilizing its facilities to practice medicine where the physician was

provided by the hospital or was otherwise acting on the hospital's behalf, and the patient reasonably believed that the physician was acting at the hospital's behest, *Malcolm v The Mount Vernon Hosp.*, 309 AD2d 704, 766 NYS2d 185 (1st Dept 2003); *Sarivola v Brookdale Hosp. and Medical Center*, 204 AD2d 245, 612 NYS2d 151 (1st Dept 1994); *Soltis v State*, 172 AD2d 919, 568 NYS2d 470 (3d Dept 1991). For a further discussion of hospitals' liability for the negligence of physicians utilizing their facilities, see PJI 2:150, Comment, *Liability for Acts and Omissions of Another*.

The employer and employee, although sued together, are not usually joint tortfeasors, *Pangburn v Buick Motor Co.*, 211 NY 228, 105 NE 423 (1914); see *Zeglen v Minkiewicz*, 12 NY2d 497, 240 NYS2d 965, 191 NE2d 450 (1963). An employer held vicariously liable for the conduct of an employee is entitled to seek indemnification from the employee, see *Schubert v August Schubert Wagon Co.*, 249 NY 253, 164 NE 42 (1928); *Oceanic Steam Nav. Co. v Compania Transatlantica Espanola*, 134 NY 461, 31 NE 987 (1892); *Rome Cable Corp. v Tanney*, 21 AD2d 342, 250 NYS2d 304 (4th Dept 1964).

As a general matter, employees and agents of a company are not subject to vicarious liability for the tortious conduct of a fellow employee or agent, *Doe v Bloomberg, L.P.*, 36 NY3d 450, 143 NYS3d 286, 167 NE3d 454 (2021). Similarly, directors, officers, and shareholders are generally not considered to be employers for purposes of the imposition of vicarious liability and, thus, are not subject to personal liability for torts committed by corporate employees, *id.*

The application of the doctrine of comparative negligence to cases arising on or after September 1, 1975, see CPLR 1413; PJI 2:36, obviates the necessity for the rule in *Brown v Poritzky*, 30 NY2d 289, 332 NYS2d 872, 283 NE2d 751 (1972), that contributory negligence of an employee barred recovery by the employer from a negligent third party, *Hercules Chemical Co., Inc. v North Star Reinsurance Corp.*, 72 AD2d 538, 421 NYS2d 67 (1st Dept 1979). Comparative negligence on the part of an employee will not be imputed to the employer so as to reduce the employer's recovery for property damage to its vehicle, *Kalechman v Drew Auto Rental, Inc.*, 33 NY2d 397, 353 NYS2d 414, 308 NE2d 886 (1973); *Holt v Nesbit*, 110 AD2d 1039, 488 NYS2d 898 (4th Dept 1985); see *State v Popricki*, 89 AD2d 391, 456 NYS2d 850 (3d Dept 1982).

A partner's liability for the conduct of his or her partners is governed by the principles stated in the pattern charge, *Partnership Law* §§ 20, 24; *Gorton v Fellner*, 88 AD2d 742, 451 NYS2d 873 (3d Dept 1982), as the "wrong flowing from the commission of a tort by a partner is imputable to all of his partners, jointly and severally, and an action may be brought against all or any of them in their individual capacities," *Clients' Sec. Fund v Grandeau*, 129 AD2d 383, 517 NYS2d 587 (3d Dept 1987), *aff'd*, 72 NY2d 62, 530 NYS2d 775, 526 NE2d 270 (1988), "or against the partnership as an entity," *Pedersen v Manitowoc Co.*, 25 NY2d 412, 306 NYS2d 903, 255 NE2d 146 (1969).

The existence of a franchisor-franchisee relationship, without more, does not give rise to the franchisor's vicarious liability, *Hernandez v Denny's Corporation*, 177 AD3d 1372, 114 NYS3d 147 (4th Dept 2019); *Martinez v Higher Powered Pizza, Inc.*, 43 AD3d 670, 841 NYS2d 526 (1st Dept 2007). Rather, vicarious liability exists only if the franchisor exercised control over the franchisee's day-to-day operations, *Hernandez v Denny's Corporation*, *supra*; *Martinez v Higher Powered Pizza, Inc.*, *supra*; see *Khanimov v McDonald's Corp.*, 121 AD3d 1050, 995 NYS2d 202 (2d Dept 2014); *Schoenwandt v Jamfro Corp.*, 261 AD2d 117, 689 NYS2d 461 (1st Dept 1999). Thus, where there was no such control, a franchisor was not vicariously liable for the acts of franchisee even though the franchisor had the right to dictate and enforce food quality standards, the franchisee's hours of operation, the franchisee's menus, the franchisee's employee dress code and the packaging the franchisee used, *Martinez v Higher Powered Pizza, Inc.*, *supra*.

An employee acting within the scope of his or her employment is entitled to the immunities of the employer, *Howard v Finnegans Warehouse Corp.*, 33 AD2d 1090, 307 NYS2d 1022 (3d Dept 1970).

A customer in a store who volunteers to assist an employee in a detail of the employee's work is owed no duty by the employer, *Farkas v Cedarhurst Natural Food Shoppe Inc.*, 51 AD2d 793, 380 NYS2d 287 (2d Dept 1976), *aff'd* on other grounds, 41 NY2d 1041, 396 NYS2d 165, 364 NE2d 829 (1977); *Harrington v L.T. Stevenson, Inc.*, 255 App Div 1017, 8 NYS2d 658 (2d Dept 1938); *Bernhardt v American Ry. Express Co.*, 218 App Div 195, 218 NYS 123 (4th Dept 1926).

The respondeat superior principle does not apply to a public official in relation to the official's subordinates, *Dowler v Johnson*, 225 NY 39, 121 NE 487 (1918); *Foyster v Tutuska*, 25 AD2d 940, 270 NYS2d 535 (4th Dept 1966); see *Barr v Albany*, 50 NY2d 247, 428 NYS2d 665, 406 NE2d 481 (1980), unless the official has command authority over the subordinates and unreasonably fails to exercise it, see also *Vathy v Rupp Rental Corp.*, 43 AD2d 892, 352 NYS2d 280 (4th Dept 1974) (Citing PJI 2:238).

Punitive damages (see PJI 2:278) may not be awarded against a vicariously liable defendant unless there is evidence that such defendant authorized, condoned or ratified the employee's conduct or retained the employee with actual or constructive knowledge of the employee's unfitness or incompetence, *Loughry v Lincoln First Bank, N.A.*, 67 NY2d 369, 502 NYS2d 965, 494 NE2d 70 (1986); *Benson v Syntex Laboratories, Inc.*, 249 AD2d 904, 672 NYS2d 191 (4th Dept 1998) (error for court to instruct jury that punitive damages could be assessed against corporate employer based on the principles of respondeat superior rather than corporate complicity); *Harrell v Champlain Enterprises Inc.*, 222 AD2d 876, 634 NYS2d 880 (3d Dept 1995); *Kelleher v F.M.E. Auto Leasing Corp.*, 192 AD2d 581, 596 NYS2d 136 (2d Dept 1993); see *Cleghorn v New York Cent. & H.R.R. Co.*, 56 NY 44 (1874); Annot: 93 ALR3d 826. Evidence of specific acts of incompetence is required,

Richardson, Evidence (10th ed. Prince) § 186, p. 156. The vicariously liable defendant must be shown to have known of these prior acts, or the evidence must permit the inference that such defendant ought to have known of them. The inference may be predicated upon evidence that the employee's incompetence was generally known in the community, *Park v New York Cent. & H.R.R. Co.*, 155 NY 215, 49 NE 674 (1898); *McCarthy v Ritch*, 59 App Div 145, 69 NYS 129 (2d Dept 1901). The jury should be instructed that evidence of prior acts and of reputation is admitted solely to prove notice and may not be considered as evidence of the fault of the employee at the time of the accident, *Zucker v Whitridge*, 205 NY 50, 98 NE 209 (1912); *Cleghorn v New York Cent. & H.R.R. Co.*, *supra*; see *People v Holliday*, 38 NY2d 763, 381 NYS2d 53, 343 NE2d 770 (1975).

Absent evidence of authorization, condonation, or ratification, the vicariously liable defendant is responsible for compensatory damages only, even though the actor's conduct may justify an award of punitive damages against him or her, *Loughry v Lincoln First Bank, N.A.*, 67 NY2d 369, 502 NYS2d 965, 494 NE2d 70 (1986); *Cleghorn v New York Cent. & H.R.R. Co.*, 56 NY 44 (1874); *Kelleher v F.M.E. Auto Leasing Corp.*, 192 AD2d 581, 596 NYS2d 136 (2d Dept 1993). Public policy would seem to nullify any agreement between an employer and employee providing indemnity to one held liable for punitive damages, see *Hartford Acc. and Indem. Co. v Village of Hempstead*, 48 NY2d 218, 422 NYS2d 47, 397 NE2d 737 (1979) (insurance against punitive damage award is proscribed as against public policy); but see *Zurich Ins. Co. v Shearson Lehman Hutton, Inc.*, 84 NY2d 309, 618 NYS2d 609, 642 NE2d 1065 (1994) (where foreign damage award has both punitive and compensatory purposes, indemnification by insurance company is not prohibited). The case law above addressing punitive damages should be considered in light of recent United States Supreme Court case law. For a discussion of this problem, see Comment to PJI 2:278.

PJI 2:236. Liability for the Conduct of Another— Employer-Employee—Prohibited Act

Even though you find that AB, the employer, specifically instructed CD, the employee, not to perform [describe the act in question], if you find that it was done in furtherance of the employer's business and was reasonably foreseeable by the employer, you may find that it was within the scope of the employee's authority.

Comment

The charge is to be used as an addition to PJI 2:235 when the facts warrant.

Based upon *Riviello v Waldron*, 47 NY2d 297, 418 NYS2d 300, 391

NE2d 1278 (1979); *O'Boyle v Avis Rent-A-Car System, Inc.*, 78 AD2d 431, 435 NYS2d 296 (2d Dept 1981); *Brown v Bolton*, 19 AD2d 668, 241 NYS2d 36 (3d Dept 1963); *Bluestein v Scoparino*, 277 App Div 534, 100 NYS2d 577 (1st Dept 1950); see 52 NYJur2d, Employment Relations § 337.

The general rule was stated in *O'Boyle v Avis Rent-A-Car System, Inc.*, 78 AD2d 431, 435 NYS2d 296 (2d Dept 1981), as an “employee who acts in direct contradiction of his employer’s instructions can still be within the scope of his employment.” In that case, a sixteen-year-old employee drove a rental car from his employer’s gas station to obtain lunch, and was involved in an accident. The youth was not licensed to drive, had been specifically instructed by his supervisor not to drive rental cars off the premises, and had deviated from his lunch mission to drive his girlfriend home at the time of the accident. Nonetheless, it was for the jury to determine if the employee’s conduct in taking the car to get his lunch was foreseeable, and thus within the scope of employment. In *Brown v Bolton*, 19 AD2d 668, 241 NYS2d 36 (3d Dept 1963), a town employee, despite express instructions not to permit children to enter the town dump, invited plaintiff, a twelve-year-old, to assist in the work. The Court held that it was for the jury to decide whether the employee’s act was within the scope of his employment.

Although not determinative on the scope of employment issue, the employer is entitled to show that it had printed and brought to its employee’s attention a manual of instructions counseling against the act in question, *Brown v Great Atlantic & Pac. Tea Co.*, 275 App Div 304, 89 NYS2d 247 (1st Dept 1949); see *Norwood v Simon Property Group, Inc.*, 200 AD3d 891, 159 NYS3d 482 (2d Dept 2021) (triable issue of fact whether theater manager’s brandishing baton and pellet gun at unruly customers was within scope of employment where, although employee handbook prohibited brandishing weapons while engaged in theater business, manager was required to facilitate removal of disruptive or potentially violent customers).

Caselaw imposing strict liability upon common carriers for the wrongful acts of their employees, has been overruled by *Adams v New York City Transit Authority*, 88 NY2d 116, 643 NYS2d 511, 666 NE2d 216 (1996). Although the holding applied only to common carriers, the court stated that “. . . [i]t is doubtful that a court today would hold the proprietor of these classes of enterprises [hotels, hospitals and restaurant owners] absolutely liable for an employee’s intentional torts solely because of the existence of those conditions.”

PJI 2:237. Liability for the Conduct of Another— Employer-Employee—Wilful Tort

Even though you find that the employee’s act was (reckless, intentional) the employer is nonetheless responsible for the plaintiff’s (injury, dam-

ages) if you find that the employee was acting in furtherance of the employer's business and within the scope of the employee's authority.

Comment

The charge is to be used as an addition to PJI 2:235 when the facts warrant.

Based on *Sims v Bergamo*, 3 NY2d 531, 169 NYS2d 449, 147 NE2d 1 (1957); *De Wald v Seidenberg*, 297 NY 335, 79 NE2d 430 (1948); *Langguth v Bickford's, Inc.*, 297 NY 982, 80 NE2d 363 (1948); *Murray v Watervliet City School Dist.*, 130 AD2d 830, 515 NYS2d 150 (3d Dept 1987); *Burns v New York*, 6 AD2d 30, 174 NYS2d 192 (1st Dept 1958); see 52 NYJur2d, *Employment Relations* §§ 343–348; Annot: 13 ALR5th 217.

As stated in *Rounds v Delaware, L. & W.R. Co.*, 64 NY 129 (1876), and quoted in many later cases with respect to misconduct by an employee: “the master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority and inflicts an unjustifiable injury upon another.”

It is not sufficient that the employee was engaged in the employer's service at the time of the incident giving rise to the action. The test is whether the employee's act was in furtherance of the employer's business and was incident to the performance of duties entrusted to the employee, *Ochsenbein v Shapley*, 85 NY 214 (1881). Where the employee's act was committed solely for personal ends rather than in furtherance of or incident to the employer's business, the employer will not be held liable, *Doe v Guthrie Clinic, Ltd.*, 22 NY3d 480, 982 NYS2d 431, 5 NE3d 578 (2014) (nurse's unauthorized disclosure of patient's confidential medical information for personal reasons); *Cornell v State*, 46 NY2d 1032, 416 NYS2d 542, 389 NE2d 1064 (1979) (sexual assault on patient by attendant).

A number of cases involving intentional wrongs deal with assaults committed by an employee: *Sims v Bergamo*, 3 NY2d 531, 169 NYS2d 449, 147 NE2d 1 (1957) (assault by bartender seeking to maintain order); *De Wald v Seidenberg*, 297 NY 335, 79 NE2d 430 (1948) (assault by building superintendent seeking to enforce landlord's rule); *Kouri v Eataly N.Y. LLC*, 199 AD3d 416, 157 NYS3d 413 (1st Dept 2021) (assault by security guards in ejecting plaintiff from premises); *Fauntleroy v EMM Group Holdings LLC*, 133 AD3d 452, 20 NYS3d 22 (1st Dept 2015); *Norwood v Simon Property Group, Inc.*, 200 AD3d 891, 159 NYS3d 482 (2d Dept 2021) (menacing unruly patrons with baton and pellet gun while attempting to escort them off employer's premises);

Young Bai Choi v D & D Novelties, Inc., 157 AD2d 777, 550 NYS2d 376 (2d Dept 1990) (assault by employee attempting to extricate automobile from snowbank in order to make run to post-office). But the cases are not limited to assaults, see Annonio v Balzano, 139 AD2d 943, 527 NYS2d 923 (4th Dept 1988) (deliberate foul by jockey); Horowitz v Sears, Roebuck and Co., Inc., 137 AD2d 492, 524 NYS2d 236 (2d Dept 1988) (anti-Semitic conduct by salesman); Murray v Watervliet City School Dist., 130 AD2d 830, 515 NYS2d 150 (3d Dept 1987) (slander committed by public-school teacher). "Where authority is conferred to act for another, without special limitation, it carries with it, by implication, authority to do all things necessary to its execution; and when it involves the exercise of discretion of the servant, or the use of force towards or against another, the use of such force or discretion is a part of the thing authorized, and when exercised, becomes, as to third persons, the discretion and act of the master, and this, although the servant departed from the private instructions of the master, provided he was engaged at the time in doing his master's business, and was acting within the general scope of his employment," Rounds v Delaware, L. & W.R. Co., 64 NY 129 (1876). Caselaw imposing strict liability upon common carriers for the wrongful acts of their employees, has been overruled by Adams v New York City Transit Authority, 88 NY2d 116, 643 NYS2d 511, 666 NE2d 216 (1996). Although the holding applied only to common carriers, the court stated that ". . . [i]t is doubtful that a court today would hold the proprietor of these classes of enterprises (hotels, hospitals and restaurant owners) absolutely liable for an employee's intentional torts solely because of the existence of those conditions."

**PJI 2:238. Liability for the Conduct of Another—
Employer-Employee—Special Employee**

An employee in the general service of an employer may be transferred for a limited time to the temporary service of another employer, (who, which) then becomes responsible for the employee's negligence.

When an employee is in the temporary service of another employer, his or her general employer is not liable for injuries caused by the employee.

The test for deciding who is the employer of a particular employee who has caused an injury is not necessarily who is paying the employee's wages, but who was directing the employee as to how the work was to be performed.

In this case, plaintiff seeks to recover for injuries sustained when struck by a (crane, vehi-

cle, other equipment). The (crane, vehicle, other equipment) that was involved in this case was owned by the defendant AB. At the time of the accident it was being used on work of the defendant CD, but was being operated by the defendant EF who was on AB's payroll. If you find that there was negligence on the part of EF in the operation of the (crane, vehicle, other equipment) and that as a result of that negligence plaintiff was injured, you must next consider whether it was AB or CD (who, which) had the primary control and direction of EF and the work EF was performing at the time of the accident, for only the party that had primary control and direction is responsible, together with EF, for EF's negligence.

The defendant CD claims that (he, she, it) hired AB to perform specific work, that AB sent the (crane, vehicle, other equipment) and EF to do that work, that while it gave directions to EF concerning what portion of the work was to be done at what time and where it was to be done, (he, she, it) never had or assumed primary control and direction of EF or the work. AB says that (he, she, it) simply (leased, loaned) the (crane, vehicle, other equipment) to CD and agreed to furnish an operator but that CD had control over both the details of the work EF was to do and its ultimate results and that (he, she, it), AB, had control over neither.

In deciding whether at the time of the accident AB or CD had primary control and direction of EF and the work EF was performing, you may consider the following factors [*use only such factors as are warranted by the evidence such as:*] what was the employment relationship of EF to AB and CD at that time, that is, who paid EF's wages, social security and unemployment taxes and carried workers' compensation insurance covering EF and who had the right to discharge EF; what was the (contract, arrangement) between AB and CD, that is, did they agree that AB was to perform specified work, or simply that AB would (lease, loan) a manned piece of equipment so that CD could

perform work of its own; at the time of the accident was the (crane, vehicle, other equipment) being used for a purpose other than that for which under the (contract, arrangement) between AB and CD it was expected it would be used; under the (contract, arrangement) who was to pay for the fuel for the (crane, vehicle, other equipment) and keep it in repair; was any other employee of AB present at the work site on a regular basis or at the time of the accident, and, if so, for what purpose was (he, she) there; who in fact gave orders to EF as to how the (crane, vehicle, other equipment) was to be operated and how the work was to be done, as distinct from the details concerning what the work was and when and where it was to be done.

No single one of these factors is decisive. Unless on consideration of all the evidence you find that at the time of the accident AB had surrendered to CD direction and control over both the details of EF's work and its ultimate results, you will find that the defendants AB and EF are responsible for plaintiff's injuries. If, however, you find on all the evidence that CD gave directions beyond those required to designate what work was to be done and when and where, and at the time of the accident CD had primary control and direction over both the details of the work EF was doing and its ultimate results, you will find that the defendants CD and EF are responsible for plaintiff's injuries.

Under no circumstance can you find that both AB and CD are responsible for plaintiff's injuries.

Comment

Based on *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 578 NYS2d 106, 585 NE2d 355 (1991); *Wawrzonek v Central Hudson Gas & Electric Corporation*, 276 NY 412, 12 NE2d 525 (1938); *Irwin v Klein*, 271 NY 477, 3 NE2d 601 (1936); *Ramsey v New York Cent. R. Co.*, 269 NY 219, 199 NE 65 (1935); *Bartolomeo v Charles Bennett Contracting Co.*, 245 NY 66, 156 NE 98 (1927); *Braxton v Mendelson*, 233 NY 122, 135 NE 198 (1922); *Szarewicz v Alboro Crane Rental Corp.*, 50 AD2d 770, 377 NYS2d 54 (1st Dept 1975), *aff'd*, 40 NY2d 1076, 392 NYS2d 283, 360 NE2d 960 (1976); *Brooks v Chemical Leaman Tank*

Lines, Inc., 71 AD2d 405, 422 NYS2d 695 (1st Dept 1979); *L. B. Smith, Inc. v Mar-Van Equipment, Inc.*, 67 AD2d 751, 412 NYS2d 216 (3d Dept 1979); *Hill v Erdle Perforating Co.*, 53 AD2d 1008, 386 NYS2d 265 (4th Dept 1976) (citing PJI); see Restatement, Second, Agency, § 227; 52 NYJur2d Employment Relations, §§ 327, 328. There may be several special employers, but only the one having paramount control and direction at the time of the accident will be held liable, *Irwin v Klein*, supra.

A special employee is one who is transferred for a limited duration to the service of another, *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 578 NYS2d 106, 585 NE2d 355 (1991); *Chiloyan v Chiloyan*, 197 AD3d 612, 152 NYS3d 717 (2d Dept 2021); *Ribeiro v Dynamic Painting Corp.*, 23 AD3d 795, 803 NYS2d 754 (3d Dept 2005); *Goss v State University Const. Fund*, 261 AD2d 860, 690 NYS2d 811 (4th Dept 1999). General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer, *Thompson v Grumman Aerospace Corp.*, supra; *Goss v State University Const. Fund*, supra.

The pattern charge is illustrative of one type of case in which the special employee issue arises. It may be an issue when no equipment is involved, *Parke-Bernet Galleries, Inc. v Franklyn*, 26 NY2d 13, 308 NYS2d 337, 256 NE2d 506 (1970). For example, a hospital staff physician may, under the circumstances of a particular case, be the special employee of the patient's private physician, *Hollant v North Shore Hospital, Inc.*, 24 Misc2d 892, 206 NYS2d 177 (Sup 1960), *aff'd*, 17 AD2d 974, 235 NYS2d 372 (2d Dept 1962) (but note that the hospital employee "must pass out of the direction and control . . . of the former [hospital] into that of the latter [physician]"). Special employment may be an issue when the equipment is a motor vehicle, in which case the provisions of § 388 of the Vehicle and Traffic Law must also be considered, *Irwin v Klein*, 271 NY 477, 3 NE2d 601 (1936); see PJI 2:245 through PJI 2:250.

On the facts of a particular case it may be necessary to consider additional factors not mentioned in the pattern charge. Thus, *McNamara v Leipzig*, 227 NY 291, 125 NE 244 (1919), states as a test: "whose is the work being performed." That factor has been omitted from the pattern charge because, in many cases, although the work is done on the job of the special employer, it is work the general contractor has contracted to do, and the jury could reasonably conclude that it is the "work" of both the general and the special employer. In a given case it may, however, be appropriate to add this element to the charge. Thus, where there is an indirect but substantial benefit to the general employer, the jury may infer that the general employment continues even though the job on which the work is done is that of the special employer, *Delisa v Arthur F. Schmidt, Inc.*, 285 NY 314, 34 NE2d 336 (1941); *Gallo v Higgins Erections & Haulers, Inc.*, 45 AD2d 790, 357 NYS2d 152 (3d Dept 1974). Conversely, when there is no benefit to the general employer, as where the work is gratuitously undertaken or the

person and equipment loaned without charge and there is no substantial indirect benefit to the general employer, the jury may infer a special employment from the absence of benefit to the general employer and the fact that the work is that of the special employer.

The determination of special employment status is dependent upon a number of factors including, among others, the method of payment, ownership of equipment and the relative nature of the work, *Ribeiro v Dynamic Painting Corp.*, 23 AD3d 795, 803 NYS2d 754 (3d Dept 2005); see *Chiloyan v Chiloyan*, 197 AD3d 612, 152 NYS3d 717 (2d Dept 2021) (principal factors include who has right to control the employee's work, who is responsible for payment of wages and furnishing of equipment, who has right to discharge employee, and whether work being performed was in furtherance of special employer's or general employer's business). The key to the determination is who controls and directs the manner, details and ultimate result of the employee's work, *Chiloyan v Chiloyan*, supra; *Bayona v Hertz Corp.*, 148 AD3d 608, 50 NYS3d 353 (1st Dept 2017); *Ribeiro v Dynamic Painting Corp.*, supra. General supervisory control is insufficient to establish special employment status, *McLaughlan v BR Guest, Inc.*, 149 AD3d 519, 52 NYS3d 92 (1st Dept 2017); see *Ortega v 669 Meeker Avenue, LLC*, 191 AD3d 686, 140 NYS3d 271 (2d Dept 2021). However, evidence of direction and control by the special employer's superintendent is sufficient to take the issue of special employment to the jury, *Gallo v Higgins Erections & Haulers, Inc.*, 45 AD2d 790, 357 NYS2d 152 (3d Dept 1974); *Guerra v Simpson Iron Works, Inc.*, 35 AD2d 566, 313 NYS2d 539 (2d Dept 1970); see *Picardo v Kreger Truck Renting Co., Inc.*, 57 AD2d 177, 394 NYS2d 189 (1st Dept 1977). The special employment relationship is not defeated merely by the fact that plaintiff's general employer was responsible for paying plaintiff's wages and maintaining workers' compensation and insurance for the plaintiff, *Adams v North-Star Const. Co., Inc.*, 249 AD2d 1001, 672 NYS2d 166 (4th Dept 1998) (fact that temporary employment agency placed plaintiff with defendant, paid plaintiff's wages and plaintiff received workers' compensation benefits from agency's insurance carrier is not dispositive); *Burdette v Niagara County Indus. Development Agency*, 227 AD2d 979, 643 NYS2d 831 (4th Dept 1996); *Olsen v We'll Manage, Inc.*, 214 AD2d 715, 625 NYS2d 301 (2d Dept 1995).

Consent of the employee, express or implied, to becoming the servant of the special employer has been considered in several cases, *Ramsey v New York Cent. R. Co.*, 269 NY 219, 199 NE 65 (1935); *McNamara v Leipzig*, 227 NY 291, 125 NE 244 (1919); *Gallo v Higgins Erections & Haulers, Inc.*, 45 AD2d 790, 357 NYS2d 152 (3d Dept 1974); *Guerra v Simpson Iron Works, Inc.*, 35 AD2d 566, 313 NYS2d 539 (2d Dept 1970); *Bird v New York State Thruway Authority*, 8 AD2d 495, 188 NYS2d 788 (4th Dept 1959). Workers' Compensation is the exclusive remedy of the special employee in an action against the special employer, *Fallone v Misericordia Hosp.*, 23 AD2d 223, 259 NYS2d 947 (1965), *aff'd*, 17 NY2d 648, 269 NYS2d 431 (1966); *Chiloyan v Chiloyan*, 197 AD3d 612, 152 NYS3d 717 (2d Dept 2021); *Picardo v Kreger Truck Renting Co.*,

Inc., 57 AD2d 177, 394 NYS2d 189 (1st Dept 1977). When the employee is the plaintiff and the defense is that the injury was caused by a fellow servant or that Workers' Compensation is the exclusive remedy, consent clearly is a factor and should be charged, *Doran v New York City Interborough Ry. Co.*, 239 NY 448, 147 NE 62 (1925); *Murray v Union Ry. Co. of New York City*, 229 NY 110, 127 NE 907 (1920); *Gallo v Higgins Erections & Haulers, Inc.*, 45 AD2d 790, 357 NYS2d 152 (3d Dept 1974). When the employee is a defendant in an action brought by a third person injured by the employee's act, consent will seldom be an issue. If on the facts of a particular case it is in issue, the charge should be modified accordingly.

To relieve the general employer of liability there must be an actual change in relationship, the employee passing out of the direction and control of the general and into that of the special employer, *Gonzalez v John B. Lovett Assoc., Ltd.*, 228 AD2d 342, 644 NYS2d 249 (1st Dept 1996); *Reinitz v Arc Elec. Const. Co., Inc.*, 104 AD2d 247, 483 NYS2d 821 (3d Dept 1984). Absent evidence that the general employer surrendered control, it will be presumed that his or her control continued, *Stone v Bigley Bros., Inc.*, 309 NY 132, 127 NE2d 913 (1955); *Bartolomeo v Charles Bennett Contracting Co.*, 245 NY 66, 156 NE 98 (1927). "[A]s long as the employee is furthering the business of his general employer by service rendered to another there will be no inference of a new relation unless command has been surrendered, and no inference of its surrender from the mere fact of its division," *Charles v Barrett*, 233 NY 127, 135 NE 199 (1922).

Although cases arise in which the matter of control of the employee is so clear that the court may determine it as a matter of law, *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 578 NYS2d 106, 585 NE2d 355 (1991); *Bayona v Hertz Corp.*, 148 AD3d 608, 50 NYS3d 353 (1st Dept 2017); *Szarewicz v Alboro Crane Rental Corp.*, 50 AD2d 770, 377 NYS2d 54 (1st Dept 1975), *aff'd*, 40 NY2d 1076, 392 NYS2d 283, 360 NE2d 960 (1976); *Dicenzo v New York Shovel & Crane Corp.*, 282 App Div 741, 122 NYS2d 879 (2d Dept 1953), *aff'd*, 308 NY 871, 126 NE2d 309 (1955); *Winkler v Halmar International, LLC*, 199 AD3d 598, 159 NYS3d 20 (1st Dept 2021); *Olsen v We'll Manage, Inc.*, 214 AD2d 715, 625 NYS2d 301 (2d Dept 1995); *Cameli v Pace University*, 131 AD2d 419, 516 NYS2d 228 (2d Dept 1987); *Bird v New York State Thruway Authority*, 8 AD2d 495, 188 NYS2d 788 (4th Dept 1959), generally a question of fact is presented as to whether the person to whom the employee has been supplied has become the special employer, *Stone v Bigley Bros., Inc.*, 309 NY 132, 127 NE2d 913 (1955); *Wawrzonek v Central Hudson Gas & Electric Corporation*, 276 NY 412, 12 NE2d 525 (1938); *Short v Durez Division-Hooker Chemicals & Plastic Corp.*, 280 AD2d 972, 721 NYS2d 218 (4th Dept 2001). The provisions of a contract between the employers is not determinative of the issue, *Thompson v Grumman Corp.*, *supra*; *Gonzalez v John B. Lovett Assoc., Ltd.*, 228 AD2d 342, 644 NYS2d 249 (1st Dept 1996). For example, even though a contract existed between a security company and a premises owner providing that the security company would supervise and train the se-

curity guards that were assigned to the owner's business, the premises owner could still be liable for an assault committed by the security guard if evidence showed that the premises owner exercised sufficient control over the conduct of the security guards, *Kouri v Eataly N.Y. LLC*, 199 AD3d 416, 157 NYS3d 413 (1st Dept 2021) (security guards employed by codefendant security company acted at the express direction of owner's manager when forcibly ejecting plaintiff from premises); *Fauntleroy v EMM Group Holdings LLC*, 133 AD3d 452, 20 NYS3d 22 (1st Dept 2015) (contract between security company and business operator did not necessarily insulate operator from liability for tort committed by security guards if evidence showed that operator exercised sufficient control over security guards to render it special employer).

**PJI 2:240. Liability for the Conduct of Another—
Negligent Hiring or Retention of Employee**

While generally an employer is not responsible for acts of an employee that are outside the scope of (his, her) employment, it has a duty to use reasonable care in the employment, training and supervision of its employees to find out whether they are competent to do their work without danger of harm to others. This duty of reasonable care has two aspects. An employer fails in this duty where it knows that an employee (is incompetent, has vicious propensities, has a bad disposition, is given to horseplay) and the employer fails to use reasonable care to correct or remove the employee. An employer also fails in the duty of reasonable care when it knows of facts that would lead a reasonably prudent person to conduct an investigation which could have uncovered the information about the employee and fails to do so.

When the employer fails in its duty, it is liable for harm that results provided a reasonably prudent person would have foreseen the likelihood of injury to others by that employee. The employer is liable for any harm to other persons resulting from its employee's (incompetent, vicious, mean, horseplay) act, even though the employee was not at the time acting within the scope of (his, her) authority. By reasonable care is meant that degree of care that a reasonably prudent employer would use under the same circumstances.

If you find: (1) that defendant's employee AB

was (incompetent, of vicious propensities, of bad disposition, given to horseplay) and (2) that defendant had knowledge of that fact or facts which cause a reasonably prudent person to investigate the employee's (capacity, disposition), and (3) that defendant could reasonably have anticipated that AB's (incompetence, disposition) would be likely to result in injury to others, and (4) that defendant failed to use reasonable care to correct or remove AB, you will find that defendant was at fault. If, however, you find that AB was not (incompetent, vicious, of bad disposition, given to horseplay), or that though (he, she) was, that defendant did not know that fact or of facts that would cause a reasonably prudent person to investigate the employee's (capacity, disposition), or that a reasonably prudent person would not foresee that AB's (incompetence, viciousness, bad disposition, horseplay) would cause injury to others, you will find that defendant was not at fault.

Comment

Based on *Haddock v New York*, 75 NY2d 478, 554 NYS2d 439, 553 NE2d 987 (1990); *McCrink v New York*, 296 NY 99, 71 NE2d 419 (1947); *Hall v Smathers*, 240 NY 486, 148 NE 654 (1925); *Detone v Bullit Courier Service, Inc.*, 140 AD2d 278, 528 NYS2d 575 (1st Dept 1988); *Vanderhule v Berinstein*, 285 App Div 290, 136 NYS2d 95 (3d Dept 1954); *Ellsworth v Franklin County Agricultural Soc.*, 99 App Div 119, 91 NYS 1040 (3d Dept 1904); see Restatement, Second, Agency, § 213; Restatement, Second, Torts, § 317; Annot: 34 ALR2d 372; 48 ALR3d 359. The charge assumes that no fact question exists concerning the employment relationship. The charge incorporates the element of foreseeability as required by *Haddock v New York*, 106 AD2d 359, 483 NYS2d 288 (1st Dept 1984); see *Gonzalez v New York*, 133 AD3d 65, 17 NYS3d 12 (1st Dept 2015) (reviewing element of foreseeability in negligent hiring and retention case). For a general charge on the issue of foreseeability, see PJI 2:12.

An employer may be required to answer in damages for the tort of an employee against a third party when the employer has either hired or retained the employee with knowledge of the employee's propensity for the sort of behavior which caused the injured party's harm, *Miller v Miller*, 189 AD3d 2089, 137 NYS3d 853 (4th Dept 2020). The negligence of an employer under theories of negligent hiring and negligent retention is premised upon its having placed an employee in a position to cause foreseeable harm that the injured party most probably would have been spared had the employer used reasonable care in making its

decision regarding the hiring and retention of the employee, *id*; *Sheila C. v Povich*, 11 AD3d 120, 781 NYS2d 342 (1st Dept 2004). Thus, there must be a connection or nexus between the plaintiff's injuries and the employer's malfeasance such that the plaintiff has sustained damages that are proximately caused by the alleged misconduct, *Miller v Miller*, *supra*; see *Gonzalez v New York*, 133 AD3d 65, 17 NYS3d 12 (1st Dept 2015); *Alikes v Griffith*, 101 AD3d 1597, 956 NYS2d 354 (4th Dept 2012). A claim based on negligent hiring and supervision requires a showing that defendant knew of the employee's propensity to commit the alleged act or that defendant should have known of such propensity had it conducted an adequate hiring procedure, *Sandoval v Leake and Watts Services, Inc.*, 192 AD3d 91, 136 NYS3d 306 (1st Dept 2020) (summary judgment denied where employer allegedly violated its own hiring procedure by failing to investigate employee's termination from most recent employment and by failing to check professional job references for both employees); *Doe v Goldweber*, 112 AD3d 446, 976 NYS2d 77 (1st Dept 2013) (seven-month gap in physician's work record should have raised "red flag" as to prior disciplinary history); *Doe v Rohan*, 17 AD3d 509, 793 NYS2d 170 (2d Dept 2005); *Sheila C. v Povich*, *supra*; *Steinborn v Himmel*, 9 AD3d 531, 780 NYS2d 412 (3d Dept 2004); *Honohan v Martin's Food of South Burlington Inc.*, 255 AD2d 627, 679 NYS2d 478 (3d Dept 1998); see *Summors v Port Authority of New York and New Jersey*, 203 AD3d 558, 165 NYS3d 497 (1st Dept 2022) (*prima facie* entitlement to summary judgment dismissal made with proof of lack of notice employee had propensity to commit acts forming basis of complaint); *Hicks ex rel. Nolette v Berkshire Farm Center and Services for Youth*, 123 AD3d 1319, 999 NYS2d 879 (3d Dept 2014) (claim for negligent training and supervision requires showing that defendant knew or should have known of employee's propensity for conduct that caused plaintiff's injury, and that deficient training or supervision was a proximate cause of plaintiff's injury). An employer may be liable for negligent hiring when it knew or should have known of the employee's propensity to commit injury, even where the injury committed was not identical to the prior injury, *Sandoval v Leake and Watts Services, Inc.*, *supra*. Evidence of prior specific acts of incompetence is admissible, but whether a single prior act of incompetence is sufficient to take the case to the jury depends on the nature of the act, *Baulec v New York & H.R. Co.*, 59 NY 356 (1874). Incompetence cannot be proved by reputation, but is to be shown by the employee's prior specific acts, *Park v New York Cent. & H.R.R. Co.*, 155 NY 215, 49 NE 674 (1898). Plaintiff may show that the specific acts were generally known in the community, thus warranting the inference that the employer knew or should have known of them, *Park v New York Cent. & H.R.R. Co.*, *supra*.

Whether an employer has to have in place a specific screening process or, alternatively, utilizes a reasonable process only after it has some notice of negative information about a prospective employee has been addressed by appellate courts. An employer is under no duty to inquire as to whether an employee has been convicted of a crime in the past, *Yeboah v Snapple, Inc.*, 286 AD2d 204, 729 NYS2d 32 (1st Dept 2001); see *Nouel v 325 Wadsworth Realty LLC*, 112 AD3d 493, 977

NYS2d 217 (1st Dept 2013) (employee was registered sex offender, but no evidence that employer had knowledge of employee's propensity for sexual assault of children). The First Department had held that, irrespective of convictions, the depth of inquiry prior to hiring may vary in reasonable proportion to the responsibilities of the proposed employment, *Sandoval v Leake and Watts Services, Inc.*, 192 AD3d 91, 136 NYS3d 306 (1st Dept 2020); *Ford v Gildin*, 200 AD2d 224, 613 NYS2d 139 (1st Dept 1994); see *Summers v Port Authority of New York and New Jersey*, 203 AD3d 558, 165 NYS3d 497 (1st Dept 2022) (employer entitled to summary judgment dismissal of negligent hiring, training and retention claims with evidence of extensive pre-employment background check of airline employee by federal authorities and absence of prior complaints). Moreover, most intermediate appellate courts in New York have held that there is no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee, *Doe v Whitney*, 8 AD3d 610, 779 NYS2d 570 (2d Dept 2004); *Buck v Zwelling*, 272 AD2d 895, 707 NYS2d 281 (4th Dept 2000); *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 654 NYS2d 791 (2d Dept 1997) (employer cannot be charged with negligent hiring where employee came with letter of reference from prior employer which gave no reason to believe that there was any problem with employee); see *Pater v Buffalo*, 141 AD3d 1130, 36 NYS3d 323 (4th Dept 2016); see also *Stevens v Lankard*, 31 AD2d 602, 297 NYS2d 686 (2d Dept 1968), *aff'd*, 25 NY2d 640, 306 NYS2d 257, 254 NE2d 339 (1969) (as a matter of law, failure to do more than routine background check not negligence); *Ghaffari v North Rockland Cent. School Dist.*, 23 AD3d 342, 804 NYS2d 752 (2d Dept 2005) (necessary element of cause of action for negligent hiring is that employer knew or should have known of employee's propensity for conduct which caused injury). However, the Third Department has stated that a claim of negligent hiring may be based on a showing that the employee should have known of the employee's propensity for committing the injury-producing acts if it had conducted an adequate hiring procedure, *Travis v United Health Services Hospitals, Inc.*, 23 AD3d 884, 804 NYS2d 840 (3d Dept 2005); *Steinborn v Himmel*, 9 AD3d 531, 780 NYS2d 412 (3d Dept 2004); *Honohan v Martin's Food of South Burlington Inc.*, 255 AD2d 627, 679 NYS2d 478 (3d Dept 1998); *Ray v Delaware*, 239 AD2d 755, 657 NYS2d 808 (3d Dept 1997). The Third Department has also held that an employer meets its burden of establishing that it acted with reasonable care in hiring and retaining an employee by submitting evidence that it had screening procedures in place and used them when hiring that employee, *Travis v United Health Services Hospitals*, *supra*. Similarly, Correction Law § 752, which forbids discrimination against individuals with criminal records in certain hiring situations, does not require employers to hire such individuals where doing so would pose "an unreasonable risk . . . to the safety or welfare of specific individuals or the general public." Thus the statute is not a defense where such risk was present, *Glover v Augustine*, 38 AD3d 364, 832 NYS2d 184 (1st Dept 2007).

With respect to retention, reasonable care does not require as high

a degree of diligence as does selection, for “[g]ood character and proper qualifications once possessed may be presumed to continue . . . [until the employer] has notice of a change or knowledge of such facts as . . . would put a reasonable man on inquiry,” *Chapman v Erie R. Co.*, 55 NY 579 (1874); see *Pater v Buffalo*, 141 AD3d 1130, 36 NYS3d 323 (4th Dept 2016) (citing PJI). The employer must have notice of the relevant tortious propensity of the wrongdoing employee, i.e., that the employer knew or should have known of the employee’s propensity for the conduct that caused the injury, *Pater v Buffalo*, *supra*. Retention of an employee who has a known psychiatric disorder in a position which gives the employee access to guns may result in liability, *Baker v New York*, 25 AD2d 770, 269 NYS2d 515 (2d Dept 1966). The court need not reach the issue of whether the employer knew or should have known of its employee’s criminal propensities where the record indisputably establishes that both before and during the employment, the employee displayed no such propensities, *Rodriguez v United Transp. Co.*, 246 AD2d 178, 677 NYS2d 130 (1st Dept 1998). Moreover, an employer’s awareness that an assistant scoutmaster was improperly using cigarettes and alcohol, although relevant to the scoutmaster’s qualifications, is insufficient as matter of law to constitute notice that the individual might sexually assault his young charges, *Steinborn v Himmel*, 9 AD3d 531, 780 NYS2d 412 (3d Dept 2004). Similarly, a school district’s actual or constructive knowledge that its teacher slept in a room with boys under his supervision does not establish knowledge or notice of the teacher’s propensity for sexually abusive conduct, where at least one parent stated that she had requested that the teacher sleep in her son’s room because of the child’s medical condition, *Lisa P. v Attica Cent. School Dist.*, 27 AD3d 1080, 810 NYS2d 772 (4th Dept 2006).

An underlying requirement in actions for negligent hiring or retention is that the employee is individually liable for a tort or guilty of a claimed wrong against a third person, who then seeks recovery against the employer, *Primeau v Amherst*, 303 AD2d 1035, 757 NYS2d 201 (4th Dept 2003). Liability is imposed because of the negligence of the employer in selecting or retaining an incompetent employee in a situation which involves the risk of harm to others, *Sandoval v Leake and Watts Services, Inc.*, 192 AD3d 91, 136 NYS3d 306 (1st Dept 2020); see *Ford v Gildin*, 200 AD2d 224, 613 NYS2d 139 (1st Dept 1994). It is not necessarily predicated on any special relationship between the employer and plaintiff, *Haddock v New York*, 75 NY2d 478, 554 NYS2d 439, 553 NE2d 987 (1990). The principle upon which liability is based is the same as that involved when an instrumentality is furnished to one not competent to handle it, *Nolechek v Gesuale*, 46 NY2d 332, 413 NYS2d 340, 385 NE2d 1268 (1978); see *Gonzalez v New York*, 133 AD3d 65, 17 NYS3d 12 (1st Dept 2015) (negligent retention or supervision of police officer resulting in officer having possession of dangerous instrumentality is essentially indistinguishable from tort of negligent entrustment), or when a landowner permits acts harmful to passersby to be carried on by the employees or third persons on the land, see PJI 2:114, or when an incompetent contractor is hired, see PJI 2:258. The negligence of the employer in such cases is direct, not vicarious, *Rodriguez v United Transp. Co.*, 246 AD2d 178, 677 NYS2d 130 (1st Dept 1998).

Religious entities have a duty to prevent injuries inflicted by persons in their employ whom they have reason to believe will engage in injurious conduct, *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 654 NYS2d 791 (2d Dept 1997); see *Sharon B. v Reverend S.*, 244 AD2d 878, 665 NYS2d 139 (4th Dept 1997). For a discussion of the First Amendment concerns in imposing liability in such circumstances, see *Kenneth R. v Roman Catholic Diocese of Brooklyn*, *supra*; see also *Langford v Roman Catholic Diocese of Brooklyn*, 271 AD2d 494, 705 NYS2d 661 (2d Dept 2000) (dismissing claims, *inter alia*, based on negligent counseling, breach of fiduciary duty and negligent infliction of emotional distress).

Liability against a supervisor may be predicated on the supervisor's failure under the circumstances to use reasonable care to control the acts of the subordinate employee, despite having the authority to do so, *Dowler v Johnson*, 225 NY 39, 121 NE 487 (1918); see *Grant v Knepper*, 245 NY 158, 156 NE 650 (1927). Similarly, a licensed driver instructing a learner may be liable for failure to use reasonable care as an instructor, *McEwen v Keator*, 57 AD2d 1030, 395 NYS2d 260 (3d Dept 1977) (motorcycle); *Lazofsky v New York*, 22 AD2d 858, 254 NYS2d 349 (1st Dept 1964); cf. VTL § 501(4)(d) (no liability imposed on instructor for negligence of the learner); see generally Annot: 5 ALR3d 271.

Under the doctrine of respondeat superior, an employer is held liable for the negligence or otherwise tortious conduct of an employee acting within the scope of the employee's duties or in furtherance of the employer's interests, *Gonzalez v New York*, 133 AD3d 65, 17 NYS3d 12 (1st Dept 2015); see PJI 2:235-2:237. In contrast, under a cause of action for negligent hiring or retention, an employer may be liable for the acts of an employee acting outside the scope of his or her employment, *Gonzalez v New York*, *supra*. Generally, where an employee is acting within the scope of employment, thereby rendering the employer liable for any damages caused by employee's negligence under a theory of respondeat superior, no claim may proceed against the employer for negligent hiring or retention, *Farquharson v United Parcel Service*, 202 AD3d 923, 163 NYS3d 544 (2d Dept 2022); *Karoon v New York City Transit Authority*, 241 AD2d 323, 659 NYS2d 27 (1st Dept 1997). This is so because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training, *id*; see *Rossetti v Board of Educ. of Schalmont Central School Dist.*, 277 AD2d 668, 716 NYS2d 460 (3d Dept 2000). An employer is not responsible for the acts of an employee outside the scope of the employment, *Adams v New York City Transit Authority*, 88 NY2d 116, 643 NYS2d 511, 666 NE2d 216 (1996); *Hendricks v 333 Bayville Ave. Restaurant Corp.*, 260 AD2d 545, 688 NYS2d 593 (2d Dept 1999), except under the principle of this charge, *Taylor v Erie R. Co.*, 241 App Div 763, 270 NYS 514 (2d Dept 1934), *aff'd*, 268 NY 711, 198 NE 570 (1935) (false arrest); *Hall v Smathers*, 240 NY 486, 148 NE 654 (1925) (assault); *Moritz v Pines Hotel, Inc.*, 52 AD2d 1020, 383 NYS2d 704 (3d Dept 1976) (assault);

Lundberg v State, 25 NY2d 467, 306 NYS2d 947, 255 NE2d 177 (1969) (negligence); see Gonzalez v New York, supra (cause of action for negligent retention or supervision of municipal employee with dangerous propensities does not require allegations that employee's misconduct occurred within course and scope of employment). Whether an employee was acting within the course and scope of his or her employment may be a relevant factor that the jury should consider in determining foreseeability of harm in the context of proximate cause, Gonzalez v New York, supra. Gross negligence in the hiring or retention of an employee may support the award of punitive damages, see Farquharson v United Parcel Service, supra.

The period of limitations applicable to the claim arising from negligence in hiring an incompetent employee is three years, CPLR 214; see Sharon B. v Reverend S., 244 AD2d 878, 665 NYS2d 139 (4th Dept 1997), even if the employee committed an intentional tort, such as battery, Wimmer v Pratt Institute, 63 AD2d 885, 405 NYS2d 707 (1st Dept 1978). The statute of limitations period is measured from the last act of misconduct by the employee, Sharon B. v Reverend S., supra.

2. OWNER OF VEHICLE

a. LIABILITY FOR ACTS OF OPERATOR

(1) PERMISSION, EXPRESS OR IMPLIED

PJI 2:245. Liability for the Conduct of Another—Owner of Vehicle, for Acts of Operator—Permission, Express or Implied

Since the vehicle which plaintiff claims caused (his, her) injury was not being operated by the owner at the time of the accident, you must decide if such operation or use was within the express or implied permission of the owner. Section 388, subdivision 1, of the Vehicle and Traffic Law provides in part as follows: *[Read applicable portion]*. Under this statute an owner of a vehicle, although not personally (driving, riding in) it, is fully responsible for injuries resulting from its negligent (operation, use) by another regardless of the purpose for which it was being (operated, used), if in fact such (operation, use) was with the express or implied permission of the owner.

“Express” permission may consist of direct statements or acts by or on behalf of the owner that clearly show consent to such operation or use. “Implied” permission may be shown by more general evidence including, among other things, the relationship of the owner and the operator or user, their previous conduct with respect to this vehicle or other similar vehicles, their conduct immediately preceding the operation or use, and the particular use of the vehicle on the occasion in question.

Comment

Based on *Murdza v Zimmerman*, 99 NY2d 375, 756 NYS2d 505, 786 NE2d 440 (2003); *Leotta v Plessinger*, 8 NY2d 449, 209 NYS2d 304, 171 NE2d 454 (1960); *Jackson v Brown & Kleinhenz*, 273 NY 365, 7 NE2d 265 (1937); *Schrader v Carney*, 180 AD2d 200, 586 NYS2d 687 (4th Dept 1992); *Aetna Cas. and Sur. Co. v Brice*, 72 AD2d 927, 422 NYS2d 203 (4th Dept 1979), *aff'd*, 50 NY2d 958, 431 NYS2d 528, 409 NE2d 1000 (1980); *Lincoln v Austic*, 60 AD2d 487, 401 NYS2d 1020 (3d

Dept 1978); see 8B NYJur2d, Automobiles and Other Vehicles § 1059; Annot: 74 ALR3d 739. The charge should be used with PJI 1:63 concerning the presumption of consent which arises from proof of ownership of the vehicle.

VTL § 388 imputes to the owner of a car the negligence of one who uses or operates it with the owner's permission, *Murdza v Zimmerman*, 99 NY2d 375, 756 NYS2d 505, 786 NE2d 440 (2003); *Wright v O'Leary*, 172 AD3d 1495, 99 NYS3d 477 (3d Dept 2019); *Guerrieri v Gray*, 203 AD2d 324, 610 NYS2d 301 (2d Dept 1994). This section gives rise to a "very strong" presumption that the vehicle is being operated with the owner's consent and the presumption continues until there is "substantial evidence to the contrary," *Williams v J. Luke Construction Co., LLC*, 172 AD3d 1509, 99 NYS3d 460 (3d Dept 2019); *Bruno v Privilegi*, 148 AD2d 652, 539 NYS2d 403 (2d Dept 1989); see *Baker v Lisconish*, 156 AD3d 1324, 68 NYS3d 233 (4th Dept 2017); *Margolis v Volkswagen of America, Inc.*, 77 AD3d 1317, 908 NYS2d 479 (4th Dept 2010). Statutes similar to VTL § 388 have been adopted for snowmobiles, Parks, Recreation and Historic Preservation Law § 25.23; all-terrain vehicles, VTL § 2411; *Sepesi ex rel. Sepesi v Watson*, 124 AD3d 1021, 2 NYS3d 638 (3d Dept 2015); *Mikelinich v Caliandro*, 87 AD3d 99, 927 NYS2d 128 (2d Dept 2011); and boats, Navigation Law § 48.

The purpose of VTL § 388 was to change the common law rule that an absentee owner of an automobile is not liable for negligent acts of a driver who is using the vehicle on his or her own business or pleasure, *Murdza v Zimmerman*, 99 NY2d 375, 756 NYS2d 505, 786 NE2d 440 (2003); *Morris v Snappy Car Rental, Inc.*, 84 NY2d 21, 614 NYS2d 362, 637 NE2d 253 (1994). Indeed, VTL § 388 was designed to remove the hardship which the common-law rule visited upon innocent persons by preventing an owner from escaping liability by saying that the car was being used without authority or not in the owner's business, *Murdza v Zimmerman*, *supra*; *Conte v Aprea*, 23 AD3d 225, 803 NYS2d 557 (1st Dept 2005); *Bernard v Mumuni*, 22 AD3d 186, 802 NYS2d 1 (1st Dept 2005), *aff'd* for reasons in AD opinion, 6 NY3d 881, 817 NYS2d 210, 850 NE2d 25 (2006). It has long been recognized that in granting an injured party a right of action under section 388, the legislature did not otherwise intend to change any of the rules of liability in this area, *Morris v Snappy Car Rental, Inc.*, *supra*. Thus, the statute leaves unchanged the rules of liability arising from the relation of employer and employee, *Irwin v Klein*, 271 NY 477, 3 NE2d 601 (1936); see *Selles v Smith*, 4 NY2d 412, 176 NYS2d 267, 151 NE2d 838 (1958), and from entrusting a vehicle to a known incompetent driver, *Bennett v Geblein*, 71 AD2d 96, 421 NYS2d 487 (4th Dept 1979); *Rice v Spencer*, 43 Misc2d 331, 250 NYS2d 620 (Sup 1963); see *Monette v Trummer*, 105 AD3d 1328, 964 NYS2d 345 (4th Dept 2013), *aff'd*, 22 NY3d 944, 976 NYS2d 696, 999 NE2d 174 (2013).

VTL § 388 was enacted for the benefit of injured third parties and therefore the operator of the vehicle, or his or her estate, may not utilize the statute to recover against the vehicle's owner, *Shepard v Power*,

190 AD3d 63, 135 NYS3d 131 (2d Dept 2020) (operator's estate precluded from recovery against owner for injuries resulting from operator's own negligence); *Heins v Vanbourgondien*, 180 AD3d 1019, 119 NYS3d 158 (2d Dept 2020).

The vicarious liability imposed by the statute does not render the owner liable for an unforeseeable intentional act of the driver, *Gomez v Singh*, 309 AD2d 620, 767 NYS2d 67 (1st Dept 2003); *Marchetti v Avis Rent-A-Car System, Inc.*, 249 AD2d 518, 672 NYS2d 368 (2d Dept 1998); *Horney v Tisyl Taxi Corp.*, 93 AD2d 291, 461 NYS2d 799 (1st Dept 1983). Vicarious liability is not imposed on owners of fire and police vehicles, self-propelled combines, self-propelled corn and harvesting machines, and tractors used exclusively for agricultural purposes, VTL § 388(2); see *Guevara v Ortega*, 136 AD3d 508, 26 NYS3d 12 (1st Dept 2016); *Palmer v Rouse*, 198 AD2d 629, 603 NYS2d 628 (3d Dept 1993). The owner of a police vehicle is not subject to vicarious liability, regardless of whether the vehicle was being operated by a member of the police department at the time of the accident, *Guevara v Ortega*, *supra*. The owner of a farm tractor that is not used exclusively for agricultural purposes and has incidental uses is neither exempt from the obligation to maintain adequate insurance nor excepted from the vicarious liability imposed by Vehicle & Traffic Law § 388, *Palmer v Rouse*, 232 AD2d 909, 649 NYS2d 76 (3d Dept 1996).

Under the statute, liability is imposed without regard to fault of the owner, *Naso v Lafata*, 4 NY2d 585, 176 NYS2d 622, 152 NE2d 59 (1958). It makes the owner and the operator jointly and severally liable, VTL § 388(1); *Sullivan by Sullivan v Spandau*, 186 AD2d 641, 589 NYS2d 49 (2d Dept 1992). Since the liability of the owner and operator is several as well as joint, they may be sued separately. If the owner is sued, he or she may seek indemnity from the operator, *D'Ambrosio v New York*, 55 NY2d 454, 450 NYS2d 149, 435 NE2d 366 (1982); *Traub v Dinzler*, 309 NY 395, 131 NE2d 564 (1955). An attempt to completely disclaim the liability imposed by section 388 is contrary to public policy, *Morris v Snappy Car Rental, Inc.*, 84 NY2d 21, 614 NYS2d 362, 637 NE2d 253 (1994). Lessors of automobiles may not enforce restrictions on the use of the automobiles by the renter in an attempt to escape liability to a third person on the ground that the violation of the restriction removed the element of consent required by VTL § 388, *Davis v Hall*, 233 AD2d 906, 649 NYS2d 546 (4th Dept 1996).

An owner of a vehicle who is vicariously liable pursuant to VTL § 388, can be sued through a third party contribution claim, *Mowczan v Bacon*, 92 NY2d 281, 680 NYS2d 431, 703 NE2d 242 (1998). This is so even where the injured party initially fails to sue the owner and is foreclosed from doing so at a later point due to the statute of limitations, *id.* As long as an owner can be shown to bear some responsibility, actual or vicarious, for the plaintiff's injuries such that plaintiff could have joined the owner in a timely commenced action, then other defendants may seek contribution from the owner in respect to plaintiff's injuries without a statute of limitations barrier, *id.*; see *Sommer v*

Federal Signal Corp., 79 NY2d 540, 583 NYS2d 957, 593 NE2d 1365 (1992). However, a passive owner liable only pursuant to Vehicle and Traffic Law § 388 has no obligation to indemnify or defend an employer of an active tortfeasor who was acting within the scope of employment, *E.R. Furniture Delivery, Inc. v Budget Rent A Car System, Inc.*, 62 AD3d 939, 880 NYS2d 300 (2d Dept 2009).

VTL § 388 only encompasses injuries resulting from negligence in the use or operation of a motor vehicle, *Argentina v Emery World Wide Delivery Corp.*, 93 NY2d 554, 693 NYS2d 493, 715 NE2d 495 (1999). For purposes of VTL § 388, a “motor vehicle” as defined under VTL § 125 is every vehicle operated on a “public highway” under VTL § 134, *Wright v O’Leary*, 172 AD3d 1495, 99 NYS3d 477 (3d Dept 2019) (private property where utility vehicle operated is not “public highway” under VTL § 134 and thus vehicle’s owner not subject to liability under VTL § 388). To establish liability under VTL § 388, negligence in the use of the vehicle must be shown, and that negligence must be a cause of the injury, *id.* To establish liability under this section, however, the operation of the vehicle need not be a proximate cause of the injury, *id.*

A judgment in favor of the driver is *res judicata* in an action against the owner by the same plaintiff, *Good Health Dairy Products Corporation v Emery*, 275 NY 14, 9 NE2d 758 (1937); see *Bishop v Downs*, 18 AD2d 1127, 239 NYS2d 529 (4th Dept 1963) (a judgment in favor of the owner is *res judicata* in an action against the driver); *Christiansen v Silver Lake Contracting Corp.*, 188 AD2d 507, 591 NYS2d 189 (2d Dept 1992).

VTL § 388 may impose liability on a vehicle owner even though the negligent driver cannot be held liable because of some statutorily conferred immunity. In *Tikhonova v Ford Motor Co.*, 4 NY3d 621, 797 NYS2d 799, 830 NE2d 1127 (2005), for example, the Court of Appeals held that a vehicle lessor was subject to vicarious liability under VTL § 388 even though the driver was protected from liability by statutory diplomatic immunity. In two earlier decisions, *Naso v Lafata*, 4 NY2d 585, 176 NYS2d 622, 152 NE2d 59 (1958), and *Rauch v Jones*, 4 NY2d 592, 176 NYS2d 628, 152 NE2d 63 (1958), the Court had determined that VTL § 388 is not applicable where plaintiff’s suit against the driver would be barred by Workers’ Compensation Law § 29(6). The *Tikhonova* Court distinguished these cases by noting that they depended upon the “special context of workers’ compensation” and stated that the statute conferring diplomatic immunity, 28 USC § 1364, is not an exclusive remedy, see *Isabella v Hallock*, 22 NY3d 788, 987 NYS2d 293, 10 NE3d 673 (2014) (emphasizing distinction between immunity conferred by the Diplomatic Relations Act and exclusive-remedy provisions of Workers’ Compensation Law and federal Longshoremen’s and Harbor Worker’s Compensation Act). *Sikora v Keillor*, 13 NY2d 610, 240 NYS2d 601, 191 NE2d 88 (1963), which held that a vehicle owner could not be held vicariously liable for the negligent driving of a firefighter immune from suit under General Municipal Law § 205-b, was similarly distinguished. The *Tikhonova* Court stated that *Sikora* rested on a policy of protecting those who aid emergency workers. In contrast, no similar strong state

policy supports protecting those who lease vehicles to diplomats. Notwithstanding the holdings in *Naso v Lafata*, supra, and *Rauch v Jones*, supra, Workers' Compensation Law § 29(6) does not bar an action against a third person guilty of negligence concurring with negligence by plaintiff's co-employee, *Caulfield v Elmhurst Contracting Co.*, 268 App Div 661, 53 NYS2d 25 (2d Dept 1945), aff'd, 294 NY 803, 62 NE2d 237 (1945); *Christiansen v Silver Lake Contracting Corp.*, 188 AD2d 507, 591 NYS2d 189 (2d Dept 1992); *Carpenter v Miller*, 132 AD2d 859, 518 NYS2d 67 (3d Dept 1987); see *Mansour v Paddock Chevrolet, Inc.*, 198 AD3d 1280, 154 NYS3d 189 (4th Dept 2021).

A release of the driver reserving rights against the owner preserves such rights, *Plath v Justus*, 28 NY2d 16, 319 NYS2d 433, 268 NE2d 117 (1971). Although the owner's liability is derivative, General Obligations Law § 15-108 provides that the release of one tortfeasor does not discharge any other even if he or she is only vicariously liable, unless its terms specifically so provide, *Riviello v Waldron*, 47 NY2d 297, 418 NYS2d 300, 391 NE2d 1278 (1979). Whether the release was intended by both parties to release both the owner and the driver may present a fact question, see *Starr v Johnsen*, 143 AD2d 130, 531 NYS2d 589 (2d Dept 1988) (issue as to whether plaintiff knew that owner and driver might be the same person).

In an action by the owner against third parties, the driver's negligence will not be imputed to the owner, *Molino v Putnam*, 29 NY2d 44, 323 NYS2d 817, 272 NE2d 323 (1971); see PJI 2:250.

"Owner" is defined as "A person, other than a lien holder, having the property in or title to a vehicle" and "includes any lessee or bailee . . . having the exclusive use . . . for a period greater than thirty days," VTL § 128; see *Hardeman v Mendon Leasing Corp.*, 87 AD2d 232, 450 NYS2d 808 (1st Dept 1982), aff'd, 58 NY2d 892, 460 NYS2d 499, 447 NE2d 47 (1983); *Monette v Trummer*, 105 AD3d 1328, 964 NYS2d 345 (4th Dept 2013), aff'd, 22 NY3d 944, 976 NYS2d 696, 999 NE2d 174 (2013); *Sullivan v Sullivan v Spandau*, 186 AD2d 641, 589 NYS2d 49 (2d Dept 1992); *Simon v El Service Corp.*, 85 AD2d 556, 452 NYS2d 407 (1st Dept 1981); Annot: Who is "owner" within statute making owner responsible for injury or death inflicted by operator of automobile, 74 ALR3d 739 (as to joint owners, see discussion below). Ownership of stock in a corporation which owns a vehicle does not make one an "owner" within the meaning of VTL § 388, *Bank v Rebold*, 69 AD2d 481, 419 NYS2d 135 (2d Dept 1979). A co-owner is not precluded from bringing a § 388 claim against other statutory owners, *Hassan v Montuori*, 99 NY2d 348, 756 NYS2d 126, 786 NE2d 25 (2003).

New York law makes vehicle lessors and vehicle rental companies vicariously liable as "owners" under VTL § 388, see *Hassan v Montuori*, 99 NY2d 348, 756 NYS2d 126, 786 NE2d 25 (2003); *Morris v Snappy Car Rental, Inc.*, 84 NY2d 21, 614 NYS2d 362, 637 NE2d 253 (1994); see also *Keating v SS & R Management Co.*, 59 AD3d 176, 872 NYS2d 459 (1st Dept 2009) (registered owner of taxi that was in business of

registering and then leasing vehicles titled to another entity as “agent” for that entity vicariously liable for negligence taxi driver using vehicle with registered owner’s permission); *Ryan v Sobolevsky*, 4 AD3d 222, 772 NYS2d 310 (1st Dept 2004) (bank that was assigned original lessor’s right and interest in vehicle lease was “owner” where bank’s name was on certificate of title); *Taughrin v Rodriguez*, 254 AD2d 735, 677 NYS2d 861 (4th Dept 1998) (“owner” includes company administering lease on behalf of owner); *Davis v Hall*, 233 AD2d 906, 649 NYS2d 546 (4th Dept 1996) (lessor may not enforce restrictions on lessee’s use of vehicle to avoid vicarious liability under VTL § 388); *Sullivan v Sullivan v Spandau*, 186 AD2d 641, 589 NYS2d 49 (2d Dept 1992) (under VTL § 388, lessor and lessee are jointly and severally liable). In *ELRAC, Inc. v Ward*, 96 NY2d 58, 724 NYS2d 692, 748 NE2d 1 (2001), the Court of Appeals held that VTL § 370 prohibits a rental agency from seeking indemnification for claims arising from personal injury from its renters and permissive users for amounts up to the minimum liability insurance mandated by statute.

VTL § 388, as it applies to vehicle lessors and vehicle rental companies has now been pre-empted with respect to lessors by the federal Transportation Equity Act, 49 U.S.C. § 30106, popularly known as the Graves Amendment, which applies to actions commenced on or after August 10, 2005, *Jones v Bill*, 10 NY3d 550, 860 NYS2d 769, 890 NE2d 884 (2008). Since an action is “commenced” when a summons and complaint or summons with notice is filed, the correct date for determining the applicability of the federal statute is the date when the summons and complaint against the tortfeasor were filed, even where the vehicle lessor was joined by the filing of an amended summons and complaint after the effective date of the statute, *Jones v Bill*, 10 NY3d 550, 860 NYS2d 769, 890 NE2d 884 (2008). The Graves Amendment provides that an owner of a motor vehicle “engaged in the trade or business of renting or leasing motor vehicles” that rents or leases a vehicle to a person “shall not be liable under the law of any State or political subdivision thereof . . . by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results out of the use, operation, or possession of the vehicle during the period of the rental or lease,” see *Cioffi v S.M. Foods, Inc.*, 129 AD3d 888, 10 NYS3d 620 (2d Dept 2015). The Graves Amendment represents a valid exercise of Congress’s power to regulate interstate commerce, *Hall v Elrac, Inc.*, 52 AD3d 262, 859 NYS2d 641 (1st Dept 2008); *Graham v Dunkley*, 50 AD3d 55, 852 NYS2d 169 (2d Dept 2008). Additionally, the statute does not violate equal protection, *Hall v Elrac, Inc.*, *supra*. The federal statute does not preclude state laws imposing liability on vehicle lessors and renters for their own negligence or criminal wrongdoing, see *Olmann v Neil*, 132 AD3d 744, 18 NYS3d 105 (2d Dept 2015) (protection of Graves Amendment unavailable where plaintiff seeks to hold defendant liable for alleged failure to maintain vehicle); *Cioffi v S.M. Foods, Inc.*, *supra* (protection of Graves Amendment unavailable where defendant engaged in criminal wrongdoing that was a proximate cause of plaintiff’s injuries), nor does it preempt state laws requiring lessors and renters to meet minimum financial responsibility or to satisfy specified liability insurance standards. Thus, VTL § 370, which requires

rental agencies to obtain a minimum amount of insurance for their vehicles, appears to remain valid and enforceable.

The protection of the federal statute is limited to owners of a motor vehicles “engaged in the trade or business of renting or leasing motor vehicles” and may not protect finance companies or banks that retain title, see *Ryan v Sobolevsky*, 4 AD3d 222, 772 NYS2d 310 (1st Dept 2004).

Registration or a certificate of title is *prima facie* evidence of ownership, *Switzer v Aldrich*, 307 NY 56, 120 NE2d 159 (1954); *Zegarowicz v Ripatti*, 77 AD3d 650, 911 NYS2d 69 (2d Dept 2010); *Dobson v Gioia*, 39 AD3d 995, 834 NYS2d 356 (3d Dept 2007) (applying Navigation Law § 48); *Corrigan v DiGuardia*, 166 AD2d 408, 560 NYS2d 472 (2d Dept 1990). However, this presumption of ownership is not conclusive, and may be rebutted by evidence which demonstrates that another individual owned the vehicle in question, *Zegarowicz v Ripatti*, *supra*; *Aronov v Bruins Transp., Inc.*, 294 AD2d 523, 743 NYS2d 131 (2d Dept 2002); see *Walker v Webster*, 197 AD3d 942 (4th Dept 2021) (issue of fact where there was evidence vehicle was titled in one defendant’s name but registered to someone else). The transfer of title of a vehicle is deemed to occur when the parties intend the transfer to occur, *Godfrey v G.E. Capital Auto Lease, Inc.*, 89 AD3d 471, 933 NYS2d 208 (1st Dept 2011). Thus, title to a vehicle may pass to a purchaser when he or she takes delivery of it, notwithstanding that formal registration of the vehicle in the purchaser’s name occurs later, *id.* The presumption may also be rebutted by evidence that a non-title holder had a possessory interest with the attendant characteristics of dominion and control, *Dobson v Gioia*, *supra*. For example, the title holder’s spouse was potentially the “*de facto*” owner of a boat where there was evidence that the non-titled spouse had negotiated the purchase of the boat, was solely responsible for paying the purchase price, had been the boat’s principal operator, was the named insured, had made and paid for all arrangements for maintenance and repair and had retained a marina to help sell the boat, *id.* As against an injured third party, a registered owner who transfers a vehicle without removing the license plates will be estopped from denying ownership, *Switzer v Aldrich*, *supra*; *Elfeld v Burkham Auto Renting Co.*, 299 NY 336, 87 NE2d 285 (1949); *Berger v Charles Schatz, Inc.*, 26 AD2d 551, 271 NYS2d 108 (2d Dept 1966); but see *Sosnowski v Kolovas*, 127 AD2d 756, 512 NYS2d 148 (2d Dept 1987).

An authorized automobile dealer is required to verify that a purchaser has obtained insurance before issuing a temporary vehicle registration, see Vehicle & Traffic Law §§ 312(1), 420-a(4); 15 NYCRR 78.23. Where a dealer fails to comply with a statutory mandate regarding vehicle registration procedures, it will be estopped from denying ownership, *Brown v Harper*, 231 AD2d 483, 647 NYS2d 245 (2d Dept 1996); *Panzella v Major Chevrolet, Inc.*, 209 AD2d 594, 619 NYS2d 129 (2d Dept 1994); see *Gonzalez v Zaki’s Auto Sales Corp.*, 183 AD3d 623, 123 NYS3d 189 (2d Dept 2020) (dealer not estopped from denying ownership where its failure to comply with statutory requirements

regarding timely submission of paperwork that has a reasonable explanation). One who has intentionally registered a vehicle in his or her own name cannot prove, after an accident, that he or she never owned the vehicle, *Shuba v Greendonner*, 271 NY 189, 2 NE2d 536 (1936); *Norman v Ferrara*, 107 AD2d 739, 484 NYS2d 600 (2d Dept 1985), although it is, apparently, permissible to show mistake, *Ferris v Sterling*, 214 NY 249, 108 NE 406 (1915); *Doherty v Rogers*, 209 App Div 291, 204 NYS 536 (4th Dept 1924). The fact that transporter plates are affixed to a vehicle establishes prima facie that the vehicle is owned by the owner of the plates and that the driver was engaged in the business of the owner of the plates, *Mitchell v Auto Buyers, Inc.*, 43 AD2d 830, 350 NYS2d 757 (2d Dept 1974) (presumption overcome); see *Fulater v Palmer's Granite Garage, Inc.*, 90 AD2d 685, 456 NYS2d 289 (4th Dept 1982). Where a car dealer, knowing that the purchaser's insurance policy had lapsed, unlawfully registers a new car in the purchaser's name, the car dealer may be estopped from denying ownership of the vehicle, *Taylor v Botnick Motor Corp.*, 146 AD2d 81, 539 NYS2d 141 (3d Dept 1989). Similarly, where a car dealer negligently gave its dealer plates to its regular repair shop without instructions to limit the plates' use to the dealer's vehicles and the repair shop placed the plates on an unregistered vehicle of its own, the dealer was estopped from denying ownership of the unregistered vehicle, *Ciatto v Lieberman*, 1 AD3d 553, 769 NYS2d 48 (2d Dept 2003).

The estoppel of the record title operates against the record owner only and does not prevent either the injured party or the record owner's insurer from establishing that the vehicle was in fact owned by another, *Dairylea Co-op., Inc. v Rossal*, 64 NY2d 1, 483 NYS2d 1001, 473 NE2d 251 (1984) (citing PJI); *Bornhurst v Massachusetts Bonding & Ins. Co.*, 21 NY2d 581, 289 NYS2d 937, 237 NE2d 201 (1968). Absent rebuttal evidence, the fact that the defendant's name appears upon an injury-producing instrumentality warrants the inference of operation and control, *Demogenes v Village Carting Co., Inc.*, 44 AD2d 155, 354 NYS2d 7 (1st Dept 1974).

Permission to operate or use the vehicle may be implied in fact or implied in law. "Implied authority is actual authority circumstantially proved . . . evidenced by conduct of the principal which has been such as to justify the jury in finding that the agent had actual authority to do what he did," *Atwater v Lober*, 133 Misc 652, 233 NYS 309 (Co Ct 1929). Payment of compensation by the owner to the driver is only some evidence bearing on consent; it is by no means conclusive, *Nalli v Peters*, 241 NY 177, 149 NE 343 (1925). An inference of permissive use may also be drawn from the course of conduct built up between the owner and the driver, *Schulman v Consolidated Edison Co. of New York, Inc.*, 85 AD2d 186, 447 NYS2d 722 (1st Dept 1982). When the owner of a vehicle places it under the unrestricted control of a second person, the owner's consent to use of the vehicle may reasonably be found to extend to a third person whom the second person permits to drive it, *Bernard v Mumuni*, 22 AD3d 186, 802 NYS2d 1 (1st Dept 2005), *aff'd*, 6 NY3d 881, 817 NYS2d 210, 850 NE2d 25 (2006). Where the owner leased to A a ve-

hicle with driver and directed the driver to accept his orders from A and A surrendered control to B on whose business the vehicle was being used when plaintiff was injured, B's use was within the permission of the owner, and the owner and B, but not A, were held liable, *Irwin v Klein*, 271 NY 477, 3 NE2d 601 (1936); *Wilson v Williams*, 37 AD2d 781, 325 NYS2d 349 (2d Dept 1971), *aff'd*, 30 NY2d 848, 335 NYS2d 90, 286 NE2d 472 (1972). Similarly, when an owner loaned his car to his friend Z "just for you" and Z loaned it to A, an unlicensed driver, who injured plaintiff, defendant owner was held on all the evidence in the case to have vested Z with general control of the vehicle without limitation of authority and thus impliedly consented to A's use, *Brindley v Krizsan*, 13 NY2d 976, 244 NYS2d 779, 194 NE2d 688 (1963); see *Bernard v Mumuni*, 22 AD3d 186, 802 NYS2d 1 (1st Dept 2005), *aff'd* for reasons in AD opinion, 6 NY3d 881, 817 NYS2d 210, 850 NE2d 25 (2006); *Schrader v Carney*, 180 AD2d 200, 586 NYS2d 687 (4th Dept 1992).

The fact that the driver is unlicensed does not affect the owner's statutory responsibility, *Brindley v Krizsan*, 13 NY2d 976, 244 NYS2d 779, 194 NE2d 688 (1963); *Bernard v Mumuni*, 22 AD3d 186, 802 NYS2d 1 (1st Dept 2005), *aff'd* for reasons in AD opinion, 6 NY3d 881, 817 NYS2d 210, 850 NE2d 25 (2006); *Carter v Travelers Ins. Co.*, 113 AD2d 178, 495 NYS2d 168 (1st Dept 1985) (owner left vehicle in parking lot where unlicensed garage employee caused accident); nor is it necessary that the owner have knowledge of the driver's use for implied consent to be spelled out, *May v Heiney*, 12 NY2d 683, 233 NYS2d 474, 185 NE2d 910 (1962); see *Bernard v Mumuni*, *supra*.

The presumption of consent to use a motor vehicle is rebuttable and the question of consent and authority ordinarily presents an issue of fact, *Baker v Lisconish*, 156 AD3d 1324, 68 NYS3d 233 (4th Dept 2017); *Connors v Paris*, 199 AD2d 4, 604 NYS2d 103 (1st Dept 1993); *Reyes v Sternberg*, 27 AD2d 828, 278 NYS2d 167 (1st Dept 1967); see *Williams v J. Luke Construction Co., LLC*, 172 AD3d 1509, 99 NYS3d 460 (3d Dept 2019). The presumption of permission can be rebutted by evidence that the permitted operation was restricted to daylight hours, *Rachon v Cheuvant*, 37 AD2d 911, 325 NYS2d 452 (4th Dept 1971), or by evidence that a rented vehicle has not been returned and that the lessor reported the vehicle as "missing" to the police, *Speller v Ryder Truck Rental, Inc.*, 47 AD2d 608, 363 NYS2d 823 (1st Dept 1975), or by an averment by the owner that the vehicle was stolen and operated without her consent coupled with an admission by the driver corroborating the same, *Holmes v McCrea*, 186 AD3d 1043, 130 NYS3d 160 (4th Dept 2020); *Bost v Thomas*, 275 AD2d 513, 712 NYS2d 218 (3d Dept 2000), or by evidence that the employer adopted a policy prohibiting use of the vehicle for non-work-related purposes, *Baker v Lisconish*, *supra* (triable issue created), or by evidence of an "unambiguous and unequivocal agreement" restricting authorization to use a vehicle, *Rooney v Myers*, 132 AD2d 839, 517 NYS2d 627 (3d Dept 1987); see *Williams v J. Luke Construction Co., LLC*, *supra* (employer policy prohibiting reporting to work under influence of alcohol not unambiguous where employee, under the influence, caused accident driving company vehicle to work).

The Court of Appeals has noted that where substantial evidence establishes that permission was conditioned upon driving in a certain locality only, or conditioned upon instructions not to allow any riders, the owner is exonerated from liability when an accident occurs subsequent to a breach of the restriction, *Murdza v Zimmerman*, 99 NY2d 375, 756 NYS2d 505, 786 NE2d 440 (2003). The restrictions as to time, place, and permitted use of the vehicle, which restrictions relieve the owner from liability if violated by the user, are to be distinguished from “limiting instructions which relate to the manner of operation, such as speeding or careless pilotage of the car,” for which the owner is still held accountable if violated by the user, *Leotta v Plessinger*, 8 NY2d 449, 209 NYS2d 304, 171 NE2d 454 (1960); *Williams v J. Luke Construction Co., LLC*, *supra*. “Substantial evidence” in this context means evidence which reasonably sustains the proposition that permission was not given or was subject to a restriction with which the driver did not comply, *Orlando v Pioneer Barber Towel Supply Co.*, 239 NY 342, 146 NE 621 (1925).

Uncontradicted disavowals of permission by both the owner and driver constitute such evidence and may lead to summary judgment, depending upon the strength and plausibility of the disavowals and whether they leave room for doubts that are best left for the jury, *Country-Wide Ins. Co. v National R.R. Passenger Corp.*, 6 NY3d 172, 811 NYS2d 302, 844 NE2d 756 (2006); see *Sepesi ex rel. Sepesi v Watson*, 124 AD3d 1021, 2 NYS3d 638 (3d Dept 2015); *Murphy v Carnesi*, 30 AD3d 570, 817 NYS2d 136 (2d Dept 2006); see also *Britt v Pharmacologic Pet Services, Inc.*, 36 AD3d 1039, 828 NYS2d 630 (3d Dept 2007) (uncontradicted disavowals of permission by both driver and owner constitute substantial evidence rebutting presumption of permissive use and “in most circumstances” entitle owner to summary judgment). Where such uncontradicted disavowals are bolstered by additional evidence such as accident reports, summary judgment is usually (although not always) warranted, *Country-Wide Ins. Co. v National R.R. Passenger Corp.*, *supra*; see *Rooney v Myers*, 132 AD2d 839, 517 NYS2d 627 (3d Dept 1987); *Capalario v Murray*, 52 AD2d 1037, 384 NYS2d 579 (4th Dept 1976); see also *St. Andrassy v Mooney*, 262 NY 368, 186 NE 867 (1933) (claim against owner should not have been submitted to jury where there were uncontradicted disavowals of permission by owner, owner’s wife and driver). In contrast, where competent evidence is introduced suggesting implausibility, collusion or implied permission, the issue of consent should go to the jury even where both the owner and the driver have denied that permission was given, *Murphy v Carnesi*, *supra*. As to the effect of presumptions generally, see PJI 1:63.

Permission will be implied in law under some circumstances, as where a vehicle is left double parked, *Winnowski v Polito*, 294 NY 159, 61 NE2d 425 (1945); or where the owner stops in the center of the highway and leaves the vehicle, *Coons v Massachusetts Bonding and Ins. Co.*, 9 NY2d 994, 218 NYS2d 66, 176 NE2d 515 (1961); or where the owner leaves the vehicle for repairs requiring road testing as an incident thereto, *Celani v Interstate Motor Freight Systems, Inc.*, 30

AD2d 772, 292 NYS2d 305 (4th Dept 1968). Permission may also be implied where a vehicle is taken from an employer's facility by an employee and the employer's acts and omissions, including failure to timely investigate the disappearance of its vehicle, are so unreasonable as to amount to an implied consent, *Powell by Boone v Hertz Corp.*, 182 AD2d 441, 582 NYS2d 169 (1st Dept 1992).

VTL § 388 is also construed to apply to "constructive consent" of a lessor of automobiles to the operation of its vehicle by a third person with permission of the lessee, even though the rental agreement provides that a lessor's actual consent to third person operation is required, *Allstate Insurance Company v Travelers Insurance Company*, 39 NY2d 784, 385 NYS2d 285, 350 NE2d 616 (1976); *Motor Vehicle Acc. Indemnification Corp. v Continental Nat. Am. Group Co.*, 35 NY2d 260, 360 NYS2d 859, 319 NE2d 182 (1974); *Hardeman v Mendon Leasing Corp.*, 87 AD2d 232, 450 NYS2d 808 (1st Dept 1982), *aff'd*, 58 NY2d 892, 460 NYS2d 499, 447 NE2d 47 (1983); see *Davis v Hall*, 233 AD2d 906, 649 NYS2d 546 (4th Dept 1996); see also *Carlson v American Intern. Group, Inc.*, 30 NY3d 288, 67 NYS3d 100, 89 NE3d 490 (2017). Unlike restrictions placed on the use of an individual's vehicle, the Court of Appeals has reasoned that restrictions by car rental agencies on their vehicles implicate more serious concerns as they affect the use of a large number of vehicles on the road over potentially long time periods, *Murdza v Zimmerman*, 99 NY2d 375, 756 NYS2d 505, 786 NE2d 440 (2003); see *Carlson v American Intern. Group, Inc.*, *supra*. A finding of constructive consent and its attendant liability under § 388 requires a consensual link between the negligent operator and one whose possession of the vehicle is authorized, *Murdza v Zimmerman*, *supra*. Where, however, the lessor both reported the vehicle stolen and took other significant steps to recover it, there was a sufficient basis for finding revocation of the lessor's consent to the lessee's operation of the vehicle, *Matter of Utica Mut. Ins. Co.*, 95 AD2d 150, 465 NYS2d 553 (2d Dept 1983); see *Koenig v Price*, 200 AD2d 559, 606 NYS2d 310 (2d Dept 1994).

An employer that permits an employee's use of its vehicle stands in a very different position than a car rental agency, which rents large numbers of vehicles to the general public for profit, *Murdza v Zimmerman*, 99 NY2d 375, 756 NYS2d 505, 786 NE2d 440 (2003). While it is foreseeable that a rented vehicle would come into the hands of any number of operators by the very nature of the quasi-ownership relationship created by a lease, the bailment of a vehicle to an employee spawns a markedly different relationship with its own set of expectations, *id.* An at-will employment relationship and the frequent contact between an employee and employer demand compliance with restrictions on vehicle operation placed on the employee and, as a result, it is reasonable for an employer to expect employees to comply with its use restrictions, *id.* Therefore, the Court of Appeals has held that an employer may explicitly restrict those who may operate its vehicle, while simultaneously restricting its liability as an owner under VTL § 388, *id.* In *Murdza*, the Court held that even if the employee had consented to the

driver's use of the employer's van, the employee handbook explicitly restricted those who could operate its vehicles and thereby rebutted the presumption of liability against the employer under VTL § 388, *id.*

Evidence of co-ownership creates a presumption that one co-owner has consented to the vehicle's operation by the other, *Payne v Payne*, 28 NY2d 399, 322 NYS2d 238, 271 NE2d 220 (1971). A co-owner of a vehicle is not precluded from bringing a § 388 claim against other statutory owners, *Hassan v Montuori*, 99 NY2d 348, 756 NYS2d 126, 786 NE2d 25 (2003).

Once the disputed issue of permission is resolved against the owner, it is a violation of the owner's right to counsel to direct that the trial be conducted by the driver's attorney alone, *Schulman v Consolidated Edison Co. of New York, Inc.*, 85 AD2d 186, 447 NYS2d 722 (1st Dept 1982). For a discussion of what constitutes "use or operation" of a vehicle, see Comment to PJI 2:249.

(2) LIMITATION ON USE

PJI 2:246. Liability for the Conduct of Another—Owner of Vehicle, for Acts of Operator—Limitation on Use—Area, Purpose

In granting permission for the use of a vehicle, an owner may restrict such use to a specified area or purpose. Use of the vehicle beyond such area or for another purpose would then be without the owner's permission, and in that event the owner may not be held responsible for the user's negligence.

Comment

Based on *Piwowarski v Cornwell*, 273 NY 226, 7 NE2d 111 (1937); *Chaika v Vandenberg*, 252 NY 101, 169 NE 103 (1929); *Rooney v Myers*, 132 AD2d 839, 517 NYS2d 627 (3d Dept 1987); *Cosimo v Hollenbeck*, 19 AD2d 921, 244 NYS2d 9 (3d Dept 1963); see *Murdza v Zimmerman*, 99 NY2d 375, 756 NYS2d 505, 786 NE2d 440 (2003); *Psota v Long Island R. Co.*, 246 NY 388, 159 NE 180 (1927); *Capalario v Murray*, 52 AD2d 1037, 384 NYS2d 579 (4th Dept 1976); 8B NYJur2d, *Automobiles and Other Vehicles* § 1069. This charge should be used in conjunction with PJI 1:63 and 2:245 where appropriate.

Concerning whether a particular use is within the scope of the permission granted, the principles are the same whether the case concerns owner-operator under VTL § 388, or involves an employer-employee relationship. As to the latter, see PJI 2:235 through PJI 2:238. When express permission is of indefinite character, its extent is a jury question, *Jorgensen v Jaeger*, 257 NY 171, 177 NE 410 (1931); *Walls v Zuvic*, 113 AD2d 936, 493 NYS2d 628 (2d Dept 1985) (citing PJI).

The granting of express permission to use a vehicle for a specific purpose, such as to place it in a designated garage for the night, constitutes a restriction on its use, and if an accident occurs while the operator is otherwise using the vehicle, the owner will not be liable therefor, *Der Ohannessian v Elliott*, 233 NY 326, 135 NE 518 (1922). Such conduct is said to amount not to a deviation but to an abandonment of the owner's service, relieving the owner from responsibility, *Coyne v Kennedy*, 229 NY 550, 129 NE 911 (1920); see Annot: 51 ALR2d 8. Observe, however, that where an operator has deviated from the authorized route and then has begun to return to the route the operator had been directed to take, the operator will be held to be engaged on his principal's business, and the owner may be held responsible, *De Lancey v Nationwide Ins. Co.*, 26 AD2d 631, 272 NYS2d 468 (2d Dept 1966), *aff'd*, 20 NY2d 807, 284 NYS2d 701, 231 NE2d 288 (1967). But the evidence must show that the driver's "dominant purpose" was the perfor-

mance of the employer's business at the time of the accident, *Fiocco v Carver*, 234 NY 219, 137 NE 309 (1922).

PJI 2:247. Liability for the Conduct of Another—Owner of Vehicle, for Acts of Operator—Limitation on Use—Persons in Vehicle

If you find that *[name of owner]* told *[name of user]* not to permit any passenger in the vehicle and that *[name of user]* did permit plaintiff to ride as a passenger in the vehicle, *[name of owner]* is not responsible for any injury to plaintiff.

Comment

The charge is based on *Moore v Leaseway Transp. Corp.*, 49 NY2d 720, 426 NYS2d 259, 402 NE2d 1160 (1980) (citing PJI); *Psota v Long Island R. Co.*, 246 NY 388, 159 NE 180 (1927); *Capalario v Murray*, 52 AD2d 1037, 384 NYS2d 579 (4th Dept 1976); *Primeau v Insurance Co. of North America*, 46 AD2d 459, 363 NYS2d 124 (3d Dept 1975); see *Murdza v Zimmerman*, 99 NY2d 375, 756 NYS2d 505, 786 NE2d 440 (2003); 8B NYJur2d, *Automobiles and Other Vehicles* §§ 1069, 1076. This charge should be used in conjunction with PJI 1:63 and 2:245 where appropriate.

Ordinarily, the fact that a passenger is carried without permission will not affect liability to persons other than the passenger, *Clawson v Pierce-Arrow Motor Car Co.*, 231 NY 273, 131 NE 914 (1921), but if an owner grants permission for the use of the vehicle only if a named person is not permitted therein, and such person in fact drives the vehicle, the owner will not be liable to anyone for resulting damage, *Hinchey v Sellers*, 7 NY2d 287, 197 NYS2d 129, 165 NE2d 156 (1959). Note, however, that in *Arcara v Moresse*, 258 NY 211, 179 NE 389 (1932), a different result was reached when the owner forbade that a particular person drive but not that he be present in the vehicle. If no restriction as to riders is placed upon the driver, the owner will be responsible for injuries caused to a rider by the driver's negligence, unless the purpose for which the vehicle was entrusted to the driver precluded the implication of consent to the carrying of passengers, *Svenson v Zakrocki*, 268 App Div 777, 48 NYS2d 567 (2d Dept 1944).

Although a private owner can place valid restrictions upon the vehicle, a different rule applies to leased vehicles “. . . because of the nature of the car rental business, courts look unfavorably upon provisions in rental agreements restricting the use to which the vehicle may be put,” *Hardeman v Mendon Leasing Corp.*, 87 AD2d 232, 450 NYS2d 808 (1st Dept 1982), *aff'd*, 58 NY2d 892, 460 NYS2d 499, 447 NE2d 47 (1983), or who may operate it, *Motor Vehicle Acc. Indemnification Corp. v Continental Nat. Am. Group Co.*, 35 NY2d 260, 360 NYS2d 859, 319

NE2d 182 (1974). The strong public policy expressed in VTL § 388 that a person injured in an auto accident should have recourse to a solvent defendant typically precludes restrictions on the use of leased vehicles, *Allstate Ins. Co. v Dailey*, 47 AD2d 375, 367 NYS2d 87 (2d Dept 1975), *aff'd*, 39 NY2d 759, 384 NYS2d 776, 349 NE2d 876 (1976); *Davis v Hall*, 233 AD2d 906, 649 NYS2d 546 (4th Dept 1996); *Cooperman v Ferrentino*, 37 AD2d 474, 326 NYS2d 675 (2d Dept 1971); see *Conte v Aprea*, 23 AD3d 225, 803 NYS2d 557 (1st Dept 2005); see also *Carlson v American Intern. Group, Inc.*, 30 NY3d 288, 67 NYS3d 100, 89 NE3d 490 (2017). Unlike restrictions placed on the use of an individual's vehicle, the Court of Appeals has reasoned that restrictions by car rental agencies on their vehicles implicate more serious concerns as they affect the use of a large number of vehicles on the road over potentially long time periods, *Murdza v Zimmerman*, 99 NY2d 375, 756 NYS2d 505, 786 NE2d 440 (2003); see *Carlson v American Intern. Group, Inc.*, *supra*. Nevertheless, a restriction on or a condition of use of a vehicle in a lease agreement which is breached by the driver may serve to relieve the lessor of liability under VTL § 388 where the violated restriction, use of vehicle as a gypsy cab, is both reasonable and realistic, *Hannibal v Kimbeni*, 289 AD2d 446, 735 NYS2d 567 (2d Dept 2001). In *Conte v Aprea*, *supra*, a restriction precluding unlicensed drivers from operating the leased vehicle is not breached where the driver's license was suspended for failing to pay a traffic ticket and neither the owner nor driver knew of the suspension at the time of the accident.

PJI 2:248. Liability for the Conduct of Another—Owner of Vehicle, for Acts of Operator—Limitation on Use—Manner of Operation

In granting permission for the use of (his, her) vehicle, an owner may place restrictions on such use, but violation of restrictions as to the manner of operation of the vehicle resulting in injury will not relieve an owner from responsibility.

Comment

Based on *Leotta v Plessinger*, 8 NY2d 449, 209 NYS2d 304, 171 NE2d 454 (1960); *Arcara v Moresse*, 258 NY 211, 179 NE 389 (1932); see *Murdza v Zimmerman*, 99 NY2d 375, 756 NYS2d 505, 786 NE2d 440 (2003); see also *Hinchey v Sellers*, 7 NY2d 287, 197 NYS2d 129, 165 NE2d 156 (1959); 8B NYJur2d, *Automobiles and Other Vehicles* § 1069. This charge should be used in conjunction with PJI 1:63 and 2:245 where appropriate.

The restrictions as to time, place, and permitted use of the vehicle, which restrictions relieve the owner from liability if violated by the user, are to be distinguished from "limiting instructions which relate to the manner of operation, such as speeding or careless pilotage of the car," for which the owner is still held accountable if violated by the

user, *Leotta v Plessinger*, 8 NY2d 449, 209 NYS2d 304, 171 NE2d 454 (1960); see *Williams v J. Luke Construction Co., LLC*, 172 AD3d 1509, 99 NYS3d 460 (3d Dept 2019).

(3) USE OR OPERATION

PJI 2:249. Liability for the Conduct of Another—Owner of Vehicle, for Acts of Operator—Use or Operation

Under the statute an owner may be held liable for injuries resulting from negligence in the use or operation of the vehicle by a person using or operating it with the owner's permission. It is not necessary that the person to whom the owner granted permission be actually operating the vehicle; if such person is present in the vehicle while it is being operated by someone else, he or she is using it with the owner's permission, and the owner will be liable for any injury caused by the driver's negligence. [*Where the accident occurred from loading or unloading the vehicle, the following should be charged:* In addition, a vehicle's owner can be liable for injuries resulting from loading and unloading the vehicle, provided the owner has given permission to use or operate the vehicle.]

Comment

The charge is based upon *Moore v Leaseway Transp. Corp.*, 49 NY2d 720, 426 NYS2d 259, 402 NE2d 1160 (1980) (citing PJI); *Arcara v Moresse*, 258 NY 211, 179 NE 389 (1932); *Williams v Monk*, 33 AD2d 699, 306 NYS2d 188 (2d Dept 1969) (citing PJI); see *Argentina v Emery World Wide Delivery Corp.*, 93 NY2d 554, 693 NYS2d 493, 715 NE2d 495 (1999) (for a portion of charge resulting or portion of charge pertaining to loading and unloading vehicle); see also 7A Am Jur 2d (Rev.) 913, *Automobiles and Highway Traffic* § 680; 8B NYJur2d, *Automobiles and Other Vehicles* § 1075; Annot: 74 ALR3d 739; see *Schrader v Carney*, 180 AD2d 200, 586 NYS2d 687 (4th Dept 1992). This charge should be used in conjunction with PJI 1:63 and 2:245 where appropriate.

The statute referred to is VTL § 388, subd 1. Until July 1, 1958 the predecessor statutes (VTL § 59, Highway Law § 282-e) made the owner of a vehicle "operated upon a public highway" responsible only for "negligence in operation" of the vehicle "by any person legally using or operating the same." On recommendation of the Law Revision Commission, 1958 Report, Recommendations and Studies, 587 ff, the statute was amended to provide that the owner of a vehicle "used or operated in this state" is responsible for "negligence in the use or operation" of the vehicle "by any person using or operating the same" with the owner's permission, see *Argentina v Emery World Wide Delivery Corp.*, 93 NY2d 554, 693 NYS2d 493, 715 NE2d 495 (1999). No change in language was made when VTL § 59 became VTL § 388, subd 1.

Because VTL § 388 refers to use or operation “in this state,” it is applicable to an out-of-state owner whose vehicle is in an accident within this state, *Harrison v Malcolm*, 186 AD2d 502, 589 NYS2d 865 (1st Dept 1992); *Lovetere v Stackhouse*, 25 AD2d 628, 267 NYS2d 758 (1st Dept 1966), but not to a New York owner whose vehicle is involved in an accident outside the state, *Selles v Smith*, 4 NY2d 412, 176 NYS2d 267, 151 NE2d 838 (1958); *Fornaro v Jill Bros., Inc.*, 22 AD2d 695, 253 NYS2d 771 (2d Dept 1964), *aff’d*, 15 NY2d 819, 257 NYS2d 938, 205 NE2d 862 (1965), unless New York’s contacts with the accident are sufficient to warrant application of New York law, *Farber v Smolack*, 20 NY2d 198, 282 NYS2d 248, 229 NE2d 36 (1967). As to choice of law in automobile accident litigation, see generally *Edwards v Erie Coach Lines Co.*, 17 NY3d 306, 929 NYS2d 41, 952 NE2d 1033 (2011); *Croft v National Car Rental*, 56 NY2d 989, 453 NYS2d 631, 439 NE2d 346 (1982); *Neumeier v Kuehner*, 31 NY2d 121, 335 NYS2d 64, 286 NE2d 454 (1972).

The words “use or operation” are not limited to the physical act of steering the vehicle. In *Arcara v Moresse*, 258 NY 211, 179 NE 389 (1932), defendant loaned his car to a nephew with direction that no one else should drive it. A collision occurred while the vehicle was being driven by a third person, although the nephew was riding in it. The owner disclaimed liability. The Court held that although an owner loaning a car may restrict the uses to which it may be put, if the limiting instructions relate to the manner of operation, the use is still with the permission of the owner even though the instructions were disobeyed. The fact that an unauthorized person was driving related to the operation of the car, not to the use which might be made of it, and the nephew was “using” the car with the “permission” of the owner. “[I]f the legal user at the time be present in the car, still ‘the director of the enterprise,’ still ‘the master of the ship’ the operation of the car is his operation, though the hands on the wheel are those of a substitute, and the negligent driving will bind the owner, with whose permission the car is used” (258 NY at 215).

VTL § 388 has not been limited to situations where a vehicle is in motion, *Argentina v Emery World Wide Delivery Corp.*, 93 NY2d 554, 693 NYS2d 493, 715 NE2d 495 (1999). Thus, in *Argentina v Emery World Wide Delivery Corp.*, *supra* the Court held that a plaintiff who was injured while unloading a truck can recover damages from a truck’s owner pursuant to the statute. However, mere “preparatory and preliminary activity” antecedent to loading or unloading of a vehicle falls outside VTL § 388, *Argentina v Emery World Wide Delivery Corp.*, *supra*, note 1; *Frontuto v Ray Burgun Trucking Co., Inc.*, 78 NY2d 938, 573 NYS2d 634, 578 NE2d 432 (1991). Any act in the exercise of control, use, or operation of the vehicle will constitute use or operation within the meaning of VTL § 388. Thus, in *Guadagno v H. S. Trucking*, 29 AD2d 979, 289 NYS2d 691 (2d Dept 1968), the owner was held liable for injuries resulting from improper loading by the lessee’s employees, and in *Eckert v G.B. Farrington Co.*, 262 App Div 9, 27 NYS2d 343 (4th Dept 1941), *aff’d*, 287 NY 714, 39 NE2d 932 (1942), when the owner’s

employee failed to protect a person who was helping him fix a tire on the highway.

The words "use or operation" have been given a similarly broad interpretation in the context of VTL § 253 (providing for service on a non-resident by serving the Secretary of State); see *Aranzullo v Collins Packing Co.*, 18 AD2d 1068, 239 NYS2d 398 (1st Dept 1963), *aff'd*, 14 NY2d 578, 248 NYS2d 874, 198 NE2d 255 (1964); *Wahler v Thompson*, 36 Misc2d 847, 234 NYS2d 105 (Sup 1962), *rev'd* on other grounds, 26 AD2d 895, 274 NYS2d 862 (4th Dept 1966).

When vehicles are used in combination by attachment or tow, the person using or operating any one of the vehicles is deemed to be using or operating each vehicle in the combination, and both owners will be liable for any negligence in their use or operation, VTL § 388(1); *Travelers Ins. Co. v General Acc., Fire & Life Assur. Corp.*, 28 NY2d 458, 322 NYS2d 704, 271 NE2d 542 (1971); *Mount Vernon Fire Ins. Co. v Travelers Indem. Co.*, 63 AD2d 254, 407 NYS2d 23 (1st Dept 1978), *aff'd*, 47 NY2d 575, 419 NYS2d 899, 393 NE2d 974 (1979); 8B NYJur2d, *Automobiles and Other Vehicles*, § 1079. However, the owner of an attached or towed vehicle who was held liable under the statute to a third person has a claim over against the owner of the towing vehicle, *Mondelli v Harrison Hub, Bed & Spring Co.*, 10 Misc2d 883, 172 NYS2d 931 (NY City Ct 1958); see *Employers Mut. Liability Ins. Co. of Wis. v Indemnity Ins. Co. of North America*, 37 Misc2d 421, 234 NYS2d 839 (Sup 1962). The negligence of the driver of the tractor will not be imputed to the owner of the trailer in a property damage action against a motorist who collides with the tractor, *George W. Brown, Inc. v Pipe Welding Supply, Inc.*, 26 AD2d 855, 274 NYS2d 41 (3d Dept 1966). Vicarious liability is not imposed on owners of fire and police vehicles, self-propelled combines, self-propelled corn and harvesting machines, and tractors used exclusively for agricultural purposes, VTL § 388(2); see *Guevara v Ortega*, 136 AD3d 508, 26 NYS3d 12 (1st Dept 2016); *Palmer v Rouse*, 198 AD2d 629, 603 NYS2d 628 (3d Dept 1993). The owner of a police vehicle is not subject to vicarious liability, regardless of whether the vehicle was being operated by a member of the police department at the time of the accident, *Guevara v Ortega*, *supra*. The owner of a farm tractor that is not used exclusively for agricultural purposes and has incidental uses is neither exempt from the obligation to maintain adequate insurance nor excepted from the vicarious liability imposed by Vehicle & Traffic Law § 388, *Palmer v Rouse*, 232 AD2d 909, 649 NYS2d 76 (3d Dept 1996).

(4) CONTRIBUTORY NEGLIGENCE NOT IMPUTED

PJI 2:250. Liability for the Conduct of Another—Owner of Vehicle, for Acts of Operator—Contributory Fault Not Imputed

I have already instructed you that a vehicle owner who is sued as a defendant may, under certain circumstances, be held responsible for the negligence of the driver of the vehicle. However, the principle that the owner may be held responsible for the negligence of the driver does not apply to the owner's own lawsuit to recover for (personal injuries, property damage) sustained by the owner. The owner may recover for (personal injuries, property damages), even though negligence of the driver of the vehicle may have contributed to bringing about (the accident, injury, [*or other appropriate characterization of the event*]). The negligence of the driver, if any, has no effect on whether the owner may recover for (personal injuries, property damages).

Comment

Based on *Kalechman v Drew Auto Rental, Inc.*, 33 NY2d 397, 353 NYS2d 414, 308 NE2d 886 (1973); *Mikelinich v Caliandro*, 87 AD3d 99, 927 NYS2d 128 (2d Dept 2011) (ATV) (citing PJI); *Holt v Nesbit*, 110 AD2d 1039, 488 NYS2d 898 (4th Dept 1985); *Moxon v Barbour*, 106 AD2d 558, 483 NYS2d 73 (2d Dept 1984); *State v Popricki*, 89 AD2d 391, 456 NYS2d 850 (3d Dept 1982); *Smalley v Associated Transport, Inc.*, 52 AD2d 979, 383 NYS2d 108 (3d Dept 1976).

Kalechman v Drew Auto Rental, Inc., 33 NY2d 397, 353 NYS2d 414, 308 NE2d 886 (1973), overruled the doctrine established by *Gochee v Wagner*, 257 NY 344, 178 NE 553 (1931), which provided that contributory negligence of the driver of vehicle would be imputed to an owner present in the vehicle and, thereby preclude the owner from recovery from a third person (but not the driver); *Mikelinich v Caliandro*, 87 AD3d 99, 927 NYS2d 128 (2d Dept 2011). Prior to *Kalechman*, the contributory negligence of the driver was also imputed to an absentee owner, except in an action by the absentee owner to recover for property damage to the vehicle, *Mills v Gabriel*, 284 NY 755, 31 NE2d 512 (1940); see *Continental Auto Lease Corp. v Campbell*, 19 NY2d 350, 280 NYS2d 123, 227 NE2d 28 (1967); *Mikelinich v Caliandro*, *supra*.

Kalechman establishes that an owner, including one present in the vehicle, is to be allowed "to recover for negligent operation of the vehi-

cle—no matter what his relationship to the driver may be—unless it is shown that his own personal negligence contributed to the injury,” 33 NY2d at 405. Accordingly, the negligence of the driver is not imputed to the owner for purposes of precluding or reducing any recovery by owner for personal injuries or property damage, see *Mikelinich v Caliandro*, 87 AD3d 99, 927 NYS2d 128 (2d Dept 2011). That principle applies even where the injured plaintiff is the owner of the vehicle who was in the passenger seat at the time of the accident, *Schuyler v Perry*, 69 AD3d 33, 886 NYS2d 228 (2d Dept 2009) (citing PJI). Likewise, the driver’s fault is not to be imputed even where the owner is the employer of the driver of the vehicle, *Holt v Nesbit*, 110 AD2d 1039, 488 NYS2d 898 (4th Dept 1985); see *Kalechman v Drew Auto Rental, Inc.*, 33 NY2d 397, 353 NYS2d 414, 308 NE2d 886 (1973).

Note, however, that the above charge deals only with the imputation of contributory fault to the owner. An owner is responsible to others for negligence of one who uses the vehicle with the owner’s permission, see PJI 2:245. Further note that the jury will be required to apportion fault for purposes of determining claims of comparative fault and contribution, see CPLR Article 14; PJI 2:275. Since CPLR Article 16 does not apply where the action is based on defendant’s use or ownership of a motor vehicle, an owner whose driver is negligent may obtain a full recovery against the owner or driver of the other vehicle.

(5) UNATTENDED VEHICLE

PJI 2:251. Liability for the Conduct of Another—Owner of Stolen Vehicle—Keys Left in Ignition

The automobile which (struck, collided) with plaintiff had been stolen. Plaintiff claims that defendant is liable for the injuries (he, she) sustained as a result of that collision because (defendant, person driving with defendant's permission) negligently left the keys in the ignition switch of defendant's automobile when (he, she) parked it.

Section 1210 of the Vehicle and Traffic Law provides:

"Unattended Motor Vehicle.

(a) No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the vehicle . . . provided, however, the provision for removing the key from the vehicle shall not require the removal of keys hidden from sight about the vehicle for convenience or emergency."

A violation of the Vehicle and Traffic Law constitutes negligence.

In order to recover in this lawsuit, plaintiff has the burden of proving:

(1) that (defendant, person driving with defendant's permission) was negligent in that (he, she) left the defendant's automobile unattended without (removing, concealing the ignition key), and

(2) that such negligence was a substantial factor in bringing about (the accident, injury, [*or other appropriate characterization of the event*]).

Comment

Based on VTL § 1210; *Johnson v Manhattan & Bronx Surface*

Transit Operating Authority, 71 NY2d 198, 524 NYS2d 415, 519 NE2d 326 (1988); *Epstein v Mediterranean Motors, Inc.*, 109 AD2d 340, 491 NYS2d 391 (2d Dept 1985), *aff'd*, 66 NY2d 1018, 499 NYS2d 397, 489 NE2d 1299 (1985); *Guaspari v Gorsky*, 36 AD2d 225, 319 NYS2d 708 (4th Dept 1971); *Annot*: 45 ALR3d 787; 6A Warren's N.Y. Negligence, § 105.

For a charge on proximate cause, see PJI 2:70.

At common law, the owner of a stolen vehicle was not liable for injuries caused by the thief, *Epstein v Mediterranean Motors, Inc.*, 109 AD2d 340, 491 NYS2d 391 (2d Dept 1985), *aff'd*, 66 NY2d 1018, 499 NYS2d 397, 489 NE2d 1299 (1985). However, a "person driving or in charge of a motor vehicle" who, without hiding the keys from sight, permits the vehicle "to stand unattended without first stopping the engine, locking the ignition, removing the key from the vehicle" in violation of VTL § 1210(a) may be liable in negligence if his or her violation was a substantial factor in the plaintiff's injuries, *Merchants Ins. Group v Haskins*, 11 AD3d 694, 783 NYS2d 400 (2d Dept 2004). Liability may also be imposed on the vehicle's owner if the statute was violated by a person operating the vehicle with the owner's unrestricted permission, *id.*

Section 1210 of the Vehicle and Traffic Law applies to vehicles "upon public highways, private roads open to public motor vehicle traffic and any other parking lot," VTL § 1100(a). As a result, if the vehicle is stolen from a private garage, *Epstein v Mediterranean Motors, Inc.*, 109 AD2d 340, 491 NYS2d 391 (2d Dept 1985), *aff'd*, 66 NY2d 1018, 499 NYS2d 397, 489 NE2d 1299 (1985), or a driveway, *Albouyeh v Suffolk*, 62 NY2d 681, 476 NYS2d 522, 465 NE2d 29 (1984); *Koenig v Price*, 200 AD2d 559, 606 NYS2d 310 (2d Dept 1994), the owner will not be subject to liability under the statute. Prior to the 1984 amendment of VTL § 1100, the "keys in ignition" statute did not apply to vehicles taken from parking lots, *Katz v Goodyear Tire & Rubber Co.*, 143 AD2d 639, 533 NYS2d 111 (2d Dept 1988). Earlier cases exempting owners from responsibility because the vehicle was taken from a parking lot, *Berk v Hill*, 126 AD2d 920, 511 NYS2d 186 (3d Dept 1987); *Zwerdling v Gillis*, 99 AD2d 564, 470 NYS2d 952 (3d Dept 1984); *Podstupka v Brannon*, 81 Misc2d 338, 365 NYS2d 670 (Sup 1975), *aff'd*, 54 AD2d 692, 387 NYS2d 544 (2d Dept 1976), are no longer controlling. VTL § 1100(a) does not apply to private areas limited to private use, *Surace v Kersten*, 278 AD2d 226, 717 NYS2d 283 (2d Dept 2000). Thus, a private parking area in a condominium development is not a "parking lot" under VTL §§ 129-b and 1210(a), *id.*

A defendant who testified that she did not leave her keys in the car on the day it was stolen was entitled to summary judgment because of the failure of plaintiff to meet the burden of coming forth with some proof of a violation of VTL § 1210, *Clay v Moss*, 186 AD2d 780, 589 NYS2d 80 (2d Dept 1992).

Whether a vehicle has been left unattended may be a jury question.

In *Brennan v New York*, 108 AD2d 834, 485 NYS2d 339 (2d Dept 1985), the driver of a sanitation truck left the motor running while he checked a malfunctioning hopper at the back, and in *Baginski v New York Telephone Co.*, 130 AD2d 362, 515 NYS2d 23 (1st Dept 1987), the driver of a van left the motor running while he checked the front wheels. In each case, the jury's finding that the vehicle was "unattended" was upheld. However, in *Simon v El Service Corp.*, 85 AD2d 556, 452 NYS2d 407 (1st Dept 1981), where an adult remained in the vehicle when the driver exited it, and in *Carpenter v Miller*, 132 AD2d 859, 518 NYS2d 67 (3d Dept 1987), where the driver left her car at a gasoline station pump with an attendant nearby, they were not "unattended" under VTL § 1210.

The statute does not apply to emergency vehicles, *Cox v Kelly*, 131 AD2d 809, 517 NYS2d 174 (2d Dept 1987). Neither the thief, *Rushink v Gerstheimer*, 82 AD2d 944, 440 NYS2d 738 (3d Dept 1981), nor one who participated in the theft, *Mocciaro v Lopergolo*, 125 AD2d 974, 510 NYS2d 368 (4th Dept 1986), may seek the benefit of the statute, but an innocent passenger in the stolen vehicle may, *Howard v Kiskiel*, 152 AD2d 950, 544 NYS2d 91 (4th Dept 1989).

The statute specifically states that the ignition key may be left in or on the vehicle, provided it is not in plain view, *Banellis v Yackel*, 49 NY2d 882, 427 NYS2d 941, 405 NE2d 185 (1980); see *Manning by Manning v Brown*, 91 NY2d 116, 667 NYS2d 336, 689 NE2d 1382 (1997); Annot: 70 ALR4th 276 (key hidden under book lying on front seat). A parent who established as a matter of law that her keys were hidden from sight about the vehicle for convenience or emergency was not liable under the theory of negligent supervision to third parties injured by a child operating the motor vehicle absent a showing that the parent had knowledge of the child's propensity to use automobiles without permission, or to steal or borrow items the child was not authorized to use, *Gore v Mackie*, 278 AD2d 879, 718 NYS2d 762 (4th Dept 2000).

3. INDEPENDENT CONTRACTOR

Introductory Statement

The general rule is that an employer who hires an independent contractor is not liable for the negligent acts of the independent contractor or of the contractor's employees, since such employers ordinarily do not control the manner in which independent contractors perform their work, *Brothers v New York State Elec. and Gas Corp.*, 11 NY3d 251, 869 NYS2d 356, 898 NE2d 539 (2008); *Chainani by Chainani v Board of Educ. of City of New York*, 87 NY2d 370, 639 NYS2d 971, 663 NE2d 283 (1995); *Feliberty v Damon*, 72 NY2d 112, 531 NYS2d 778, 527 NE2d 261 (1988); *McDonald v Shell Oil Co.*, 20 NY2d 160, 281 NYS2d 1002, 228 NE2d 899 (1967); *Mery v Eginger*, 149 AD3d 827, 49 NYS3d 905 (2d Dept 2017), *aff'd*, 31 NY3d 1068, 78 NYS3d 266, 102 NE3d 1048 (2018); *WFE Ventures, Inc. v GBD Lake Placid, LLC*, 197 AD3d 824, 153 NYS3d 214 (3d Dept 2021). Whether an individual is an independent contractor or employee must be determined on an ad hoc basis, see *Matter of Want Ad Digest, Inc.*, 105 AD2d 895, 482 NYS2d 360 (3d Dept 1984), and typically involves a question of fact as to who controls the methods and means by which the work is done, see *Claim of Rivera*, 69 NY2d 679, 512 NYS2d 14, 504 NE2d 381 (1986); *WFE Ventures, Inc. v GBD Lake Placid, LLC*, *supra*; *Stevens v Spec Inc.*, 224 AD2d 811, 637 NYS2d 979 (3d Dept 1996). The general rule is subject to numerous exceptions, such that it has been observed that the general rule "is now primarily important as a preamble to the catalog of its exceptions," *Kleeman v Rheingold*, 81 NY2d 270, 598 NYS2d 149, 614 NE2d 712 (1993); see *Brothers v New York State Elec. and Gas Corp.*, *supra*; *Mery v Eginger*, *supra*.

The Kleeman Court stated that the exceptions fall roughly into three basic categories: (1) negligence of the employer in selecting, *Bryant v Presbyterian Hospital in City of New York*, 304 NY 538, 110 NE2d 391 (1953); PJI 2:258, instructing or supervising the contractor, *Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55, 604 NE2d 117 (1992); PJI 2:257; (2) employment for work that is inherently or abnormally dangerous, *Rosenberg v Equitable Life Assur. Soc. of U.S.*, 79 NY2d 663, 584 NYS2d 765, 595 NE2d 840 (1992); PJI 2:256 and (3) instances in which the employer is under a specific non-delegable duty, *Brothers v New York State Elec. and Gas Corp.*, 11 NY3d 251, 869 NYS2d 356, 898 NE2d 539 (2008); *Kleeman v Rheingold*, 81 NY2d 270, 598 NYS2d 149, 614 NE2d 712 (1993); PJI 2:216A, 2:217; see *Lanza v B.H.N.V. Realty Corp.*, 201 AD3d 468, 160 NYS3d 234 (1st Dept 2022) (store owner may be vicariously liable for its exterminator's negligence based upon non-delegable duty to maintain its store in reasonably safe condition); *Pesante v Vertical Indus. Development Corp.*, 29 NY3d 983, 53 NYS3d 249, 75 NE3d 666 (2017) (nondelegable duty to keep premises safe), *affg* 142 AD3d 656, 36 NYS3d 716 (2d Dept 2016); *Mery v Eginger*, 149 AD3d 827, 49 NYS3d 905 (2d Dept 2017) (church did not have nondelegable duty to mow lawn), *aff'd* 31 NY3d 1068, 78 NYS3d 266, 102 NE3d 1048 (2018); *Nelson v E&M 2710 Clarendon LLC*, 129 AD3d 568, 12 NYS3d 51 (1st

Dept 2015) (nondelegable duty imposed by Multiple Dwelling Law § 78 to maintain premises in reasonably safe condition inapplicable where accident occurred as result of means and methods of work, not due to condition of premises); *Begley v New York*, 111 AD3d 5, 972 NYS2d 48 (2d Dept 2013) (school district did not have nondelegable duty to provide non-negligent nursing services to student with medical problems who was placed out of the district; consequently, home district not vicariously liable for actions of nurse hired as independent contractor); *Hosmer v Kubricky Const. Corp.*, 88 AD3d 1234, 931 NYS2d 738 (3d Dept 2011) (dam owners have nondelegable statutory duty to operate and maintain dam in safe condition); *Ortiz v Nunez*, 32 AD3d 759, 821 NYS2d 185 (1st Dept 2006) (one undertaking work on public highway has nondelegable duty to avoid creating conditions dangerous to users); *Emmons v New York*, 283 AD2d 244, 725 NYS2d 29 (1st Dept 2001). A nondelegable duty has been described as one that the employer is not free to delegate to a contractor, *Feliberty v Damon*, 72 NY2d 112, 531 NYS2d 778, 527 NE2d 261 (1988). Whether a duty is nondelegable turns on policy considerations, *id.* The doctrine is invoked when “the responsibility is so important to the community that the employer should not be permitted to transfer it to another,” *id.* For some examples of when a nondelegable duty has been found, see *id.*

The exceptions were described in somewhat different terms in *Rosenberg v Equitable Life Assur. Soc. of U.S.*, 79 NY2d 663, 584 NYS2d 765, 595 NE2d 840 (1992) and in *Hesch v Seavey*, 188 AD2d 808, 591 NYS2d 546 (3d Dept 1992); see *Parsons v New York*, 195 AD2d 282, 599 NYS2d 594 (1st Dept 1993). Additional exceptions have been found: (1) when services are accepted in the reasonable belief that they are being rendered by the hirer, *Hill v St. Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904, 490 NE2d 823 (1986) (citing PJI); *Miles v R & M Appliance Sales, Inc.*, 26 NY2d 451, 311 NYS2d 491, 259 NE2d 913 (1970); *Citron v Northern Dutchess Hosp.*, 198 AD2d 618, 603 NYS2d 639 (3d Dept 1993); *Noble v Porter*, 188 AD2d 1066, 591 NYS2d 669 (4th Dept 1992); see *Taylor v Point at Saranac Lake, Inc.*, 135 AD3d 1147, 23 NYS3d 682 (3d Dept 2016); *Brink v Muller*, 86 AD3d 894, 927 NYS2d 719 (3d Dept 2011), and (2) where the hirer is on notice of a dangerous condition negligently created by the independent contractor and has a reasonable amount of time in which to remedy the condition but fails to do so, *Magrum v Dee Dee's A Tavern, Inc.*, 12 AD3d 825, 784 NYS2d 670 (3d Dept 2004).

Despite the foregoing formulations, no clearly defined criteria exist for determining when vicarious liability should be imposed for the negligence of an independent contractor, *Brothers v New York State Elec. and Gas Corp.*, 11 NY3d 251, 869 NYS2d 356, 898 NE2d 539 (2008); *Kleeman v Rheingold*, 81 NY2d 270, 598 NYS2d 149, 614 NE2d 712 (1993); *Hosmer v Kubricky Const. Corp.*, 88 AD3d 1234, 931 NYS2d 738 (3d Dept 2011). Rather, “‘a *sui generis* inquiry’” must be conducted, since “‘the conclusion ultimately rests on policy considerations,’” *Brothers v New York State Elec. and Gas Corp.*, *supra* (quoting *Kleeman v Rheingold*, *supra*); *Hosmer v Kubricky Const. Corp.*, *supra*. Applying

the relevant policy considerations, the Court held in *Brothers v New York State Elec. and Gas Corp.*, supra, that a safety provision in an annual work permit issued pursuant to Highway Law § 52 was not sufficient to impose vicarious liability on the permittee for injuries resulting from the unsafe conduct of its hired contractor. While it left open the question whether such a permit provision constitutes a contract, the *Brothers* Court held that the permit, even if viewed as a contractual obligation, did not give rise to a nondelegable duty in tort.

Whether one of the exceptions is applicable is usually a question of law for the court, *Chainani by Chainani v Board of Educ. of City of New York*, 87 NY2d 370, 639 NYS2d 971, 663 NE2d 283 (1995); *Kleeman v Rheingold*, 81 NY2d 270, 598 NYS2d 149, 614 NE2d 712 (1993); *Rosenberg v Equitable Life Assur. Soc. of U.S.*, 79 NY2d 663, 584 NYS2d 765, 595 NE2d 840 (1992); *Hesch v Seavey*, 188 AD2d 808, 591 NYS2d 546 (3d Dept 1992). A factual issue may be presented as to whether the work was inherently dangerous, *Wright v Tudor City Twelfth Unit*, 276 NY 303, 12 NE2d 307 (1938), or whether the plaintiff could have reasonably believed that the services were being provided by the hirer, *Noble v Porter*, 188 AD2d 1066, 591 NYS2d 669 (4th Dept 1992); see *Taylor v Point at Saranac Lake, Inc.*, 135 AD3d 1147, 23 NYS3d 682 (3d Dept 2016); *Lewis v Manis*, 266 AD2d 844, 697 NYS2d 428 (4th Dept 1999); *Citron v Northern Dutchess Hosp.*, 198 AD2d 618, 603 NYS2d 639 (3d Dept 1993), or whether the hirer negligently supervised the contractor's performance, *Houde v Barton*, 202 AD2d 890, 609 NYS2d 411 (3d Dept 1994); *Davies v Contel of New York Inc.*, 187 AD2d 898, 590 NYS2d 307 (3d Dept 1992). The fact that a limited power of supervision is retained for the purpose of seeing that the work is properly performed is not sufficient to render the hirer liable for the negligence of the contractor, *Santella v Andrews*, 266 AD2d 62, 698 NYS2d 631 (1st Dept 1999) (despite general supervisory powers, newspaper distributor not liable for negligence of deliverer of newspapers); *Davies v Contel of New York Inc.*, supra; *Horn v State*, 31 AD2d 364, 297 NYS2d 795 (3d Dept 1969); but see *Shaheen v International Business Machines Corp.*, 157 AD2d 429, 557 NYS2d 972 (3d Dept 1990). A factual issue may arise as to whether a particular detail was delegated, *Hooey v Airport Const. Co.*, 253 NY 486, 171 NE 752 (1930).

Even if the work has been delegated to an independent contractor, the hirer may be held liable for claims arising from alleged defects or damages resulting from the contractor's methods or materials if the hirer has actual or constructive notice that the contractor is performing the work in a dangerous manner, *Rosenberg v Schwartz*, 260 NY 162, 183 NE 282 (1932) and has retained or exercised some supervisory control over the work operation, *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993); *Rapp v Zandri Const. Corp.*, 165 AD2d 639, 569 NYS2d 994 (3d Dept 1991); see *Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 609 NYS2d 168, 631 NE2d 110 (1993). However, the retention of general supervisory powers over an independent contractor cannot alone form a basis for the imposition of liability against the contractor's employer, *Goodwin v Comcast Corp.*, 42 AD3d 322, 840 NYS2d 781 (1st Dept 2007).

The exception for activities within the employer's nondelegable duties applies to the duty of landowners to provide reasonably safe means of ingress and egress, *Backiel v Citibank, N.A.*, 299 AD2d 504, 751 NYS2d 492 (2d Dept 2002). Moreover, a landowner may be liable to an employee of the independent contractor whose negligent activities caused injury if the employee's duties did not include those activities, *id.*

The rule and exceptions governing vicarious liability of a hirer of an independent contractor apply also for a general contractor who engages a subcontractor, *Gravelle v Norman*, 75 N.Y.2d 779, 552 N.Y.S.2d 86, 551 N.E.2d 579 (1989); *Broderick v Cauldwell-Wingate Co.*, 301 NY 182, 93 NE2d 629 (1950); *Rapp v Zandri Const. Corp.*, 165 AD2d 639, 569 NYS2d 994 (3d Dept 1991).

**PJI 2:255. Liability for the Conduct of Another—
Independent Contractor—General Rule**

If you find that the plaintiff is entitled to recover from defendant CD, you must then decide whether CD was defendant EF's employee or an independent contractor. If CD was EF's employee, EF is liable for CD's conduct; but if CD was an independent contractor, EF is not responsible for CD's acts.

Whether CD was EF's employee or an independent contractor is a question for you to decide after considering all the facts and circumstances of the case. An independent contractor is one who was hired to perform services for another, according to his or her own skill and judgment as to the manner or method of performance, free from the control and direction of the person for whom the services are being performed in all matters connected with the manner or method of performance, except as to when and where, in general, it should be done and the result or product of the work. In deciding whether CD was EF's employee or an independent contractor, you may consider the following factors [*use only such factors as are warranted by the evidence*]: (— was CD a skilled worker; was CD in business for (himself, herself), doing work for other persons in addition to CD; was (he, she) hired to perform a specific job for EF or was (he, she) to perform work generally over an indefinite

period; was the work such as to require skill and judgment; was CD paid by the job or on a time basis; who, if anybody, made unemployment insurance payments and carried Workers' Compensation insurance on CD; were deductions taken from amounts paid by EF to CD for withholding taxes and social security; who furnished the tools and materials and any additional workers required for the work; who determined the days and hours when work was to be done; who under the (contract, arrangement) between CD and EF was to decide, and who in fact made the decisions concerning the methods, means or procedures of accomplishing the work as distinct from what work there was to do or whether the final result of the work was satisfactory; did EF reserve the right to end the (contract, arrangement) at any time). No one of these factors is decisive, [*where there is a written contract add: nor is the written contract between CD and EF conclusive of the question*]. If, on consideration of the evidence as a whole, you find that CD was subject to the direction and control of EF as to the manner or method of performing the work, your finding will be that (he, she) was an employee of EF. If, however, you find that CD was free from control or direction by EF as to the manner or method of performing the work, your finding will be that (he, she) was an independent contractor for whose conduct EF is not responsible.

Comment

[See also Introductory Statement preceding this Charge]

Based on *Mrachek v Sunshine Biscuit, Inc.*, 308 NY 116, 123 NE2d 801 (1954); *Matter of Morton*, 284 NY 167, 30 NE2d 369 (1940); *Beach v Velzy*, 238 NY 100, 143 NE 805 (1924); *Shapiro v Robinson*, 102 AD2d 822, 476 NYS2d 596 (2d Dept 1984), *aff'd*, 63 NY2d 896, 483 NYS2d 203, 472 NE2d 1031 (1984) (citing PJI); *Szabados v Quinn*, 156 AD2d 186, 548 NYS2d 442 (1st Dept 1989); *Galligan v St. Vincent's Hospital of City of New York*, 28 AD2d 592, 279 NYS2d 886 (3d Dept 1967); *Fidel Ass'n of New York v Miller*, 259 App Div 486, 20 NYS2d 381 (3d Dept 1940), *aff'd*, 287 NY 626, 39 NE2d 265 (1941); 3 NYJur2d Agency and Independent Contractors §§ 322–325. Although a number of the cited cases arose under the Workers' Compensation and Unemployment

Insurance laws, they are pertinent since the courts utilized the common law definition of independent contractor in applying those statutes. Whether one is an independent contractor or an employee depends on the presence or absence of various indicia, the most important of which is who has control over the manner in which the work was to be performed, *Matter of Morton*, *supra*; *Szabados v Quinn*, *supra*; see *Anderson v Oliver's Garage & Service Station, Inc.*, 186 AD2d 608, 588 NYS2d 604 (2d Dept 1992); *DeFeo v Frank Lambie, Inc.*, 146 AD2d 521, 536 NYS2d 459 (1st Dept 1989).

The question whether the actor is an independent contractor or employee is usually a factual issue for the jury, *Carrion v Orbit Messenger, Inc.*, 82 NY2d 742, 602 NYS2d 325, 621 NE2d 692 (1993); *Bratt v Midland Asphalt Corp.*, 8 NY2d 963, 204 NYS2d 191, 168 NE2d 855 (1960); *Johnson v R. T. K. Petroleum Co.*, 289 NY 101, 44 NE2d 6 (1942); *Shah v Lokhandwala*, 265 AD2d 396, 697 NYS2d 73 (2d Dept 1999); *Blincoe v Newsday, Inc.*, 26 AD2d 687, 272 NYS2d 452 (2d Dept 1966). However, where there is no conflict in the evidence, the question may properly be determined by the court as a matter of law, *Shapiro v Robinson*, 102 AD2d 822, 476 NYS2d 596 (2d Dept 1984), *aff'd*, 63 NY2d 896, 483 NYS2d 203, 472 NE2d 1031 (1984); *Berger v Dykstra*, 203 AD2d 754, 610 NYS2d 401 (3d Dept 1994); *Crage v Kissing Bridge Ski Area*, 186 AD2d 987, 588 NYS2d 449 (4th Dept 1992); *Conroy v Bevilacqua*, 179 AD2d 596, 579 NYS2d 655 (1st Dept 1992); *Sikes v Chevron Companies*, 173 AD2d 810, 571 NYS2d 43 (2d Dept 1991); *Swarts v Country Log Homes, Inc.*, 135 AD2d 807, 522 NYS2d 911 (2d Dept 1987); *Galligan v St. Vincent's Hospital of City of New York*, 28 AD2d 592, 279 NYS2d 886 (3d Dept 1967); see *Begley v New York*, 111 AD3d 5, 972 NYS2d 48 (2d Dept 2013). The terms of a contract between the actor and hirer is not determinative, *Matter of Morton*, 284 NY 167, 30 NE2d 369 (1940); *Shah v Lokhandwala*, *supra*; *Carrion v Orbit Messenger, Inc.*, 192 AD2d 366, 596 NYS2d 50 (1st Dept 1993), *aff'd*, 82 NY2d 742, 602 NYS2d 325, 621 NE2d 692 (1993).

The general rule that a party who retains an independent contractor, as distinguished from an employee, has no liability for the independent contractor's negligent acts is based upon the premise that one who employs an independent contractor has no right to control the manner in which the work is to be done and, thus, the risk of loss is placed on the contractor, *Kleeman v Rheingold*, 81 NY2d 270, 598 NYS2d 149, 614 NE2d 712 (1993); *Weinfeld v HR Photography, Inc.*, 149 AD3d 1014, 52 NYS3d 458 (2d Dept 2017); *Goodwin v Comcast Corp.*, 42 AD3d 322, 840 NYS2d 781 (1st Dept 2007); *Berger v Dykstra*, 203 AD2d 754, 610 NYS2d 401 (3d Dept 1994). Control of the method and means by which the work is to be done, therefore, is a critical factor in determining whether one is an independent contractor or an employee for the purposes of tort liability, *Berger v Dykstra*, *supra*; see *Willis v New York*, 266 AD2d 208, 697 NYS2d 311 (2d Dept 1999). However, the retention of general supervisory powers over an independent contractor cannot alone form a basis for the imposition of liability against the contractor's employer, *Goodwin v Comcast Corp.*, *supra*; see *Weinfeld v HR Photography, Inc.*, *supra*.

When a salesperson is involved, factors such as ownership of the vehicle used; who had title to the merchandise sold; who controlled the price at which sales were made; who extended credit to the customers; who determined the terms of the sales contract; and who fixed the route or territory, are relevant, *Matter of Electrolux Corporation*, 288 NY 440, 43 NE2d 480 (1942); *Regan v Bellows*, 11 AD2d 586, 200 NYS2d 575 (3d Dept 1960). In *Shah v Lokhandwala*, 265 AD2d 396, 697 NYS2d 73 (2d Dept 1999), the contract between the real estate agent and the principal designated the agent as an independent contractor but the Court found that this was not dispositive given the evidence that the principal's agents were required to work exclusively for the principal, to attend weekly sales meetings, to use only business cards bearing the principal's name, to comply with the principal's dress code and other office procedures and to keep the principal's office manager apprised of all transactions.

The party asserting the existence of an employer-employee relationship has the burden of proof on that issue, *Shapiro v Robinson*, 63 NY2d 896, 483 NYS2d 203, 472 NE2d 1031 (1984). But one who holds out an independent contractor to be its agent or employee may be estopped from asserting the independent contractor status if the person injured had relied on that representation, *Hill v St. Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904, 490 NE2d 823 (1986); *Miles v R & M Appliance Sales, Inc.*, 26 NY2d 451, 311 NYS2d 491, 259 NE2d 913 (1970).

**PJI 2:256. Liability for the Conduct of Another—
Independent Contractor—Danger Inherent in
the Work**

If you find that plaintiff AB is entitled to recover from defendant CD, you must then determine whether defendant EF is also liable for plaintiff's injuries. While generally one who hires an independent contractor is not responsible for the acts of the contractor or the contractor's employees, an exception to that rule exists when danger to others is inherent in the work and the hirer reasonably should have anticipated from the nature of the work that it would be dangerous to others. By danger inherent in the work is meant danger that arises out of the normal performance of the work as distinct from danger arising out of the unusual manner in which the work is done. Whether EF reasonably should have anticipated that the normal performance of the work would be dangerous to others depends on whether a reasonably prudent person would have anticipated that danger under the circumstances.

[State facts giving rise to action, such as]: (The parties agree that plaintiff was injured when a window cleaning brush fell on him as he was walking along the sidewalk in front of a building owned by EF, that CD was an independent contractor hired by EF to wash the windows of the building, and that the brush was dropped by one of CD's employees). In determining whether there was danger for passersby inherent in the work, you may consider (the height of the windows on which CD's employee was assigned to work and the location of those windows with respect to the sidewalk, the time of day the work was usually done), and all of the other circumstances existing at the time and place of the occurrence. If you find that there was danger to passersby inherent in the normal performance of the work CD was hired to do, that a reasonably prudent person would have anticipated that danger under the circumstances, and that at the time plaintiff was injured, CD's employee was performing the work by a method that EF should reasonably have anticipated (he, she) would use, then AB would be entitled to a verdict against both CD and EF. If, however, you find that danger to passersby was not inherent in the normal performance of the work CD was hired to do, or that a reasonably prudent person would not have anticipated danger to passersby from the normal performance of the work, or that CD adopted a method of performance that would not have been anticipated by a reasonably prudent person, then AB would be entitled to a verdict against CD only.

Comment

[See Introductory Statement Preceding PJI 2:255]

Based on *Rosenberg v Equitable Life Assur. Soc. of U.S.*, 79 NY2d 663, 584 NYS2d 765, 595 NE2d 840 (1992); *Wright v Tudor City Twelfth Unit*, 276 NY 303, 12 NE2d 307 (1938); *Rohlf v Weil*, 271 NY 444, 3 NE2d 588 (1936); *Kammerman v 170 St. Pharmacy, Inc.*, 269 App Div 430, 55 NYS2d 673 (1st Dept 1945), *aff'd*, 295 NY 631, 64 NE2d 655 (1945); *Vaniglia v Northgate Homes*, 106 AD2d 384, 482 NYS2d 299 (2d Dept 1984); *Kojic v New York*, 76 AD2d 828, 428 NYS2d 305 (2d Dept

1980) (citing PJI); *Horn v State*, 31 AD2d 364, 297 NYS2d 795 (3d Dept 1969) (citing PJI); *Hildebrand v Kazmierczak*, 25 AD2d 603, 267 NYS2d 604 (4th Dept 1966) (citing PJI); *Krauthamer v 443-4th Ave. Corp.*, 2 AD2d 699, 152 NYS2d 539 (2d Dept 1956); *Lockowitz v Melnyk*, 1 AD2d 138, 148 NYS2d 232 (1st Dept 1956); see *Restatement, Second, Torts*, §§ 416, 426, 427; *Prosser and Keeton, Torts* (5th Ed.) § 71; 3 NYJur2d *Agency and Independent Contractors* § 351.

Whether the work is inherently dangerous is normally a question of fact to be determined by the jury, *Rosenberg v Equitable Life Assur. Soc. of U.S.*, 79 NY2d 663, 584 NYS2d 765, 595 NE2d 840 (1992) (citing PJI); *Reid v Styco of Rochester, Inc.*, 214 AD2d 955, 626 NYS2d 342 (4th Dept 1995); *Montano v O'Connell*, 186 AD2d 461, 589 NYS2d 26 (1st Dept 1992); but see *Maristany v Patient Support Services, Inc.*, 264 AD2d 302, 693 NYS2d 143 (1st Dept 1999). The cases speak of "inherently dangerous" or "intrinsically dangerous" work or of danger which the work itself creates but the *Restatement, Second, Torts*, § 427 recognizes "danger inherent in the work" as the more accurate expression and that phrase is used in a number of more recent New York decisions, see *Rosenberg v Equitable Life Assur. Soc. of U.S.*, *supra*. Thus the washing of rubber mats is not inherently dangerous but when, as in *Wright v Tudor City Twelfth Unit*, 276 NY 303, 12 NE2d 307 (1938), they are washed on the sidewalk with soap and water, there is danger to passersby inherent in the work. Washing a sidewalk, however, is not inherently dangerous work that would render a building owner liable for the negligence of an independent contractor, *Rodriguez v C.F. Lex Associates*, 235 AD2d 354, 658 NYS2d 256 (1st Dept 1997). It has been determined that the use of hydrofluoric acid to clean the facade of a building in a public place is an inherently dangerous activity, *Beck v Woodward Affiliates*, 226 AD2d 328, 640 NYS2d 205 (2d Dept 1996); see also *Kopinska v Metal Bright Maintenance Co., Inc.*, 309 AD2d 633, 766 NYS2d 21 (1st Dept 2003) (liability may be imposed on property owner for passerby's injuries resulting from contractor's use of a fluid containing bleach to clean building exterior). However, plaintiff's injury must be caused by a danger inherent in the activity, *Mery v Eginger*, 149 AD3d 827, 49 NYS3d 905 (2d Dept 2017) (danger of passerby being struck by object ejected from lawn mower not inherent in lawn mowing), *aff'd* 31 NY3d 1068, 78 NYS3d 266, 102 NE3d 1048 (2018); *Saini v Tonju Associates*, 299 AD2d 244, 750 NYS2d 55 (1st Dept 2002) (danger of excessively hot water flowing from apartment faucet not inherent in installation of temporary boiler); *MacDonald v Heuer*, 253 AD2d 795, 677 NYS2d 630 (2d Dept 1998) (danger of failing to drain all of freon from refrigerator is not danger inherent in removal of freon from refrigerator). Blasting has been found to involve such a risk of harm that absolute liability is imposed, *Spano v Perini Corp.*, 25 NY2d 11, 302 NYS2d 527, 250 NE2d 31 (1969). Blasting is also inherently dangerous in the sense that an owner or general contractor cannot escape liability by delegating the task to an independent contractor, *Carmel Associates Inc. v Turner Const. Co.*, 35 AD2d 157, 314 NYS2d 941 (1st Dept 1970). This rule is inapplicable when the person injured is an employee of the contractor, *Whitaker v Norman*, 75 NY2d 779, 552 NYS2d

86, 551 NE2d 579 (1989); *Nagy v State*, 89 AD2d 199, 456 NYS2d 241 (3d Dept 1982). The placement of electrical equipment in a public place is not an inherently dangerous activity, provided that the equipment can be set up without creating a tripping hazard, *Baraban v Orient Express Hotels, Inc.*, 292 AD2d 203, 739 NYS2d 366 (1st Dept 2002). Likewise, the activity of transporting construction material, including gravel, over rural roads and hilly terrain is not an inherently dangerous activity, *Carlineo v Akins*, 71 AD3d 1535, 898 NYS2d 386 (4th Dept 2010).

The Restatement and some New York cases (e.g., *Janice v State*, 201 Misc 915, 107 NYS2d 674 (Ct Cl 1951)) recognize that there are in fact two overlapping exceptions to the general rule of non-liability: one, that if the hirer should recognize that the work is likely to create a peculiar risk of harm unless special precautions are taken, the hirer may be held for the independent contractor's failure to exercise reasonable care to take such precautions; the other, that if there is danger inherent in the work, which the hirer should anticipate, he or she may be held liable for the contractor's failure to take reasonable precautions against danger. Most of the New York cases speak in terms of the latter exception, although some of the fact situations with which they deal can be fitted into the former, see *Christie v Ranieri and Sons*, 194 AD2d 453, 599 NYS2d 271 (1st Dept 1993) (examining liability under both exceptions). To attempt in this Comment to categorize the various cases would serve little purpose, particularly since neither the cases nor the Restatement have clearly drawn the line. The fact situation in a given case may, however, warrant use of a charge couched in terms of the peculiar risk-special precautions rule rather than the pattern charge.

The "inherently dangerous" exception cannot be applied unless the work involves not only a risk of harm inherent in the nature of the work, but also that the hirer recognized or should have recognized that risk in advance of the contract, *Rosenberg v Equitable Life Assur. Soc. of U.S.*, 79 NY2d 663, 584 NYS2d 765, 595 NE2d 840 (1992); see *Nelson v E&M 2710 Clarendon LLC*, 129 AD3d 568, 12 NYS3d 51 (1st Dept 2015); *Kopinska v Metal Bright Maintenance Co., Inc.*, 309 AD2d 633, 766 NYS2d 21 (1st Dept 2003). In *Rosenberg*, plaintiff sought to impose liability upon a life insurance company for the negligence of a physician it had retained to conduct a stress test upon decedent who had applied for life insurance and who had a history of heart disease; see *Mery v Eginger*, 149 AD3d 827, 49 NYS3d 905 (2d Dept 2017) (lawn mowing not inherently dangerous activity), *aff'd* 31 NY3d 1068, 78 NYS3d 266, 102 NE3d 1048 (2018); *Maristany v Patient Support Services, Inc.*, 264 AD2d 302, 693 NYS2d 143 (1st Dept 1999) (typical nursing assignment is not inherently dangerous activity).

The hirer of an independent contractor is not, however, required to anticipate danger that arises, not from the nature of the work, but from the manner of its performance, *Schwartz v Merola Bros. Const. Corporation*, 290 NY 145, 48 NE2d 299 (1943); see *Nelson v E&M 2710 Clarendon LLC*, 129 AD3d 568, 12 NYS3d 51 (1st Dept 2015); *Baraban v*

Orient Express Hotels, Inc., 292 AD2d 203, 739 NYS2d 366 (1st Dept 2002). If the work contracted for would not otherwise be dangerous, and the injury results only from negligence of the contractor in performing an operative detail or from the contractor's carrying out the work in an unusual manner not reasonably to be anticipated, the hirer is not expected to anticipate such danger and is not responsible. If, however, the nature of the work is such as to involve risk of danger, even when performed in a usual manner, the hirer is required to protect others against the danger and will be responsible even though the agreement with the contractor required the contractor to take necessary precautions. Thus, when a contractor is hired to do inside work and one of its employees lays a board on a window sill from which it is dislodged, the hirer-landlord is not liable to a tenant in the yard below injured by the board, *Hyman v Barrett*, 224 NY 436, 121 NE 271 (1918), and an owner-hirer is not liable to a plaintiff injured by a loose board blown by a high wind from a scaffold erected some fifteen feet from the sidewalk, *Hexamer v Webb*, 101 NY 377, 4 NE 755 (1886). But an owner who hires a painter to paint a sign over a sidewalk is responsible to a pedestrian injured when the scaffold collapsed and the painter fell, *Rohlf v Weil*, 271 NY 444, 3 NE2d 588 (1936); see *Kopinska v Metal Bright Maintenance Co., Inc.*, 309 AD2d 633, 766 NYS2d 21 (1st Dept 2003) (owner potentially liable for a passerby's injuries resulting from the use of fluid containing bleach to clean building exterior); *Rothstein v State*, 284 AD2d 130, 726 NYS2d 636 (1st Dept 2001) (owner liable for independent contractor's negligence which causes dangerous condition on sidewalk or public highway).

Moreover, when the danger is not apparent, the owner is entitled to rely on the judgment of the contractor as to whether precautions are required, *McDonald v Shell Oil Co.*, 20 NY2d 160, 281 NYS2d 1002, 228 NE2d 899 (1967). The distinction between liability and nonliability is stated in *Boylhart v Di Marco & Reimann*, 270 NY 217, 200 NE 793 (1936), as follows: “. . . in the one case the danger has its origin in an act of negligence collateral to the work, which could not be foreseen and guarded against beforehand, while in the other the danger is inherent in the work contracted to be done and might reasonably be expected.” The pattern charge incorporates one phase of the “collateral negligence” principle by its reference to the normal performance of the work. The other phase need not be separately referred to in the charge, since its hypothesis is that the work is not dangerous, a factor which is covered in the charge.

Although danger is not normally inherent in the work, the hirer may be responsible for a dangerous condition negligently created by an independent contractor if the hirer has actual or constructive notice of the condition, *Schwartz v Merola Bros. Const. Corporation*, 290 NY 145, 48 NE2d 299 (1943); *Weinfeld v Kaplan*, 282 NY 348, 26 NE2d 287 (1940); *Wright v Tudor City Twelfth Unit*, 276 NY 303, 12 NE2d 307 (1938); *Hyman v Barrett*, 224 NY 436, 121 NE 271 (1918); *Lanza v B.H.N.V. Realty Corp.*, 201 AD3d 468, 160 NYS3d 234 (1st Dept 2022); *Tipaldi v Riverside Memorial Chapel*, 273 App Div 414, 78 NYS2d 12

(1st Dept 1948), *aff'd*, 298 NY 686, 82 NE2d 585 (1948); *Vaniglia v Northgate Homes*, 106 AD2d 384, 482 NYS2d 299 (2d Dept 1984); *Kojic v New York*, 76 AD2d 828, 428 NYS2d 305 (2d Dept 1980). It may, therefore, be necessary to add to the pattern charge instructions concerning notice, see *Wright v Tudor City Twelfth Unit*, *supra*.

Another settled exception to the rule exempting a property owner from liability for the negligence of its independent contractor is a situation where the contractor's negligence causes a dangerous condition on a sidewalk or public highway, *Ortiz v Nunez*, 32 AD3d 759, 821 NYS2d 185 (1st Dept 2006); *Kopinska v Metal Bright Maintenance Co., Inc.*, 309 AD2d 633, 766 NYS2d 21 (1st Dept 2003); *Rothstein v State*, 284 AD2d 130, 726 NYS2d 636 (1st Dept 2001). The hirer is subject to liability in this scenario upon the theory that the responsibility to keep public thoroughfares safe is so important to the community that the hirer should not be permitted to transfer liability therefor to another, *id.*

Finally, although danger is not inherent in the work, the hirer may nonetheless be responsible if the work becomes dangerous by the act or interference of the hirer, *Besner v Central Trust Co. of New York*, 230 NY 357, 130 NE 577 (1921) (elevator repairman killed through negligence of an independent contractor, owner who directed use of elevator during the making of repairs held liable).

**PJI 2:257. Liability for the Conduct of Another—
Independent Contractor—Interference by
Hirer**

Even though (the parties agree, you find) that EF did not direct and control the manner or method of performance of CD's work generally, and that CD was, therefore, an independent contractor, EF is still responsible for the plaintiff's injuries if you find that EF (interfered with CD's work, directed how a part of the work should be done) and that such (interference, direction) was a substantial factor in causing the plaintiff's injuries.

Comment

[See also Introductory Statement preceding PJI 2:255.]

Unless the parties agree on CD's status as an independent contractor, the above charge must be used with PJI 2:255. In that case, there must be added to the last sentence of PJI 2:255: "unless you find EF liable under the exception which I will now state for you."

The pattern charge is based on *Hanley v Central Sav. Bank*, 255

App Div 542, 8 NYS2d 371 (1st Dept 1938), *aff'd*, 280 NY 734, 21 NE2d 513 (1939); *Butts v J.C. Mackay Co.*, 25 NYS 531 (Sup 1893), *aff'd*, 147 NY 715, 42 NE 722 (1895); *Horn v State*, 31 AD2d 364, 297 NYS2d 795 (3d Dept 1969) (citing PJI); see *Burke v Ireland*, 166 NY 305, 59 NE 914 (1901); *Uppington v New York*, 165 NY 222, 59 NE 91 (1901); *Berg v Parsons*, 156 NY 109, 50 NE 957 (1898); *Fischer v Battery Bldg. Maintenance Co.*, 135 AD2d 378, 521 NYS2d 678 (1st Dept 1987); *Restatement, Second, Torts*, §§ 410, 414; *Restatement, Second, Agency*, § 212; *Prosser & Keeton, Torts* § 71 (5th ed); 3 NYJur2d, *Agency and Independent Contractors* § 345; 2B Warren, *Negligence, Contractors* § 34.04 (2) (b) (4th ed). The interference or direction must be a proximate cause of the injury, *Berg v Parsons*, *supra*; *Hawke v Brown*, 28 App Div 37, 50 NYS 1032 (4th Dept 1898). For a charge on proximate cause, see PJI 2:70.

Trivial acts such as the holding of a ladder, see *Beach v Velzy*, 238 NY 100, 143 NE 805 (1924), acts of general supervision rather than direction, *Uppington v New York*, 165 NY 222, 59 NE 91 (1901); *Joyce v Convent Ave. Const. Co.*, 155 App Div 586, 140 NYS 663 (1st Dept 1913); *Hawke v Brown*, 28 App Div 37, 50 NYS 1032 (4th Dept 1898); *Losee v Paramount Hotel Corp.*, 137 Misc 530, 242 NYS 608 (Sup 1930), or daily presence at the premises, *Cullom v McKelvey*, 26 App Div 46, 49 NYS 669 (1st Dept 1898), are not sufficient by themselves to impose liability.

The rule stated in the pattern charge governs the responsibility of a general contractor for the acts of a subcontractor's employees, *Employers Mut. Liability Ins. Co. of Wis. v Di Cesare & Monaco Concrete Const. Corp.*, 9 AD2d 379, 194 NYS2d 103 (1st Dept 1959); *Politi v Irvmar Realty Corp.*, 7 AD2d 414, 183 NYS2d 748 (1st Dept 1959), and the fact that the general contractor retains a limited power of general supervision will not make the general contractor liable for the negligence of the subcontractor, *Moore v Charles T. Wills, Inc.*, 250 NY 426, 165 NE 835 (1929); see *Davies v Contel of New York Inc.*, 187 AD2d 898, 590 NYS2d 307 (3d Dept 1992). Even if the work has been delegated to an independent contractor, the hirer may be held liable for claims arising from alleged defects or damages resulting from the contractor's methods or materials if the hirer has actual or constructive notice that the contractor is performing the work in a dangerous manner, *Rosenberg v Schwartz*, 260 NY 162, 183 NE 282 (1932) and has retained or exercised some supervisory control over the operation, *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993); *Rapp v Zandri Const. Corp.*, 165 AD2d 639, 569 NYS2d 994 (3d Dept 1991); see *Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 609 NYS2d 168, 631 NE2d 110 (1993); but see *Mascellino v Buffalo General Hosp.*, 123 AD2d 507, 507 NYS2d 97 (4th Dept 1986) (stating that knowledge of the contractor's conduct, without a showing that the hirer retained power to supervise the contractor in the details of the work, was sufficient to impose liability).

**PJI 2:258. Liability for the Conduct of Another—
Independent Contractor—Hiring Incompetent
Contractor**

A person who hires an independent contractor may be liable to someone who is injured as a result of the contractor's conduct if it is shown that the person who hired the contractor was negligent in selecting a careless or incompetent person with whom to contract. Negligence is the failure to use reasonable care — that is, the care that a reasonably prudent person would have used under the same circumstances. A competent contractor is a contractor who possesses the knowledge, skill, and experience that a contractor should have in order to do the work for which (he, she, it) is employed. An employer is entitled to rely upon the supposed qualifications and good reputation of a contractor, and is not bound to anticipate that the contractor would cause injury to AB.

If you find that defendant EF lacked that knowledge, skill or experience to perform the work for which (he, she, it) was hired by defendant CD, and if you further find that defendant CD knew, or in the use of reasonable care should have ascertained that EF was not qualified to undertake the work, then you will find that CD was negligent. But if you find that EF was a competent contractor, or if you find that CD did not know and could not, in the use of reasonable care, find out that EF was not qualified to do the work for which (he, she, it) was hired by CD, then you will find that CD was not negligent, and CD would not be liable for AB's (injuries, damages) caused by EF's negligence.

Comment

[See also Introductory Statement to this Division]

Based on *Bryant v Presbyterian Hospital in City of New York*, 304 NY 538, 110 NE2d 391 (1953); *Burke v Ireland*, 166 NY 305, 59 NE 914 (1901); *Coley v Cohen*, 261 App Div 878, 26 NYS2d 863 (4th Dept 1941), *aff'd*, 289 NY 365, 45 NE2d 913 (1942); *Lewis v Columbus Hospital*, 1 AD2d 444, 151 NYS2d 391 (4th Dept 1956); *Strickland v State*, 13

Misc2d 425, 177 NYS2d 983 (Ct Cl 1958); see Restatement, Second, Torts §§ 307, 411; 3 NYJur2d, Agency and Independent Contractors § 343; Annot: 78 ALR3d 910. Causal relation must be established, *Parsan v New York Breweries Co.*, 208 NY 337, 101 NE 879 (1913); *Lewis v Columbus Hospital*, supra. For a charge on proximate case, see PJI 2:70.

The definition of competent contractor is taken from Restatement, Second, Torts 411, Comment (a), which suggests that to be competent, a contractor must also possess necessary equipment, see *Kuhn v P.J. Carlin Const. Co.*, 274 NY 118, 8 NE2d 300 (1937). No New York case defining competence has been located, but the definition used is supported by the reference to previous experience in *Kueckel v Ryder*, 54 App Div 252, 66 NYS 522 (1st Dept 1900), aff'd, 170 NY 562, 62 NE 1096 (1902), lack of previous experience in *Janice v State*, 201 Misc 915, 107 NYS2d 674 (Ct Cl 1951), the use of student nurses as presenting a jury question of competence in *Howe v Medical Arts Center Hospital*, 261 App Div 1088, 26 NYS2d 957 (2d Dept 1941), aff'd, 287 NY 698, 39 NE2d 303 (1942), and *Ward v St. Vincent's Hospital*, 39 App Div 624, 57 NYS 784 (1st Dept 1899), and the Appellate Term's reference in *Goldstein v Wolkenberg*, 54 Misc 545, 104 NYS 736 (AppT 1907), to "a skillful, reliable and competent builder." The fact that the contractor's license to carry on the activity had been revoked was held to be immaterial in the absence of evidence as to the cause of the revocation in *Lewis v Columbus Hospital*, 1 AD2d 444, 151 NYS2d 391 (4th Dept 1956).

An employer has the right to rely on the supposed qualifications and good character of the contractor, and is not bound to anticipate misconduct on the contractor's part, *Nelson v E&M 2710 Clarendon LLC*, 129 AD3d 568, 12 NYS3d 51 (1st Dept 2015). Thus, to hold a party liable under theories of negligent hiring, negligent retention or negligent supervision, a plaintiff must establish that the party knew or should have known of the contractor's propensity for the conduct which caused the injury, *Weinfeld v HR Photography, Inc.*, 149 AD3d 1014, 52 NYS3d 458 (2d Dept 2017); *Bellere v Gerics*, 304 AD2d 687, 759 NYS2d 105 (2d Dept 2003); *Sato v Correa*, 272 AD2d 389, 707 NYS2d 371 (2d Dept 2000); see *Chichester v Wallace*, 150 AD3d 1073, 55 NYS3d 378 (2d Dept 2017); *Nelson v E&M 2710 Clarendon LLC*, supra. In certain cases, reasonable care has been held to require "appropriate investigation of the character and capacity" of the contractor, *Bryant v Presbyterian Hospital in City of New York*, 304 NY 538, 110 NE2d 391 (1953) (hospital nurse); *Chichester v Wallace*, 150 AD3d 1073, 55 NYS3d 378 (2d Dept 2017) (home health aide); *Lewis v Columbus Hospital*, 1 AD2d 444, 151 NYS2d 391 (4th Dept 1956) (hospital intern); see *Hamburger v Cornell University*, 240 NY 328, 148 NE 539 (1925). However, a principal's liability for negligent supervision or instruction of its contractor normally arises only with respect to the performance of the work that is inherent in the principal's business, *Sandra M. v St. Luke's Roosevelt Hosp. Center*, 33 AD3d 875, 823 NYS2d 463 (2d Dept 2006). Thus, a hospital cannot be held liable for negligently supervising or

instructing the employment agency it retains to supply temporary nursing assistants, since the function of hiring temporary nursing assistants is collateral to the hospital's main function of providing health care services, *Sandra M. v St. Luke's Roosevelt Hosp. Center*, *supra*. Further, the hospital's retention of a right to accept or reject temporary employees supplied by the agency does not impose a duty on the hospital's part to screen such employees, *Sandra M. v St. Luke's Roosevelt Hosp. Center*, *supra*.

No presumption of incompetence arises from the conduct which injured the plaintiff, *Lewis v Columbus Hospital*, 1 AD2d 444, 151 NYS2d 391 (4th Dept 1956); *Hawke v Brown*, 28 App Div 37, 50 NYS 1032 (4th Dept 1898); *Strickland v State*, 13 Misc2d 425, 177 NYS2d 983 (Ct Cl 1958); *Mehler v Fisch*, 65 Misc 549, 120 NYS 807 (AppT 1910). Evidence of prior acts of negligence is admissible on the issue of competence, *Bauler v New York & H.R.R. Co.*, 59 NY 536. It is not enough to show that the contractor's reputation for incompetence was notorious; plaintiff must also show that the hirer either had knowledge of that reputation or failed to make the inquiry which reasonable care required, *Hawke v Brown*, *supra*; *Kelly v New York*, 11 NY 432 (1854). To establish liability, there must be evidence that the hirer had knowledge of prior acts of incompetence or inexperience on the part of the contractor, *Toscarelli v Purdy*, 217 AD2d 815, 629 NYS2d 833 (3d Dept 1995).

The principle stated in the pattern charge applies also to one who, after hiring a contractor, acquires knowledge that the contractor is incompetent or is performing the work in a manner likely to cause injury or damage to others, see *Rosenberg v Schwartz*, 260 NY 162, 183 NE 282 (1932).

Generally, where a school district hires an independent contractor to provide transportation services, it will not be held liable for injuries sustained in connection therewith, *David XX v Saint Catherine's Center for Children*, 267 AD2d 813, 699 NYS2d 827 (3d Dept 1999). However, liability may be imposed on a school district if it was aware of an unreasonable risk posed by the conduct or nonfeasance of the transportation company and failed to take steps to minimize the risk, *id*.

4. FAMILY RELATIONSHIP

a. GENERAL PRINCIPLES

Introductory Statement

The principles which disabled parties from maintaining actions against family members have been long abrogated through statute and judicial decision. The common law disability resulting from marriage was repealed by General Obligations Law § 3-313; see *State Farm Mut. Auto. Ins. Co. v Westlake*, 35 NY2d 587, 364 NYS2d 482, 324 NE2d 137 (1974); *Coster v Coster*, 289 NY 438, 46 NE2d 509 (1943). Intra-family tort immunity for nonwillful torts no longer exists, *Gelbman v Gelbman*, 23 NY2d 434, 297 NYS2d 529, 245 NE2d 192 (1969). However, interspousal liability claims may be excluded from insurance coverage, Insurance Law § 3420(g); *American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 (1st Dept 1984).

The abolition of intra-family tort immunity enables an injured family member to bring an otherwise viable action against another family member; it does not, however, create any substantive causes of action. It is now well settled that there is no cause of action against a parent for negligent parental supervision, *Holodook v Spencer*, 36 NY2d 35, 364 NYS2d 859, 324 NE2d 338 (1974); see *Rios v Smith*, 95 NY2d 647, 722 NYS2d 220, 744 NE2d 1156 (2001); *LaTorre v Genesee Management, Inc.*, 90 NY2d 576, 665 NYS2d 1, 687 NE2d 1284 (1997); *Krichmar v Krichmar*, 42 NY2d 858, 397 NYS2d 775, 366 NE2d 863 (1977); *Brito v Manhattan and Bronx Surface Transit Operating Authority*, 188 AD2d 253, 590 NYS2d 450 (1st Dept 1992); *Pravato v Pravato*, 175 AD2d 116, 571 NYS2d 811 (2d Dept 1991); *Wilson by Wilson v Sears, Roebuck and Co.*, 126 AD2d 954, 511 NYS2d 726 (4th Dept 1987), nor does negligent parental supervision support a claim for contribution, *Holodook v Spencer*, supra; see *Rios v Smith*, supra; *LaTorre v Genesee Management, Inc.*, supra; *Thurel v Varghese*, 207 AD2d 220, 621 NYS2d 633 (2d Dept 1995), except in cases involving negligent entrustment of a dangerous instrumentality, *Nolechek v Gesuale*, 46 NY2d 332, 413 NYS2d 340, 385 NE2d 1268 (1978); see *Rios v Smith*, supra; *McNamara v Banney*, 249 AD2d 950, 672 NYS2d 569 (4th Dept 1998). However, Insurance Law § 3420(g) and Vehicle & Traffic Law § 388(4) provide that interspousal negligence claims are not covered by insurance policies unless the policy contains a specific provision for such coverage.

A cause of action for negligent supervision may be brought against grandparents, aunts, uncles or others who are temporarily supervising the child, *Adolph E. by Susan E. v Lori M.*, 166 AD2d 906, 560 NYS2d 567 (4th Dept 1990); *Costello by Hines v Marchese*, 137 AD2d 482, 524 NYS2d 232 (2d Dept 1988); *Broome v Horton*, 53 AD2d 1030, 386 NYS2d 156 (4th Dept 1976); see *Mirand v New York*, 84 NY2d 44, 614 NYS2d 372, 637 NE2d 263 (1994); *Havens v Kling*, 277 AD2d 1017, 715 NYS2d 812 (4th Dept 2000) (Golf Club and Lions Club could be held liable for

negligent supervision over children participating in junior golf program that they sponsored). However, a foster parent cannot be held liable for negligent supervision of a foster child, *McCabe v Dutchess*, 72 AD3d 145, 895 NYS2d 446 (2d Dept 2010).

It is necessary to distinguish ordinary negligence claims arising from intra-family torts from nonviable claims for negligent supervision, see *Hoppe v Hoppe*, 281 AD2d 595, 724 NYS2d 65 (2d Dept 2001) (duty not to negligently maintain explosives is duty owed to all, and not simply duty emanating from parent-child relationship); *Leek by Leek v McGlone*, 140 AD2d 413, 528 NYS2d 115 (2d Dept 1988) (breach of duty to world-at-large based on defective brakes on minibike); *Grivas v Grivas*, 113 AD2d 264, 496 NYS2d 757 (2d Dept 1985) (negligence in leaving lawn mower unattended with motor running); *Goedkoop v Ward Pavement Corp.*, 51 AD2d 542, 378 NYS2d 417 (2d Dept 1976) (negligent maintenance of explosives); *Bucholtz v Grimmer*, 50 AD2d 1062, 376 NYS2d 277 (4th Dept 1975) (negligence action against parent on basis of respondeat superior, not negligent supervision). A claim against a parent for failure to exercise reasonable care with respect to accessibility to a swimming pool arises from a duty owed to the world-at-large, separate from the family relationship, *Semmens v Hopper*, 128 AD2d 767, 513 NYS2d 472 (2d Dept 1987); see *Young v Greenberg*, 181 AD2d 492, 581 NYS2d 26 (1st Dept 1992). A mother's decision to hold an infant in her arms while riding in a car, however, is one within the parameters of her parental discretion and judgment and is not owed to the world at large, *Thurel v Varghese*, 207 AD2d 220, 621 NYS2d 633 (2d Dept 1995).

In addition, a parent owes a duty to third parties to protect them from a child's use of a dangerous instrument when the parent is aware of and capable of controlling its use, see PJI 2:260. However, there is no dangerous instrument exception for claims by the child against the parent, *Nolechek v Gesuale*, 46 NY2d 332, 413 NYS2d 340, 385 NE2d 1268 (1978); see *Schwartz v Licht*, 173 AD2d 458, 570 NYS2d 83 (2d Dept 1991); *Kelchner v John Deere Co.*, 149 AD2d 911, 540 NYS2d 390 (4th Dept 1989); *Larsen v Heitmann*, 133 AD2d 533, 519 NYS2d 904 (4th Dept 1987); *Paladino v Isasi*, 123 AD2d 379, 506 NYS2d 457 (2d Dept 1986). The third parties who may sue a parent for negligent entrustment of a dangerous instrument to a child include other family members as well as siblings of the child, *Bottillo v Poette*, 152 AD2d 840, 544 NYS2d 47 (3d Dept 1989) (adult brother has claim against sister for negligent entrustment of a dangerous weapon to her son, plaintiff's nephew); *Alessi v Alessi*, 103 AD2d 1023, 478 NYS2d 396 (4th Dept 1984) (sibling has same claim as third party against parent for negligent entrustment of dangerous instrument to other sibling); *Acquaviva v Piazzolla*, 100 AD2d 502, 472 NYS2d 704 (2d Dept 1984). In specific situations, the parent can also be liable for negligently entrusting a dangerous instrument to a child where the parent could have foreseen that his child's access to and use of the instrument could involve lending it to a friend of the child and that such use might expose others to injury, *Rios v Smith*, 95 NY2d 647, 722 NYS2d 220, 744 NE2d 1156 (2001).

In addition to the dangerous instrument exception, the courts have recognized a “vicious propensity” exception, by which a parent can be held liable based on knowledge of the child’s propensity for the harmful conduct, see *Adolph E. by Susan E. v Linda M.*, 170 AD2d 1011, 566 NYS2d 165 (4th Dept 1991); *Borelli v Board of Educ. of Highland School Dist.*, 156 AD2d 903, 550 NYS2d 120 (3d Dept 1989). In *LaTorre v Genesee Management, Inc.*, 90 NY2d 576, 665 NYS2d 1, 687 NE2d 1284 (1997), the Court held that conclusory generalized assertions of plaintiff’s violent propensities and tendencies are insufficient to satisfy the requisite pertinent knowledge of the kind of dangerous propensities attributed to plaintiff’s mother that would sustain a cause of action for negligent supervision against a parent.

PJI 2:260. Liability for the Conduct of Another—Family Relationship—Liability of Parent for Tort of Child—Negligence in Permitting Use of Instrumentality

A parent is not responsible for the acts of (his, her) child, but is responsible for the failure to use reasonable care in entrusting to or leaving in the possession of the child an instrument which, in view of the nature of the instrument, the age, intelligence, and disposition of the child and (his, her) prior experience with such an instrument, constitutes an unreasonable risk of harm to others. Reasonable care means that degree of care which a reasonably prudent parent would use under the same circumstances.

If you find that *(name of defendant-parent)* gave to *(name of infant defendant)* a *[state kind of instrument]*, or with knowledge that *(name of infant defendant)* had a *(instrument)* in (his, her) possession, permitted (him, her) to keep it, and that in view of the age, intelligence, disposition and prior experience of *(name of infant defendant)* with *(instrument)* (his, her) possession of the *(instrument)* constituted an unreasonable risk of harm to others and that in (giving it to, leaving it in the possession of) *(name of infant defendant)*, *(defendant-parent)* failed to use reasonable care, you will find that *(defendant-parent)* was negligent. If, however, you find that *(defendant-parent)* did not give the *(instrument)* to *(name of infant defendant)* and did not have knowledge that *(name of infant defendant)* had it in (his, her) possession, or

that under all of the circumstances, possession by (name of infant defendant) of the (instrument) did not constitute an unreasonable risk of harm to others, or that (defendant-parent) used reasonable care under the circumstances, your finding will be that (defendant-parent) was not negligent.

Comment

Based on *Nolechek v Gesuale*, 46 NY2d 332, 413 NYS2d 340, 385 NE2d 1268 (1978) (placing motorcycle in hands of sixteen-year-old with impaired vision); *Marks v Thompson*, 18 AD2d 731, 234 NYS2d 391 (3d Dept 1962), *affd*, 13 NY2d 1029, 245 NYS2d 601, 195 NE2d 311 (1963) (cigarette lighter, no liability); *Ansbro v Noviello*, 202 AD2d 211, 608 NYS2d 222 (1st Dept 1994) and *Len v Cohoes*, 144 AD2d 187, 534 NYS2d 505 (3d Dept 1988) (motorcycle); *Costa v Hicks*, 98 AD2d 137, 470 NYS2d 627 (2d Dept 1983) (motorcycle, fourteen-year-old); *Gordon v Harris*, 86 AD2d 948, 448 NYS2d 598 (3d Dept 1982) (toy rifle, eight-year-old, no liability); *Bucholtz v Grimmer*, 50 AD2d 1062, 376 NYS2d 277 (4th Dept 1975) (chain saw, seventeen-year-old, liability); *Lichtenthal v Gawoski*, 44 AD2d 771, 354 NYS2d 267 (4th Dept 1974) (air rifle, liability); Restatement, Second, Torts, §§ 308, 316; Prosser and Keeton, Torts (5th Ed) § 123; 46 NYJur2d, Domestic Relations § 534; 79 NYJur2d, Negligence § 75; Warren's Negligence, Vol 2C-Part 2, Parent and Child § 80.01 (3) (4th Ed. 1990).

In *Gelbman v Gelbman*, 23 NY2d 434, 297 NYS2d 529, 245 NE2d 192 (1969), the Court of Appeals abolished the intrafamilial immunity doctrine which had barred suits between parents and children for nonwillful torts. In *Holodook v Spencer*, 36 NY2d 35, 364 NYS2d 859, 324 NE2d 338 (1974), the policy concerns underlying the immunity doctrine were used to partially restore the doctrine by prohibiting lawsuits by a child against a parent, or for actions seeking contribution from the parent by a third party, in cases involving negligent supervision, see *McCabe v Dutchess*, 72 AD3d 145, 895 NYS2d 446 (2d Dept 2010) (foster child has no cause of action for negligent supervision against foster parent). However, in *Nolechek v Gesuale*, 46 NY2d 332, 413 NYS2d 340, 385 NE2d 1268 (1978), the Court held that a defendant sued by a child entrusted with a dangerous instrument by a parent could obtain contribution from the parent, even though the injured child did not possess a cause of action against the parent, see *Rios v Smith*, 95 NY2d 647, 722 NYS2d 220, 744 NE2d 1156 (2001); *Barocas v F.W. Woolworth Co.*, 207 AD2d 145, 622 NYS2d 5 (1st Dept 1995). The Court of Appeals has also stated that a parent owes a duty to protect third parties from harm that is clearly foreseeable from the child's improvident use or operation of a dangerous instrument, where such use is found to be subject to the parent's control, *Rios v Smith*, *supra*; *LaTorre v Genesee Management, Inc.*, 90 NY2d 576, 665 NYS2d 1, 687 NE2d 1284 (1997).

The tort consists of entrusting or permitting the use of an instru-

ment made dangerous by the age, intelligence, infirmity, disposition, or training of the user which causes injury to a third party, *Larsen v Heitmann*, 133 AD2d 533, 519 NYS2d 904 (4th Dept 1987), see *Barocas v F.W. Woolworth Co.*, 207 AD2d 145, 622 NYS2d 5 (1st Dept 1995). Whether a particular object qualifies as a dangerous instrument depends on the nature of the instrument and the facts pertaining to its use, including the particular attributes of the minor using or operating the item, *Rios v Smith*, 95 NY2d 647, 722 NYS2d 220, 744 NE2d 1156 (2001); *Pineiro v Rush*, 163 AD3d 1097, 81 NYS3d 286 (3d Dept 2018). The following items have been determined to be dangerous instrumentalities: ATV, *Sabia v K. Hovnanian Companies*, 280 AD2d 461, 720 NYS2d 373 (2d Dept 2001); gas grill, *Bottillo v Poette*, 152 AD2d 840, 544 NYS2d 47 (3d Dept 1989) (fourteen-year-old); B-B gun, *Masone v Gianotti*, 54 AD2d 269, 388 NYS2d 322 (2d Dept 1976) (twelve-year-old); air rifle, *Kuchlik v Feuer*, 239 App Div 338, 267 NYS 256 (1st Dept 1933), *aff'd*, 264 NY 542, 191 NE 555 (1934) (fifteen-year-old); bow and arrow, *Carmona v Padilla*, 4 AD2d 181, 163 NYS2d 741 (1st Dept 1957), *aff'd*, 4 NY2d 767, 172 NYS2d 820, 149 NE2d 337 (1958) (nine-year-old); matches, *Agnesini v Olsen*, 277 App Div 1006, 100 NYS2d 338 (2d Dept 1950) (four-year-old); chain saw, *Bucholtz v Grimmer*, 50 AD2d 1062, 376 NYS2d 277 (4th Dept 1975) (seventeen-year-old); minibike, *Lalomia v Bankers & Shippers Ins. Co.*, 35 AD2d 114, 312 NYS2d 1018 (2d Dept 1970), *aff'd*, 31 NY2d 830, 339 NYS2d 680, 291 NE2d 724 (1972) (twelve-year-old); gasoline, *Craft v Mid Island Dept. Stores, Inc.*, 112 AD2d 969, 492 NYS2d 780 (2d Dept 1985) (age not mentioned); automobile, *Acquaviva v Piazzolla*, 100 AD2d 502, 472 NYS2d 704 (2d Dept 1984) (three-year-old); and, snowmobile, *Ware v Sand Lake Kiwanis Club, Inc.*, 100 Misc2d 668, 420 NYS2d 60 (Sup 1979) (fifteen-year-old); see also *Pineiro v Rush*, *supra* (question of fact as to whether bicycle constituted dangerous instrument); *Kelly v Di Cerbo*, 27 AD3d 1082, 811 NYS2d 530 (4th Dept 2006) (question of fact as to whether power boat constitutes dangerous instrument).

Items determined not to be dangerous include: simple plastic doll, *Barocas v F.W. Woolworth Co.*, 207 AD2d 145, 622 NYS2d 5 (1st Dept 1995), (2 year, 7½ months old); tennis ball thrown in darkened basement, *Schwartz v Licht*, 173 AD2d 458, 570 NYS2d 83 (2d Dept 1991) (thirteen-year-old); sexually explicit magazines and films, *Adolph E. by Susan E. v Linda M.*, 170 AD2d 1011, 566 NYS2d 165 (4th Dept 1991) (fourteen-year-old); toothpick, *Fuzie by Fuzie v South Haven School Dist. No. 30*, 146 Misc2d 1006, 553 NYS2d 961 (Sup 1990), *aff'd*, 176 AD2d 856, 575 NYS2d 451 (2d Dept 1991) (five-year-old); hot pizza, *Keohan by Keohan v Di Paola*, 97 AD2d 596, 468 NYS2d 218 (3d Dept 1983) (eight-year-old); trampoline, *Dichiaro v Gapanoff*, 270 AD2d 450, 706 NYS2d 340 (2d Dept 2000); waterslide, *Parsons v Wham-O, Inc.*, 150 AD2d 435, 541 NYS2d 44 (2d Dept 1989) (age not mentioned); exercycle, *Cohen v T. J. Thomas Co.*, 51 AD2d 963, 380 NYS2d 294 (2d Dept 1976) (age not mentioned); matches, *Beekman Estate v Midonick*, 44 Misc2d 11, 252 NYS2d 885 (Sup 1964) (3 years, 11 months); cigarette lighter, *Marks v Thompson*, 18 AD2d 731, 234 NYS2d 391 (3d Dept 1962), *aff'd*, 13 NY2d 1029, 245 NYS2d 601, 195 NE2d 311 (1963)

(four-year-old); whiffle ball bat, *Schuh v Hickis*, 37 Misc2d 477, 236 NYS2d 214 (Sup 1962) (fourteen-year-old); skateboard, *Young v Dalidowicz*, 92 AD2d 242, 460 NYS2d 82 (2d Dept 1983) (age not mentioned); snowmobile, *Alfano v Marlboro Airport, Inc.*, 85 AD2d 674, 445 NYS2d 517 (2d Dept 1981) (seventeen-year-old, licensed driver) toy rifle, *Gordon v Harris*, 86 AD2d 948, 448 NYS2d 598 (3d Dept 1982) (eight-year-old); seesaw, *Pietrzak v McGrath*, 85 AD2d 720, 445 NYS2d 827 (2d Dept 1981) (eight-year-old); tricycle, *St. Pierre by Brammer v Watervliet*, 127 Misc2d 135, 485 NYS2d 685 (Sup 1985) (one-year-old); bicycle, *Sorto v Flores*, 241 AD2d 446, 660 NYS2d 60 (2d Dept 1997) (five-year-old); bicycle with missing chainguard, *Rosenberg v Mermelstein*, 116 AD2d 712, 497 NYS2d 765 (2d Dept 1986) (ten-year-old); and automobile, *Larsen v Heitmann*, 133 AD2d 533, 519 NYS2d 904 (4th Dept 1987) (seventeen-year-old, licensed driver).

As stated previously, whether a particular object qualifies as a dangerous instrument depends on the nature of the instrument and the facts pertaining to its use, including the particular attributes of the minor using or operating the item, *Rios v Smith*, 95 NY2d 647, 722 NYS2d 220, 744 NE2d 1156 (2001); *Pineiro v Rush*, 163 AD3d 1097, 81 NYS3d 286 (3d Dept 2018); *Dichiaro v Gapanoff*, 270 AD2d 450, 706 NYS2d 340 (2d Dept 2000). While this question is often a fact-based determination, items that are commonly used by children, of suitable age in a manner consistent with their intended use, may not, as a matter of law, be classified as dangerous instruments, *Rios v Smith*, *supra*; see *Sorto v Flores*, 241 AD2d 446, 660 NYS2d 60 (2d Dept 1997) (five-year-old using bicycle); *Barocas v F.W. Woolworth Co.*, 207 AD2d 145, 622 NYS2d 5 (1st Dept 1995) (simple plastic doll used by child who was two years, seven and one-half months old); *Santalucia v Broome*, 205 AD2d 969, 613 NYS2d 774 (3d Dept 1994) (five-year-old riding bicycle). The issue of whether an all-terrain vehicle was a dangerous instrument was a question of fact properly submitted for jury determination where the record revealed that the vehicle could attain speeds of 20–30 miles per hour and a passenger would ride the vehicle by holding onto the driver, *Rios v Smith*, *supra*; see *Craft v Mid Island Dept. Stores, Inc.*, 112 AD2d 969, 492 NYS2d 780 (2d Dept 1985) (gasoline, liability); see also *Passe v Holiday Inns, Inc.*, 248 AD2d 982, 670 NYS2d 272 (4th Dept 1998) (question of fact whether “super ball,” an unusually hard rubber ball, is dangerous instrument based upon its size, weight and hardness and manner in which it is used). To establish a *prima facie* case the plaintiff must offer sufficient evidence that the parents should have known that the child was likely to use the instrumentality in a dangerous manner, *Larsen v Heitmann*, 133 AD2d 533, 519 NYS2d 904 (4th Dept 1987). Likewise, it must be established that the parent had the ability to control the use of the instrument, *Gordon v Harris*, 86 AD2d 948, 448 NYS2d 598 (3d Dept 1982).

A child who is injured by the instrumentality given to the child by the parents has no cause of action against the parents, *Chiccino v Hartman*, 87 AD2d 1002, 450 NYS2d 452 (4th Dept 1982), *aff'd*, 57 NY2d 732, 454 NYS2d 986, 440 NE2d 1333 (1982); see *Nolechek v*

Gesuale, 46 NY2d 332, 413 NYS2d 340, 385 NE2d 1268 (1978); Holodook v Spencer, 36 NY2d 35, 364 NYS2d 859, 324 NE2d 338 (1974); see also LaTorre v Genesee Management, Inc., 90 NY2d 576, 665 NYS2d 1, 687 NE2d 1284 (1997), but a sibling injured by the instrumentality does have a cause of action against the parent(s), Alessi v Alessi, 103 AD2d 1023, 478 NYS2d 396 (4th Dept 1984). Although a parent could not be held liable on a theory of negligent supervision for allowing a child to play unattended in a yard, the parent, as the operator of a dangerous instrumentality (a power mower), owed a duty to all, including her own children, not to leave the instrumentality running and unattended, Grivas v Grivas, 113 AD2d 264, 496 NYS2d 757 (2d Dept 1985); but see Kelchner v John Deere Co., 149 AD2d 911, 540 NYS2d 390 (4th Dept 1989) (no liability since permitting child to ride on mower's rake attachment not likely to cause injury to third person). A mother's decision to hold an infant in her arms while riding in a car, however, is one within the parameters of her parental discretion and judgment and is not owed to the world at large, Thurel v Varghese, 207 AD2d 220, 621 NYS2d 633 (2d Dept 1995).

The pattern charge states the common law rule. General Obligations Law § 3-112 imposes liability, not in excess of \$2,500, upon the "parent or legal guardian, other than the state or a local social services department or a foster parent, having custody of an infant over ten and less than eighteen years of age, . . . if such infant wilfully, maliciously or unlawfully damages or destroys real or personal property. . . ." The same liability up to \$2,500 is imposed for malicious acts of infants injuring public property; see General Municipal L. § 78-a; Education L. §§ 1604, 1709, 2503, 2554, 2590-g; Executive L. § 171. Similarly, GOL § 3-113 imposes liability for damage to or destruction of a cemetery plot. The constitutionality of this type of statute has been questioned, Owens v Ivey, 138 Misc2d 671, 525 NYS2d 508 (NY City Ct 1988).

The general rule is that the parent is not liable for the torts of the child, Davies v East Rockaway, 272 AD2d 503, 708 NYS2d 147 (2d Dept 2000); Napiearski v Pickering, 278 App Div 456, 106 NYS2d 28 (4th Dept 1951); Steinberg v Cauchois, 249 App Div 518, 293 NYS 147 (2d Dept 1937). Although there may be vicarious liability if the child is in fact the agent of the parent, Maurillo v Park Slope U-Haul, 194 AD2d 142, 606 NYS2d 243 (2d Dept 1993); Steinberg v Cauchois, *supra*, agency must be proven and is not presumed from the relationship. The liability stated in the pattern charge is predicated on the negligent failure of the parent to exercise the control inherent in the parent-child relationship, Gordon v Harris, 86 AD2d 948, 448 NYS2d 598 (3d Dept 1982). The Court of Appeals has stated that a parent owes a duty to protect third parties from harm that is clearly foreseeable from the child's improvident use or operation of a dangerous instrument, where such use is found to be subject to the parent's control, Rios v Smith, 95 NY2d 647, 722 NYS2d 220, 744 NE2d 1156 (2001); LaTorre v Genesee Management, Inc., 90 NY2d 576, 665 NYS2d 1, 687 NE2d 1284 (1997); Wright v O'Leary, 172 AD3d 1495, 99 NYS3d 477 (3d Dept 2019). Since control is essential, a grandparent who has such control may be liable,

Carmona v Padilla, 4 AD2d 181, 163 NYS2d 741 (1st Dept 1957), *aff'd*, 4 NY2d 767, 172 NYS2d 820, 149 NE2d 337 (1958). As to counties, see *Staruck v Otsego*, 285 App Div 476, 138 NYS2d 385 (3d Dept 1955). A minor child exercising control over a sibling will not be liable, *Smith v Sapienza*, 52 NY2d 82, 436 NYS2d 236, 417 NE2d 530 (1981). Liability may not be imposed upon a parent who does not have control of the child, *Larsen v Heitmann*, 133 AD2d 533, 519 NYS2d 904 (4th Dept 1987) (seventeen-year-old who had previously lived away from parents); see also *Len v Cohoes*, 144 AD2d 187, 534 NYS2d 505 (3d Dept 1988); *Dawes v Ballard*, 133 AD2d 662, 520 NYS2d 11 (2d Dept 1987). Nor may liability be imposed where the child was over 18 at the time of the occurrence, see CPLR 105(j); *Corrigan v DiGuardia*, 166 AD2d 408, 560 NYS2d 472 (2d Dept 1990).

In *Rios v Smith*, 95 NY2d 647, 722 NYS2d 220, 744 NE2d 1156 (2001), the Court recognized that a parent could be held liable under the theory of negligent entrustment of a dangerous instrument to a child even if the instrument was used by a friend of that child. In *Rios*, defendant father was aware that his sons had driven his all-terrain vehicles (ATVs) in the past with passengers on the vehicles and it was likely that his sons had performed “wheelies” while riding the ATVs, *id.* The defendant further acknowledged that the sons’ friend had probably driven the ATVs on prior occasions because he had been a frequent visitor to the farm where they were located, *id.* In addition, defendant admitted that he established no rules regarding his sons’ use of the ATVs, did not limit his sons’ ability to lend the ATVs to others, and did not restrict operation of the ATVs to particular areas of the farm, *id.* Under these facts, the Court held that defendant could have clearly foreseen that his sons’ access to and use of the ATVs could involve riding one of the vehicles while lending the other to a friend and that such use might expose passengers on the ATVs to injury, *id.* Therefore, the evidence was legally sufficient for the jury to determine that defendant created an unreasonable risk of harm to plaintiff by negligently entrusting the ATVs to his son, whose use of the ATVs involved lending one to a friend, who was also a minor, *id.*; see *Wright v O’Leary*, 172 AD3d 1495, 99 NYS3d 477 (3d Dept 2019) (questions of fact as to whether defendants could not have “clearly foreseen” that their 14-year-old son’s use of utility vehicle could have exposed others to injury).

Pursuant to what is known as the “family automobile doctrine,” a parent is made responsible for liability incurred through the authorized use of an automobile owned and used for family purposes by a member of the parent’s household pursuant to the parent’s orders or in the parent’s business, *Maurillo v Park Slope U-Haul*, 194 AD2d 142, 606 NYS2d 243 (2d Dept 1993). This liability is substantially the same as that of a principal for the negligence of his or her agent, *id.* Agency rules do not only apply to a parent-child relationship solely within a strictly business or employment context and members of a family may enter into a gratuitous agency relationship where there is no evidence of any payment incident to the agency relationship, *id.*

The harm that is compensable for the tort of negligent entrustment

of a dangerous instrumentality may be direct, physical injury caused to a third party by a dangerous instrument, see *Rios v Smith*, 95 NY2d 647, 722 NYS2d 220, 744 NE2d 1156 (2001). In addition, financial harm resulting from potential liability for a “concurrent” tort-feasor for the child’s death while using the dangerous instrument is also compensable, *Nolechek v Gesuale*, 46 NY2d 332, 413 NYS2d 340, 385 NE2d 1268 (1978). Therefore, a parent’s duty to protect others from harm caused by an infant’s use of a dangerous instrument improvidently provided by the parent may support a claim for contribution against the parents by one who injures an infant who was using the dangerous instrument at the time of injury, *Nolechek v Gesuale*, *supra*; see *Young v Dalidowicz*, 92 AD2d 242, 460 NYS2d 82 (2d Dept 1983). However, such a contribution claim will be dismissed if the entrustment places only the child in danger, and not the public at large, *Kelchner v John Deere Co.*, 149 AD2d 911, 540 NYS2d 390 (4th Dept 1989); *Wilson by Wilson v Sears, Roebuck and Co.*, 126 AD2d 954, 511 NYS2d 726 (4th Dept 1987); see *McNamara v Banney*, 249 AD2d 950, 672 NYS2d 569 (4th Dept 1998); but see *Young v Greenberg*, 181 AD2d 492, 581 NYS2d 26 (1st Dept 1992).

The parent need not have given the instrument to the child; it is sufficient that the parent knows that the child has and is using an instrument such as an air rifle, *Kuchlik v Feuer*, 239 App Div 338, 267 NYS 256 (1st Dept 1933), *aff’d*, 264 NY 542, 191 NE 555 (1934), or a gun, see *Kingsland v Erie County Agr. Soc.*, 298 NY 409, 84 NE2d 38 (1949); *Napiewlarski v Pickering*, 278 App Div 456, 106 NYS2d 28 (4th Dept 1951). Mere presence of a gun in the house is not sufficient, *Yusko v Remizon*, 280 App Div 637, 116 NYS2d 922 (3d Dept 1952); *Conley v Long*, 21 Misc2d 759, 192 NYS2d 203 (Sup 1959). The accessibility of the gun, its ownership, whether it is left loaded or unloaded, and the age of the child all have a bearing, *Napiewlarski v Pickering*, *supra*.

Since the liability is predicated on the parent’s negligence, a verdict in favor of the infant defendant but against the parent defendant is not inconsistent, *Carmona v Padilla*, 4 AD2d 181, 163 NYS2d 741 (1st Dept 1957), *aff’d*, 4 NY2d 767, 172 NYS2d 820, 149 NE2d 337 (1958); *Restatement, Second, Torts*, § 316 Comment c.

As to spouses generally, neither is responsible for the torts of the other, *General Obligations Law* § 3-313; *Brenner v Goldstein*, 184 App Div 268, 171 NYS 579 (1st Dept 1918); see *Prosser and Keeton, Torts* (5th Ed) § 123; 46 NYJur2d, *Domestic Relations* §§ 248, 249, 262; 8B NYJur2d, *Automobiles and Other Vehicles* § 1070. Exceptions exist when one spouse is in fact the agent of the other, 46 NYJur2d, *Domestic Relations* § 276, or with respect to acts of one spouse done at the other’s “actual coercion or instigation; and such coercion or instigation shall not be presumed, but must be proved,” *GOL* § 3-313.

In *Karoon v New York City Transit Authority*, 241 AD2d 323, 659 NYS2d 27 (1st Dept 1997), plaintiff sued defendant based on respondeat superior, alleging that the driver operated the bus with the

employer's consent and permission and that he negligently caused the accident in issue. Plaintiff also alleged two additional causes of action that included claims for negligent hiring, retention and training, and negligent entrustment of a dangerous instrumentality. The Court dismissed the additional causes of action because, if the employer was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training, *id*; see *Rossetti v Board of Educ. of Schalmont Central School Dist.*, 277 AD2d 668, 716 NYS2d 460 (3d Dept 2000). A parent cannot be held vicariously liable for the tortious conduct of an emancipated child, *Fox v Marshall*, 88 AD3d 131, 928 NYS2d 317 (2d Dept 2011); *Troiano v DeMarco*, 50 AD3d 1020, 858 NYS2d 189 (2d Dept 2008); *Hartsock v Hartsock*, 189 AD2d 993, 592 NYS2d 512 (3d Dept 1993); *Mimoun v Bartlett*, 162 AD2d 506, 556 NYS2d 705 (2d Dept 1990); *Fischer v Lunt*, 162 AD2d 1016, 557 NYS2d 220 (4th Dept 1990). However, liability may be imposed where a parent supplies a dangerous instrumentality to an adult child knowing that the adult child is likely to use it to cause harm, see *Hartsock v Hartsock*, *supra*.

PJI 2:261. Liability for the Conduct of Another—Family Relationship—Liability of Parent for Tort of Child—Failure to Restrain

A parent is not responsible for the act of (his, her) child, but is responsible for (his, her) own failure to use reasonable care to restrain the child from so viciously conducting (himself, herself) as to (intentionally harm, create an unreasonable risk of harm to) others, provided the parent has knowledge of the child's propensity toward such conduct. Reasonable care means that degree of care that a reasonably prudent parent would use under the same circumstances. Propensity toward vicious conduct means a habitual tendency to do an act that might endanger the person or property of others.

If you find that the infant defendant habitually assaulted and beat up others, that (*defendant-parent*) had knowledge of the propensity to do so, and that (*defendant-parent*) failed to use reasonable care to restrain the infant defendant, you will find that (*defendant-parent*) was negligent. If, however, you find that the infant defendant did not habitually assault others, or that though (he, she) did, (*defendant-parent*) did not have knowledge of that

fact, or that (*defendant-parent*) did use such care as a reasonably prudent parent would under the circumstances to restrain the infant, you will find that (*defendant-parent*) was not negligent.

Comment

Caveat: A parent cannot be held vicariously liable for the tortious conduct of an emancipated child, *Fox v Marshall*, 88 AD3d 131, 928 NYS2d 317 (2d Dept 2011); *Troiano v DeMarco*, 50 AD3d 1020, 858 NYS2d 189 (2d Dept 2008); *Hartsock v Hartsock*, 189 AD2d 993, 592 NYS2d 512 (3d Dept 1993); *Mimoun v Bartlett*, 162 AD2d 506, 556 NYS2d 705 (2d Dept 1990); *Fischer v Lunt*, 162 AD2d 1016, 557 NYS2d 220 (4th Dept 1990).

Based on *Staruck v Otsego*, 285 App Div 476, 138 NYS2d 385 (3d Dept 1955) (shooting); *Zuckerberg v Munzer*, 277 App Div 1061, 100 NYS2d 910 (2d Dept 1950) (assault); *Steinberg v Cauchois*, 249 App Div 518, 293 NYS 147 (2d Dept 1937) (riding bicycle on sidewalk); *Linder v Bidner*, 50 Misc2d 320, 270 NYS2d 427 (Sup 1966) (assault); see *LaTorre v Genesee Management, Inc.*, 90 NY2d 576, 665 NYS2d 1, 687 NE2d 1284 (1997); *Restatement, Second, Torts*, § 316; *Prosser and Keaton, Torts* (5th Ed) § 123; 46 NYJur2d, *Domestic Relations* § 537; 2C-Part 2, *Warren's Negligence*, VI, *Parent and Child* § 80.01 (3)(iv) (4th Ed. 1990); *Annot*: 54 ALR3d 974; 3 *Harper, James & Gray, Law of Torts*, [2d Ed.] § 18.7, at 737-738.

The Court of Appeals acknowledged the existence of the above cases in *LaTorre v Genesee Management, Inc.*, 90 NY2d 576, 665 NYS2d 1, 687 NE2d 1284 (1997), where defendants attempted to implead plaintiff's mother based upon alleged negligent supervision of her young, developmentally disabled son. The Court ruled that it was not required to resolve the question of parental liability based upon vicious propensities of a child where the record and these allegations were lacking requisite specificity, *id.* Defendants' third-party complaint alleged that plaintiff "suffered from violent propensities and tendencies rendering him incapable of interacting with other people," *id.* The Court ruled that this allegation was insufficient to satisfy the requisite pertinent knowledge of the kind of dangerous propensities attributed to plaintiff's mother that would create parental liability for a child's actions. The Court ruled that the "extraordinariness or patent foreseeability of the situation are factors to be considered in determining whether a claim may be allowed to stand, . . .," *id.*

The elements of the cause of action are knowledge by the parent that the child has a vicious propensity, *Adolph E. by Susan E. v Linda M.*, 170 AD2d 1011, 566 NYS2d 165 (4th Dept 1991); *Shaw v Roth*, 54 Misc2d 418, 282 NYS2d 844 (Sup 1967), and the ability to control the child, *Dawes v Ballard*, 133 AD2d 662, 520 NYS2d 11 (2d Dept 1987). The cases do not define vicious conduct. The definition of propensity to-

ward vicious conduct set forth in the pattern charge is the definition used in dog bite cases; see PJI 2:20. To recover there must be more than negligent play, *Gordon v Harris*, 86 AD2d 948, 448 NYS2d 598 (3d Dept 1982) (eight-year-old swinging a toy rifle); there should be a history of prior malicious acts similar to the one before the court, *Linder v Bidner*, 50 Misc2d 320, 270 NYS2d 427 (Sup 1966). Evidence of a single prior altercation in which the parents' child was allegedly assaulted cannot establish a propensity by the child to commit vicious acts, *Davies v East Rockaway*, 272 AD2d 503, 708 NYS2d 147 (2d Dept 2000). The duty is imposed upon the person or entity standing in loco parentis, *Excelsior Ins. Co. of New York v State*, 296 NY 40, 69 NE2d 553 (1946); see *Staruck v Otsego*, 285 App Div 476, 138 NYS2d 385 (3d Dept 1955). The duty extends to one in charge of an incompetent, *Rausch v McVeigh*, 105 Misc2d 163, 431 NYS2d 887 (Sup 1980) (twenty-two-year-old autistic son with past violent conduct). There must, of course, be a causal relationship, see PJI 2:70.

To impose liability there must be a failure to use reasonable means to prevent a specific type of harmful conduct, as there is no liability on the part of one standing in loco parentis for the general incorrigibility of a child, *Linder v Bidner*, 50 Misc2d 320, 270 NYS2d 427 (Sup 1966). Liability will not be imposed where the evidence establishes that the parents were not in a position to restrain their child's conduct, *Davies v East Rockaway*, 272 AD2d 503, 708 NYS2d 147 (2d Dept 2000). Likewise, knowledge by a parent that a child played football in the streets a game sometimes dangerous to passerbys and pedestrians, will not give rise to liability, *Knopf v Muntz*, 121 NYS2d 422 (Sup 1952), *no* *r*. In the absence of a reason indicating a need to isolate a child, there is no duty to keep the child under constant surveillance, *Excelsior Ins. Co. of New York v State*, 296 NY 40, 69 NE2d 553 (1946); *Wasserstein v State*, 32 AD2d 119, 300 NYS2d 263 (3d Dept 1969), *aff'd*, 27 NY2d 627, 313 NYS2d 759, 261 NE2d 665 (1970).

With regard to the statutory liability of a parent for the willful destruction of public or private property by a child, see Comment to PJI 2:260. As to spouses, the common law never recognized the ability of a wife to control her husband, and General Obligations Law § 3-313 provides that a husband is not liable for his wife's wrongful or tortious acts unless they were done as a result of his actual coercion or instigation.

b. RECOVERY BY (INFANT, PARENT, SPOUSE) NOT REDUCED BY NEGLIGENCE OF (PARENT, INFANT, OTHER SPOUSE)

PJI 2:262. Liability for the Conduct of Another—Family Relationship—Recovery by (Infant, Parent, Spouse) Not Reduced by Culpable Conduct of (Parent, Infant, Other Spouse)

If you find that plaintiff is entitled to recover under the rules of law I have given you, the sum you award as damages should not be reduced, even if you also find that there was negligence on the part of plaintiff's (husband, wife, parent, custodian) which contributed to plaintiff's injury.

Comment

Based, as to infant, on General Obligations Law § 3-111; *Boyd v Trent*, 297 AD2d 301, 746 NYS2d 191 (2d Dept 2002); *Pedersen v Balzan*, 117 AD2d 933, 499 NYS2d 239 (3d Dept 1986); *Avram v Haddad*, 88 AD2d 942, 451 NYS2d 178 (2d Dept 1982); *Van v Clayburn*, 21 AD2d 144, 249 NYS2d 310 (1st Dept 1964); *De Marco v Albany*, 17 AD2d 250, 234 NYS2d 94 (3d Dept 1962); see *Vaughan v Saint Francis Hosp.*, 29 AD3d 1133, 815 NYS2d 307 (3d Dept 2006) (citing PJI); Restatement Second, Torts § 488; 79 NYJur2d, Negligence § 118; as to parent, on *Webber v Graves*, 234 App Div 579, 255 NYS 726 (4th Dept 1932); as to spouse, on General Obligations Law § 3-313; *Michelson v Stuhlman*, 272 NY 163, 5 NE2d 185 (1936); *Reyes v 38 Sickles Street Corp.*, 188 AD2d 518, 591 NYS2d 469 (2d Dept 1992); *Bodin v Bishop, McCormick & Bishop*, 251 App Div 303, 296 NYS 304 (1st Dept 1937); see Restatement Second, Torts § 487; *Prosser & Keaton*, Torts § 74 (5th ed).

Under General Obligations Law § 3-111, a child's recovery is not reduced by the culpable conduct of a parent, see *Kelly v Metropolitan Ins. and Annuity Co.*, 82 AD3d 16, 918 NYS2d 50 (1st Dept 2011). Thus, when the jury is instructed to consider the child's own conduct, care must be taken to charge that any negligence of the parent is not to be imputed to the child, *Barraza v 55 West 47th Street Co.*, 144 AD2d 296, 534 NYS2d 175 (1st Dept 1988). For example, where parents instructed the child to ride her bicycle on the wrong side of the road, it was error to charge Vehicle & Traffic Law § 1230(a) (the parent of any child "shall not authorize or knowingly permit" such child "to violate any of the provisions of this article") since the negligence of the parents was not imputable to the child, *Pedersen v Balzan*, 117 AD2d 933, 499 NYS2d 239 (3d Dept 1986). A parent's negligence in failing to ensure that her children were restrained in their car seats at the time of a motor vehicle accident cannot be imputed to infant plaintiffs, *Boyd v Trent*, 297 AD2d 301, 746 NYS2d 191 (2d Dept 2002).

Although a parent can be liable to a child for negligence, *Hoppe v Hoppe*, 281 AD2d 595, 724 NYS2d 65 (2d Dept 2001), New York does not recognize a cause of action for negligent supervision by a parent or foster parent, *McCabe v Dutchess*, 72 AD3d 145, 895 NYS2d 446 (2d Dept 2010) (foster parent), *Holodook v Spencer*, 36 NY2d 35, 364 NYS2d 859, 324 NE2d 338 (1974) (parent); see PJI 2:260. Therefore, in an action by a child to recover for personal injuries and in a derivative suit by a parent to recover for loss of the child's services, it is error to instruct the jury to consider the parent's negligent supervision of the child, *Russo v Osofsky*, 112 AD2d 926, 492 NYS2d 623 (2d Dept 1985). However, *Costello by Hines v Marchese*, 137 AD2d 482, 524 NYS2d 232 (2d Dept 1988) held that the principle that precludes tort claims against parents for alleged negligent supervision of a child does not extend to immunize a grandparent from such claims when he or she is exercising temporary custody or control of the child.

Moreover, a parent owes a duty to protect third parties from foreseeable harm resulting from a child's improvident use of a dangerous instrument that was subject to parental control, see *Rios v Smith*, 95 NY2d 647, 722 NYS2d 220, 744 NE2d 1156 (2001); *Nolechek v Gesuale*, 46 NY2d 332, 413 NYS2d 340, 385 NE2d 1268 (1978); *Wright v O'Leary*, 172 AD3d 1495, 99 NYS3d 477 (3d Dept 2019); *Paladino v Isasi*, 123 AD2d 379, 506 NYS2d 457 (2d Dept 1986); PJI 2:260. But where the parents did not entrust the instrumentality to the child who was not living at home, the failure to control the child's use of the instrumentality at best constitutes negligent parental supervision which is not actionable, *Len v Cohoes*, 144 AD2d 187, 534 NYS2d 505 (3d Dept 1988).

A third party may seek contribution where a parent's conduct toward a child would be a tort if done by one ordinary person to another, *Holodook v Spencer*, 36 NY2d 35, 364 NYS2d 859, 324 NE2d 338 (1974). Therefore, a defendant may maintain an affirmative defense and counterclaim against a child's father based upon the alleged active and affirmative negligence of the plaintiff father while bathing his son, *id*; *Cox v Cheaib*, 231 AD2d 841, 647 NYS2d 317 (4th Dept 1996).

C. DAMAGES IN DERIVATIVE ACTION REDUCED BY PERCENTAGE OF (HIS/
HER) NEGLIGENCE

Caveat: The culpable conduct of the personal injury plaintiff serves to reduce the award of damages to the derivative action plaintiff, see *Maidman v Stagg*, 82 AD2d 299, 441 NYS2d 711 (2d Dept 1981) (wife's loss of consortium award to be reduced by percentage of fault of husband); see also *Florsz v Ogruk*, 184 AD2d 546, 585 NYS2d 220 (2d Dept 1992), (sum awarded to plaintiff on his derivative cause of action for loss of services of injured spouse reduced by plaintiff's percentage of fault in accident). If the jury finds the derivative plaintiff to be at fault, the trial court should reduce the derivative plaintiff's damages by the percentage of that fault. In the event that the personal injury plaintiff was also negligent, it may be necessary to apply another reduction to take into account the negligence of the personal injury plaintiff.

In an infant's action against one parent, derivative recovery may be had by the other parent, provided the defendant parent was not engaged in the business of the plaintiff parent, see *Stedge v Hoover*, 24 AD2d 911, 264 NYS2d 500 (3d Dept 1965); *Siekierski v Derleth*, 13 AD2d 715, 213 NYS2d 941 (4th Dept 1961).

5. JOINT ENTERPRISE

PJI 2:265. Liability for the Conduct of Another—Joint Enterprise

Plaintiff AB claims that both CD, the driver, and EF, the passenger, in the automobile that collided with the automobile (which AB was driving, in which AB was riding) are responsible for (his, her) injuries because CD and EF were engaged in a joint enterprise when the collision occurred. If you have found, under the rules that I have previously stated, that CD operated the vehicle (he, she) was driving in a negligent manner, and that (his, her) negligence was a substantial factor in causing the collision with the automobile AB was (driving, riding in), then you will proceed to the next question: were CD and EF engaged in a joint enterprise?

A joint enterprise exists when two or more people undertake an automobile trip for a common objective or purpose and with the understanding that each has the right to share control of the operation of the vehicle, that is — as to the manner in which it is driven, regardless of which one is driving. It is not necessary that the control is exercised, but only that the right of each to share control exists. The fact(s) that (CD and EF had the same destination, that EF requested the trip, that EF suggested the route, that EF had agreed to pay part of the expenses or alternate in the driving) may be considered by you on the question whether there was a joint enterprise. However, unless you find that there was a common objective and a right to share control, your finding will be that there was no joint enterprise.

Comment

Based on *Stroher v Elting*, 97 NY 102 (1884); *Seiden v Reimer*, 190 App Div 713, 180 NYS 345 (1st Dept 1920), *aff'd*, 232 NY 593, 134 NE 585 (1922); *Van Rensselaer v Chism*, 186 App Div 557, 174 NYS 751 (3d Dept 1919), *aff'd*, 231 NY 567, 132 NE 891 (1921); Restatement, Second, Torts, § 491; 8B NYJur2d, Automobiles and Other Vehicles, § 898, 900;

Annot: 3 ALR5th 1. As to the definition of joint enterprise, see *Fairbairn v State*, 107 AD2d 864, 484 NYS2d 682 (3d Dept 1985), *aff'd*, 66 NY2d 620, 495 NYS2d 32, 485 NE2d 239 (1985); *Webber v Graves*, 234 App Div 579, 255 NYS 726 (4th Dept 1932); Restatement, Second, Torts, § 491, Comment b.

Generally, the negligence of the driver of a motor vehicle is not imputed to an occupant, no matter what the relationship to the driver may be, unless the occupant was engaged in some joint enterprise with the driver, or the occupant's own negligence contributed to the occurrence, *Kalechman v Drew Auto Rental, Inc.*, 33 NY2d 397, 353 NYS2d 414, 308 NE2d 886 (1973). If the occupant is an owner of the vehicle, liability will be determined in accordance with section 388 of the Vehicle and Traffic Law, *Payne v Payne*, 28 NY2d 399, 322 NYS2d 238, 271 NE2d 220 (1971); see PJI 2:245.

Alternating use of cars in driving to and from work is not a joint enterprise, *Lacovara v Fleet Transp. Co.*, 12 AD2d 957, 211 NYS2d 215 (2d Dept 1961). Sharing expenses is not, by itself, sufficient to establish a joint enterprise, *Breasette v Briscoe*, 21 Misc2d 968, 197 NYS2d 866 (Sup 1960); nor is the sharing of driving duties, *Klinger v Berben*, 34 AD2d 1028, 310 NYS2d 845 (3d Dept 1970); nor is a request that a trip be made for the passenger's purpose, *Rarick v Bristol*, 181 Misc 1068, 47 NYS2d 258 (Sup 1944), *aff'd*, 268 App Div 953, 51 NYS2d 753 (4th Dept 1944). Notwithstanding arguments based on joint venture, the negligence of a learning driver will not be imputed to the licensed operator accompanying him or her, *Lazofsky v New York*, 22 AD2d 858, 254 NYS2d 349 (1st Dept 1964); *Wolpert v Garrett*, 278 App Div 893, 105 NYS2d 21 (4th Dept 1951); *Sardo v Herlihy*, 143 Misc 397, 256 NYS 690 (Sup 1932).

The pattern charge assumes that the common purpose is not a business purpose. When it is a business purpose, there is a joint enterprise as a matter of law, *Stroher v Elting*, 97 NY 102 (1884); *Stelling v Public Lumber Supply Co.*, 3 AD2d 713, 159 NYS2d 459 (2d Dept 1957); see Restatement, Second, Torts, § 491, Comment g. Of course, whether there is a business purpose may be a question for the jury, *McCormack v Nassau Electric R. Co.*, 18 App Div 333, 46 NYS 230 (2d Dept 1897).

While the existence of a joint enterprise permits the negligence of the driver to be imputed to the passenger in an action by third parties, the rule has no application in an action by the passenger against the driver or a third party, *Smalley v Associated Transport, Inc.*, 52 AD2d 979, 383 NYS2d 108 (3d Dept 1976); see *Kalechman v Drew Auto Rental, Inc.*, 33 NY2d 397, 353 NYS2d 414, 308 NE2d 886 (1973); see also *Maurillo v Park Slope U-Haul*, 194 AD2d 142, 606 NYS2d 243 (2d Dept 1993); but see 8B NYJur2d, Automobiles and Other Vehicles, § 902.

The doctrine of "concerted action," while related, is distinguishable

from joint enterprise. While cases involving concerted action sometimes use joint enterprise language, see *Beaver v Batrouny*, 71 AD2d 821, 419 NYS2d 391 (4th Dept 1979), their holdings on analysis appear to be that one acting in concert with a negligent person is himself negligent, see *Bichler v Eli Lilly and Co.*, 55 NY2d 571, 450 NYS2d 776, 436 NE2d 182 (1982). Thus, *De Carvalho v Brunner*, 223 NY 284, 119 NE 563 (1918), held that when two trucks were racing on a city street and a pedestrian was killed by one, the jury could find that the drivers acted in concert and that both were liable; see also *Shea v Kelly*, 121 AD2d 620, 503 NYS2d 649 (2d Dept 1986) and *Finn v Morgan*, 46 AD2d 229, 362 NYS2d 292 (4th Dept 1974), which held that the evidence of concerted action was lacking. Similarly, although not always with discussion of principle, a "common adventure" or joint act has been held to bar recovery from persons participating in the joint activity as well as from others. For example, where two young couples entered a car in a garage and turned on the motor to keep warm, resulting in their death by carbon monoxide poisoning, no one of them was charged with liability for the consequences of their joint activities, *Harper v Parker*, 12 AD2d 327, 211 NYS2d 325 (1st Dept 1961), *aff'd*, 11 NY2d 1095, 230 NYS2d 719, 184 NE2d 310 (1962). Knowledge of the negligent act exists in cases of concerted action, while in a joint enterprise liability is dependent not upon knowledge but upon common purpose and control.

6. LIABILITY FOR ACTS OF A CORPORATION

**PJI 2:266. Liability for the Conduct of Another—
Piercing the Corporate Veil**

As you have heard, the plaintiff AB claims that *[add where appropriate: the defendant]* CD *[state nature of plaintiff's substantive claims(s)]*. AB also claims that the defendant(s) EF *[identify defendant corporate/limited liability company owner(s)]*, the owner(s) of CD, should be held responsible for what CD did.

CD is a (corporation, limited liability company). Ordinarily, the owner(s) of a (corporation, limited liability company) (is, are) not responsible for what the (corporation, limited liability company) does. In most situations, the (corporation, limited liability company) is treated as separate from its owner(s) and only the (corporation, limited liability company) itself is responsible for what it does. That protection is sometimes referred to as the corporate veil or shield. However, the protection from liability that is ordinarily given to the owner(s) of (corporations, limited liability companies) is not absolute. Under certain circumstances, the (corporation's, limited liability company's) owner(s) may lose the protection of the corporate veil or shield and be held responsible for what the (corporation, limited liability company) did. We call this "piercing the corporate veil or shield."

The corporate veil or shield may be pierced when (1) the (corporation's, limited liability company's) owner(s) completely controlled the (corporation, limited liability company) and did not treat it as a separate business entity and (2) the (corporation's, limited liability company's) owner(s) used (his, her, its, their) complete control to commit a fraud or a dishonest or an unjust act in connection with the transaction about which you have heard and in violation of the injured party's rights. Both of these elements must be proved; the (owner's,

owners') complete control of the (corporation, limited liability company) is not enough by itself to remove the protection of the corporate veil or shield.

In this case, AB claims that (1) EF completely controlled CD and failed to treat it as a separate business entity in that *[state facts on which AB's claim of domination and control is based]* and (2) EF used its complete control of CD to commit a fraud or a dishonest or an unjust act against AB in that *[state nature of plaintiff's substantive claim(s)]*. EF claims that *[state owner-defendant's claims such as (he, she, it, they) did not dominate the (corporation/limited liability company), did not disregard its status as a separate business entity, did not use (his, her, its, their) control to commit a fraud or a dishonest or an unjust act against plaintiff; also state the facts on which defendant's claim is based]*.

AB has the burden of proving by a preponderance of the evidence (1) that EF completely controlled CD and did not treat it as a separate business entity and (2) that EF used its complete control of CD to commit a fraud or a dishonest or an unjust act against AB in that *[state nature of CD's claimed wrong]*. If you decide that EF did not completely control CD or that EF treated CD as a separate business entity, you will find that EF is not responsible for what CD did *[add where appropriate: on this claim]*. If you decide that EF did completely control CD and did not treat CD as a separate business entity, you will go on to consider whether EF used its control of CD to commit a fraud or a dishonest or an unjust act against AB in that *[state plaintiff's claim(s)]*.

In deciding whether AB has met (his, her, its) burden of proof, you should consider (1) whether EF ignored the separate corporate identity by *[identify formalities plaintiff claims were ignored, such as required votes by directors, separate books and records]*, (2) whether CD did not have enough money and insurance to meet its own bills and debts and

to meet its liabilities, including any liability to AB, (3) whether EF did not separate CD's assets and money from (his, her, its) own money and assets and (4) whether EF used CD's money or assets for personal needs. [*Where plaintiff seeks to hold a parent entity liable for the obligations of a subsidiary, state, as appropriate: In addition, you should consider whether CD and EF's directors, officers and personnel overlapped, whether CD and EF used the same office space and telephone numbers, whether CD permitted EF to make its own business decisions, whether CD and EF did not negotiate and contract with each other as if they were independent businesses, whether EF treated CD and the other companies it owns as independent profit centers, whether EF and EF's affiliates used CD's money or assets as if it were its own and whether EF's debts have been paid or have been guaranteed by CD or the other companies within the group.*]

If you decide that EF used its control of CD to commit a fraud or a dishonest or an unjust act against AB in that [*state plaintiff's claim(s)*], you will find that EF is liable to AB for what CD did [*state nature of plaintiff's substantive claim(s)*]. If you decide that EF did not use its control of CD to commit a fraud or a dishonest or an unjust act against AB in that [*state plaintiff's claim(s)*], you will find that EF is not liable to AB [*add where appropriate: on this claim*].

Comment

Caveat 1: The doctrine of "piercing the corporate veil" presupposes that the corporation has an underlying obligation to plaintiff, *Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 603 NYS2d 807, 623 NE2d 1157 (1993). The doctrine does not furnish a basis for a cause of action independent of plaintiff's cause of action against the corporation or limited liability company, *Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 73 NYS3d 95, 96 NE3d 191 (2018); *Morris v New York State Dept. of Taxation and Finance*, *supra*; *Buchovecky v S & J Morrell, Inc.*, 175 AD3d 945, 107 NYS3d 568 (4th Dept 2019); *ARB Upstate Communications LLC v R.J. Reuter, L.L.C.*, 93 AD3d 929, 940 NYS2d 679 (3d Dept 2012); *Matter of Estate of Moak*, 92 AD3d 1040, 938 NYS2d 648 (3d Dept 2012). Accordingly, the charge should be given only when plaintiff has a claim against the corporation

or limited liability company. If the claims against the corporation or limited liability company and the individual owners have been interposed in the same action, the jurors must be told that they should consider the liability of the owners only if they have first determined that the corporation or limited liability company is liable.

Caveat 2: The doctrine of “piercing the corporate veil” is available as a basis for imposing liability on a corporation’s owners in cases involving tort claims as well as in cases involving commercial wrongs, *Walkovszky v Carlton*, 18 NY2d 414, 276 NYS2d 585, 223 NE2d 6 (1966) (vehicular negligence); *Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 944 NYS2d 30 (1st Dept 2012) (breach of contract); *Grammas v Lockwood Associates, LLC*, 95 AD3d 1073, 944 NYS2d 623 (2d Dept 2012) (fraud and breach of warranty); *McCloud v Bettcher Industries, Inc.*, 90 AD3d 1680, 935 NYS2d 815 (4th Dept 2011) (products liability); *Lee v Arnan Development Corp.*, 77 AD3d 1261, 909 NYS2d 826 (3d Dept 2010) (premises liability); *Longshore v Paul Davis Systems of Capital Dist.*, 304 AD2d 964, 759 NYS2d 204 (3d Dept 2003) (worker’s on-the-job injuries). Accordingly, the charge should be given in any case where plaintiff has made a sufficient factual showing.

Caveat 3: There are numerous cases stating that a party seeking to pierce the corporate veil must bear a “heavy burden” of showing that the corporation was dominated as to the transaction attacked and that the domination was the instrument of fraud or wrongful or inequitable consequences, *TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d 335, 680 NYS2d 891, 703 NE2d 749 (1998); *Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 944 NYS2d 30 (1st Dept 2012); *Etex Apparel, Inc. v Tractor Intern. Corp.*, 83 AD3d 587, 922 NYS2d 315 (1st Dept 2011); *Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 798 NYS2d 45 (1st Dept 2005); *Retropolis, Inc. v 14th Street Development LLC*, 17 AD3d 209, 797 NYS2d 1 (1st Dept 2005). However, the “heavy burden” standard has not been specifically defined in the case law and, further, has been used by the courts only to determine motions to dismiss or for summary judgment, *Cobalt Partners, L.P. v GSC Capital Corp.*, *supra*; *Etex Apparel, Inc. v Tractor Intern. Corp.*, *supra*; *Sheridan Broadcasting Corp. v Small*, *supra*; *Retropolis, Inc. v 14th Street Development LLC*, *supra*; see *TNS Holdings, Inc. v MKI Securities Corp.*, *supra* (motion to stay arbitration). For that reason, the pattern charge, which is to be used in jury trials, utilizes the traditional civil standard of proof based on the preponderance of the evidence.

Based on *James v Loran Realty V Corp.*, 20 NY3d 918, 956 NYS2d 482, 980 NE2d 532 (2012); *ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 928 NYS2d 647, 952 NE2d 463 (2011); *East Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 16 NY3d 775, 919 NYS2d 496, 944 NE2d 1135 (2011); *TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d 335, 680 NYS2d 891, 703 NE2d 749 (1998); *Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 603 NYS2d 807, 623 NE2d 1157 (1993); *Walkovszky v Carlton*, 18 NY2d 414, 276 NYS2d 585, 223 NE2d 6 (1966); *Bartle v Home Owners Co-op.*, 309 NY

103, 127 NE2d 832 (1955); *Berkey v Third Ave. Ry. Co.*, 244 NY 84, 155 NE 58 (1926).

Corporations have an existence independent of their owners and are ordinarily treated as separate legal entities, *Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 603 NYS2d 807, 623 NE2d 1157 (1993); *Port Chester Elec. Const. Co. v Atlas*, 40 NY2d 652, 389 NYS2d 327, 357 NE2d 983 (1976); *Bartle v Home Owners Co-op.*, 309 NY 103, 127 NE2d 832 (1955); see *Doe v Bloomberg, L.P.*, 36 NY3d 450, 143 NYS3d 286, 167 NE3d 454 (2021). Further, the owners are normally not liable for the debts of the corporation, and, in fact, it is “perfectly legal” to incorporate for the express purpose of limiting the liability of the owners, *Morris v New York State Dept. of Taxation and Finance*, *supra*; *Rapid Transit Subway Const. Co. v New York*, 259 NY 472, 182 NE 145 (1932); see *Doe v Bloomberg, L.P.*, *supra*. However, in some limited circumstances, courts have the authority to look past the corporate form where necessary to prevent fraud or to achieve equity, *Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 73 NYS3d 95, 96 NE3d 191 (2018); *Port Chester Elec. Const. Co. v Atlas*, *supra*; *Walkovszky v Carlton*, 18 NY2d 414, 276 NYS2d 585, 223 NE2d 6 (1966); see *International Aircraft Trading Co. v Manufacturers Trust Co.*, 297 NY 285, 79 NE2d 249 (1948). This principle applies to limited liability companies as well as to corporations, *Colonial Sur. Co. v Lakeview Advisors, LLC*, 93 AD3d 1253, 941 NYS2d 371 (4th Dept 2012); *Matias ex rel. Palma v Mondo Properties LLC*, 43 AD3d 367, 841 NYS2d 279 (1st Dept 2007); *Retropolis, Inc. v 14th Street Development LLC*, 17 AD3d 209, 797 NYS2d 1 (1st Dept 2005); Limited Liability Company Law § 609. The doctrine may be applicable in a wide variety of cases, including those involving tort claims as well as those involving commercial wrongs, *Cortlandt Street Recovery Corp. v Bonderman*, *supra* (defaults under notes and related guaranties); *James v Loran Realty V Corp.*, 85 AD3d 619, 925 NYS2d 492 (1st Dept 2011), *aff’d*, 20 NY3d 918, 956 NYS2d 482, 980 NE2d 532 (2012) (premises liability); *Walkovszky v Carlton*, *supra* (vehicular negligence); *Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 944 NYS2d 30 (1st Dept 2012) (breach of contract); *Grammas v Lockwood Associates, LLC*, 95 AD3d 1073, 944 NYS2d 623 (2d Dept 2012) (fraud and breach of warranty); *McCloud v Bettcher Industries, Inc.*, 90 AD3d 1680, 935 NYS2d 815 (4th Dept 2011) (products liability); *Lee v Arnan Development Corp.*, 77 AD3d 1261, 909 NYS2d 826 (3d Dept 2010) (premises liability); *Longshore v Paul Davis Systems of Capital Dist.*, 304 AD2d 964, 759 NYS2d 204 (3d Dept 2003) (worker’s on-the-job injuries).

The doctrine of “piercing the corporate veil” does not constitute a basis for an independent cause of action, *Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 73 NYS3d 95, 96 NE3d 191 (2018); *Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 603 NYS2d 807, 623 NE2d 1157 (1993); *Villnave Construction Services, Inc. v Crossgates Mall General Company Newco, LLC*, 201 AD3d 1183, 161 NYS3d 480 (3d Dept 2022); *ARB Upstate Communications LLC v R.J. Reuter, L.L.C.*, 93 AD3d 929, 940 NYS2d 679 (3d Dept 2012); *Matter*

of Estate of Moak, 92 AD3d 1040, 938 NYS2d 648 (3d Dept 2012); Old Republic Nat. Title Ins. Co. v Moskowitcz, 297 AD2d 724, 747 NYS2d 556 (2d Dept 2002). Rather, the doctrine, which is equitable in nature, presupposes that the corporation whose “veil” is to be “pierced” has an underlying liability to plaintiff, *Morris v State Dept. of Taxation and Finance*, supra; see *Buchovecky v S & J Morrell, Inc.*, 175 AD3d 945, 107 NYS3d 568 (4th Dept 2019) (claim against individual members of LLC could not be maintained where direct indemnification claim against LLC dismissed); *State v Robin Operating Corp.*, 3 AD3d 769, 773 NYS2d 137 (3d Dept 2004) (claim against allegedly dominant corporation could not be maintained where allegedly dominated corporation was not a party and no basis in the record for concluding that dominated corporation could be liable). For that reason, some courts have held that a claim asserted under the doctrine of “piercing the corporate veil” requires that the allegedly dominated corporation be joined as a party defendant, even if it was the parent corporation that unjustly retained the disputed funds, *Stewart Tenants Corp. v Square Industries, Inc.*, 269 AD2d 246, 703 NYS2d 453 (1st Dept 2000); see *Popowich v Korman*, 73 AD3d 515, 900 NYS2d 297 (1st Dept 2010); *State v Robin Operating Corp.*, supra. However, it is not necessary to name and serve a corporation that became defunct before the lawsuit was initiated, *Spinnell v JP Morgan Chase Bank, N.A.*, 59 AD3d 361, 873 NYS2d 626 (1st Dept 2009). Claims based on the piercing the corporate veil doctrine may be asserted before a finding of liability as against codefendant dominated corporation, *Ross v Jill Stuart Intern. Ltd.*, 275 AD2d 650, 713 NYS2d 324 (1st Dept 2000). It is not necessary that an unsatisfied judgment be obtained against the dominated corporation before an action against the dominant corporation may be brought, *Chase Manhattan Bank (Nat. Ass’n) v 264 Water Street Associates*, 174 AD2d 504, 571 NYS2d 281 (1st Dept 1991); see *ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 928 NYS2d 647, 952 NE2d 463 (2011).

Application of the doctrine of “piercing the corporate veil” requires a fact-based determination, see *Millennium Const., LLC v Loupolover*, 44 AD3d 1016, 845 NYS2d 110 (2d Dept 2007); *Goldman v Chapman*, 44 AD3d 938, 844 NYS2d 126 (2d Dept 2007); *Ventresca Realty Corp. v Houlihan*, 41 AD3d 707, 838 NYS2d 609 (2d Dept 2007); *Heim v Tri-Lakes Ford Mercury, Inc.*, 25 AD3d 901, 809 NYS2d 222 (3d Dept 2006). A fact-laden claim to pierce the corporate veil is unsuited for resolution on a pre-answer, pre-discovery motion to dismiss under CPLR 3211, *Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 73 NYS3d 95, 96 NE3d 191 (2018). Where the elements of the doctrine have sufficiently been pleaded and a sufficient showing has been made in response to a motion for summary judgment, the question is one for resolution by the factfinder, *Grigsby v Francabandiero*, 152 AD3d 1195, 58 NYS3d 835 (4th Dept 2017); *Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344, 825 NYS2d 274 (2d Dept 2006); *First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 690 NYS2d 17 (1st Dept 1999); see *Lee v Arnan Development Corp.*, 77 AD3d 1261, 909 NYS2d 826 (3d Dept 2010); *Miranco Contracting, Inc. v Perel*, 57 AD3d 956, 871 NYS2d 310 (2d Dept 2008); *Shelley v Flow Intern. Corp.*, 283

AD2d 958, 724 NYS2d 244 (4th Dept 2001); *Rebh v Rotterdam Ventures Inc.*, 277 AD2d 659, 716 NYS2d 457 (3d Dept 2000).

The corporate form is not to be lightly disregarded, *Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 944 NYS2d 30 (1st Dept 2012); *Treeline Mineola, LLC v Berg*, 21 AD3d 1028, 801 NYS2d 407 (2d Dept 2005); *Baccash v Sayegh*, 53 AD3d 636, 862 NYS2d 564 (2d Dept 2008); *New York Ass'n for Retarded Children, Inc., Montgomery County Chapter v Keator*, 199 AD2d 921, 606 NYS2d 784 (3d Dept 1993). Those seeking to pierce a corporate veil in both tort and contract cases have the heavy burden of showing that the corporation was dominated in connection with the transaction at issue and that the domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences, *TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d 335, 680 NYS2d 891, 703 NE2d 749 (1998); *Joseph Kali Corp. v A. Goldner, Inc.*, 49 AD3d 397, 859 NYS2d 1 (1st Dept 2008); see *James v Loran Realty V Corp.*, 20 NY3d 918, 956 NYS2d 482, 980 NE2d 532 (2012) (plaintiff has burden to show that individual defendants "abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against [plaintiff]"). However, since an action against a corporate owner based on the doctrine of piercing the corporate veil is not the equivalent of an action in fraud, the clear and convincing standard of proof is not applicable, *Rotella v Derner*, 283 AD2d 1026, 723 NYS2d 801 (4th Dept 2001).

In general, the courts will permit "piercing" sufficient to impose liability on the corporate owners upon a showing that (1) the owners exercised complete domination of the corporation and (2) the owner's domination of the corporation was used to commit a fraud or wrong against plaintiff that injured plaintiff, *Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 73 NYS3d 95, 96 NE3d 191 (2018); *TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d 335, 680 NYS2d 891, 703 NE2d 749 (1998); *Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 603 NYS2d 807, 623 NE2d 1157 (1993); see *Guptill Holding Corp. v State*, 33 AD2d 362, 307 NYS2d 970 (3d Dept 1970), *aff'd*, 31 NY2d 897, 340 NYS2d 638, 292 NE2d 782 (1972); *Buchovecky v S & J Morrell, Inc.*, 175 AD3d 945, 107 NYS3d 568 (4th Dept 2019) (party seeking to pierce corporate veil must establish that owners through their domination abused privilege of doing business in corporate form); *Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 944 NYS2d 30 (1st Dept 2012); *ARB Upstate Communications LLC v R.J. Reuter, L.L.C.*, 93 AD3d 929, 940 NYS2d 679 (3d Dept 2012); *Heim v Tri-Lakes Ford Mercury, Inc.*, 25 AD3d 901, 809 NYS2d 222 (3d Dept 2006). Domination of the corporation by its owner is not alone sufficient, *TNS Holdings, Inc. v MKI Securities Corp.*, *supra*; *Rebh v Rotterdam Ventures Inc.*, 277 AD2d 659, 716 NYS2d 457 (3d Dept 2000). Similarly, a parent corporation can never be held liable for the actions of a subsidiary based solely on the parent corporation's ownership of a controlling interest in the subsidiary, *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 432 NYS2d 879, 412 NE2d 934 (1980); see *Finerty v Abex Corp.*, 27 NY3d 236, 32 NYS3d 44, 51 NE3d 555 (2016). The

proponent of applying the “piercing the corporate veil” doctrine must also show that the domination led to inequity, fraud or malfeasance, *Rebh v Rotterdam Ventures, Inc.*, supra; see *James v Loran Realty V Corp.*, 20 NY3d 918, 956 NYS2d 482, 980 NE2d 532 (2012); *Casa de Meadows Inc. (Cayman Islands) v Zaman*, 76 AD3d 917, 908 NYS2d 628 (1st Dept 2010); *Goldman v Chapman*, 44 AD3d 938, 844 NYS2d 126 (2d Dept 2007); *Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344, 825 NYS2d 274 (2d Dept 2006); *Island Seafood Co., Inc. v Golub Corp.*, 303 AD2d 892, 759 NYS2d 768 (3d Dept 2003). Where a corporation is a mere fragment of a larger combine which actually conducts the business, the larger corporate entity may be held responsible for the acts of that corporation, *Billy v Consolidated Mach. Tool Corp.*, supra; *Island Seafood Co., Inc. v Golub Corp.*, 303 AD2d 892, 759 NYS2d 768 (3d Dept 2003).

The circumstances of domination that will justify piercing the corporate veil include an individual owner’s operating the corporation as a “sham” for the owner’s personal activities and a corporation’s acting as the “agent,” “alter ego” or “mere instrumentality” of its shareholder, *Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 944 NYS2d 30 (1st Dept 2012) (“alter ego”); *UBS Securities LLC v Highland Capital Management, L.P.*, 93 AD3d 489, 940 NYS2d 74 (1st Dept 2012) (same); *Miller v Cohen*, 93 AD3d 424, 939 NYS2d 424 (1st Dept 2012) (same); *Fernbach, LLC v Calleo*, 92 AD3d 831, 939 NYS2d 501 (2d Dept 2012); *John John, LLC v Exit 63 Development, LLC*, 35 AD3d 540, 826 NYS2d 657 (2d Dept 2006) (“mere instrumentality,” “alter ego,” “agent”); *Island Seafood Co., Inc. v Golub Corp.*, 303 AD2d 892, 759 NYS2d 768 (3d Dept 2003); *Austin Powder Co. v McCullough*, 216 AD2d 825, 628 NYS2d 855 (3d Dept 1995); see *Butler v Stagecoach Group, PLC*, 72 AD3d 1581, 900 NYS2d 541 (4th Dept 2010), mod, 17 NY3d 306, 929 NYS2d 41, 952 NE2d 1033 (2011) (“agent” of parent corporation). Mere conclusory allegations of domination and control, however, are insufficient, *UMG Recordings, Inc. v FUBU Records, LLC*, 34 AD3d 293, 824 NYS2d 83 (1st Dept 2006).

A plaintiff who wishes to pierce the corporate veil does not have to specifically plead fraud, but must establish that the individual defendant’s domination of the corporation was used to perpetrate a wrong or injustice against that plaintiff, *Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 603 NYS2d 807, 623 NE2d 1157 (1993); *Rotella v Derner*, 283 AD2d 1026, 723 NYS2d 801 (4th Dept 2001); *Lederer v King*, 214 AD2d 354, 625 NYS2d 149 (1st Dept 1995); see *Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 73 NYS3d 95, 96 NE3d 191 (2018). Allegations of domination and control must be accompanied by particularized allegations of consequent wrongs, *Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 798 NYS2d 45 (1st Dept 2005); see *Sheinberg v 177 E. 77 Inc.*, 248 AD2d 176, 670 NYS2d 19 (1st Dept 1998) (plaintiff’s allegations must include “particularized statements detailing fraud or other corporate misconduct”); see also *East Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 16 NY3d 775, 919 NYS2d 496, 944 NE2d 1135 (2011).

(plaintiff must allege more than improper acts or bad faith by defendants).

Factors to be considered in determining whether the corporation's owners have abused the privilege of doing business in the corporate form include (1) a failure to adhere to corporate formalities, (2) inadequate capitalization, (3) a commingling of assets and (4) application of corporate funds for personal use, *East Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 884 NYS2d 94 (2d Dept 2009), *aff'd*, 16 NY3d 775, 919 NYS2d 496, 944 NE2d 1135 (2011); *McCloud v Bettcher Industries, Inc.*, 90 AD3d 1680, 935 NYS2d 815 (4th Dept 2011); *Superior Transcribing Service, LLC v Paul*, 72 AD3d 675, 898 NYS2d 234 (2d Dept 2010). In the context of parent and subsidiary corporations, the foregoing factors are considered, as well as the extent to which there is overlap in ownership, directors, officers and personnel, the use of common office space and telephone numbers, whether the organizations are lacking the separate paraphernalia that are part of the corporate form and the degree to which the allegedly dominated corporation is permitted to exercise its own business discretion, *Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341, 645 NYS2d 786 (1st Dept 1996); see *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 432 NYS2d 879, 412 NE2d 934 (1980); *Island Seafood Co., Inc. v Golub Corp.*, 303 AD2d 892, 759 NYS2d 768 (3d Dept 2003); see also *AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 AD3d 6, 867 NYS2d 169 (2d Dept 2008). Additional factors include whether the parent and subsidiary dealt with each other at arm's length, whether the corporations within a group are treated as independent profit centers, whether the property of such corporations is used by the others as if it were their own and whether the dominant corporation's debts are paid or guaranteed by the other corporations within the group, *Peery v United Capital Corp.*, 84 AD3d 1201, 924 NYS2d 470 (2d Dept 2011); *Fantazia Intern. Corp. v CPL Furs New York, Inc.*, 67 AD3d 511, 889 NYS2d 28 (1st Dept 2009); *Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 877 NYS2d 95 (2d Dept 2009).

No single factor is determinative, *Fantazia Intern. Corp. v CPL Furs New York, Inc.*, 67 AD3d 511, 889 NYS2d 28 (1st Dept 2009). At the very least, there must be direct intervention by the owners in the management of the corporation to such an extent that the corporation's paraphernalia of incorporation, directors and officers are completely ignored, *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 432 NYS2d 879, 412 NE2d 934 (1980); *McCloud v Bettcher Industries, Inc.*, 90 AD3d 1680, 935 NYS2d 815 (4th Dept 2011); *Shelley v Flow Intern. Corp.*, 283 AD2d 958, 724 NYS2d 244 (4th Dept 2001); see *Finerty v Abex Corp.*, 27 NY3d 236, 32 NYS3d 44, 51 NE3d 555 (2016) (inquiry is whether parent disregarded separate identity of subsidiary and involved itself directly in subsidiary's affairs); *Lowendahl v Baltimore & O.R. Co.*, 247 App Div 144, 287 NYS 62 (1st Dept 1936), *aff'd*, 272 NY 360, 6 NE2d 56 (1936); *Mertz v Seibel Realty, Inc.*, 265 AD2d 925, 696 NYS2d 598 (4th Dept 1999), and one of the corporations is a mere instrumentality, agent or alter ego of the other, *Island Seafood Co., Inc. v Golub*

Corp., 303 AD2d 892, 759 NYS2d 768 (3d Dept 2003); see *Astrocom Electronics, Inc. v Lafayette Radio Electronics Corp.*, 63 AD2d 765, 404 NYS2d 742 (3d Dept 1978). Put another way, the domination of a subsidiary by the parent must be so complete that the subsidiary is merely a department of the parent, *Amsellem v Host Marriott Corp.*, 280 AD2d 357, 721 NYS2d 318 (1st Dept 2001).

In the following cases, the allegations and/or evidence were deemed sufficient to justify piercing the corporate veil: *Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 73 NYS3d 95, 96 NE3d 191 (2018) (CPLR 3211; private equity funds created, owned and controlled shell companies that were used to perpetrate and conceal borrowing scheme that enriched private equity funds); *ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 928 NYS2d 647, 952 NE2d 463 (2011) (parent company caused wholly-owned subsidiary to engage in harmful transactions that allegedly shielded billions of dollars in assets from plaintiffs, thereby potentially exposing plaintiffs to significant liability); *Cunningham v Mary Agnes Manor Management, L.L.C.*, 188 AD3d 1560, 136 NYS3d 584 (4th Dept 2020) (veil piercing sufficiently alleged against defendant where plaintiff claimed corporate formalities were conduits to avoid obligations to residents of nursing home facility); *Matter of 91st Street Crane Collapse Litigation*, 154 AD3d 139, 62 NYS3d 11 (1st Dept 2017) (sole shareholder exercised dominion and control over three separate corporations, which he treated as one entity); *Grigsby v Francabandiero*, 152 AD3d 1195, 58 NYS3d 835 (4th Dept 2017) (amended complaint sufficiently alleged that defendant, through his domination of the corporation, abused privilege of doing business in corporate form to perpetrate a wrong or injustice against plaintiff); *Last Time Beverage Corp. v F & V Distribution Co., LLC*, 98 AD3d 947, 951 NYS2d 77 (2d Dept 2012) (limited liability company inadequately capitalized for business venture in issue without loan from sibling company, two companies had overlapping ownership, officers and personnel, shared same office space with other sibling companies and failed to observe certain record-keeping formalities); *Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 944 NYS2d 30 (1st Dept 2012) (allegations that domination and control used to cause subsidiary entity to breach contractual obligation for dominant corporation's own gain); *Pae v Chul Yoon*, 41 AD3d 681, 838 NYS2d 172 (2d Dept 2007) (sole owner of corporation dominated it and was solely responsible for its wrongful failure to pay plaintiff; evidence revealed absence of corporate formalities, such as lack of distinction between corporate funds and defendant's personal funds); *Manshion Joho Center Co., Ltd. v Manshion Joho Center, Inc.*, 24 AD3d 189, 806 NYS2d 480 (1st Dept 2005) (individual owner dominated and controlled corporations, disregarded corporate formalities, used corporate funds to pay his personal bills, and effectively stripped assets of corporation to enrich himself while making corporation judgment proof); *Godwin Realty Associates v CATV Enterprises, Inc.*, 275 AD2d 269, 712 NYS2d 39 (1st Dept 2000) (shareholder's stripping of corporate assets to render corporation judgment proof); *National Union Fire Ins. Co. of Pittsburgh, Pa. v Bodek*, 270 AD2d 139, 705 NYS2d 42 (1st Dept 2000) (despite individual defendant's claims that

he divested himself of interest and control, defendant instructed corporation's accountants, negotiated its business deals and credit extensions, executed promissory notes, personally guaranteed notes and directed his spouse to use corporate assets for his personal expenses).

In the following cases, the allegations and/or evidence were deemed insufficient to justify piercing the corporate veil: *James v Loran Realty V Corp.*, 20 NY3d 918, 956 NYS2d 482, 980 NE2d 532 (2012) (no evidence that defendant attempted to avoid plaintiffs' claim for damages by rendering corporation insolvent); *Etex Apparel, Inc. v Tractor Intern. Corp.*, 83 AD3d 587, 922 NYS2d 315 (1st Dept 2011) (common ownership and offices and continuation of part of affiliate's business, but maintained separate corporate identities); *SUS, Inc. v St. Paul Travelers Group*, 75 AD3d 740, 905 NYS2d 321 (3d Dept 2010) (no allegations that parent corporations had directly intervened in management of subsidiary such that subsidiary's paraphernalia of incorporation, directors, and officers were completely ignored); *Fantazia Intern. Corp. v CPL Furs New York, Inc.*, 67 AD3d 511, 889 NYS2d 28 (1st Dept 2009) (some common management, but corporations had separate bank accounts, books and records, were incorporated at different times for legitimate purposes, filed separate tax returns and substantially complied with corporate formalities); *Longshore v Paul Davis Systems of Capital Dist.*, 304 AD2d 964, 759 NYS2d 204 (3d Dept 2003) (corporations formed for separate purposes and treated by principals as separate and distinct, with no subsidiary relationships, integrated finances or commingled assets); *Worldcom, Inc. v Prepay USA Telecom, Corp.*, 294 AD2d 157, 741 NYS2d 532 (1st Dept 2002) (commingling involving only several thousand dollars, where plaintiffs claimed millions of dollars in damages); *Lou Atkin Castings, Inc. v M. Fabrikant & Sons, Inc.*, 216 AD2d 111, 628 NYS2d 98 (1st Dept 1995) (affiliate corporations separately capitalized, not formed to conceal or deceive and domination by one corporation not complete); *New York Ass'n for Retarded Children, Inc., Montgomery County Chapter v Keator*, 199 AD2d 921, 606 NYS2d 784 (3d Dept 1993) (control of corporation by single shareholder; no showing of illegality or fraud); see *Grigsby v Francabandiero*, 152 AD3d 1195, 58 NYS3d 835 (4th Dept 2017) (allegation of equitable ownership insufficient to salvage dismissal of this portion of amended complaint).

Reverse Veil Piercing

Typically, the doctrine of piercing the corporate veil is applied to hold an individual or parent corporation liable for the actions of the business entity he, she or it controls. In general, the corporate veil will not be pierced for the benefit of the corporation or its individual owners, *Richbell Information Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 765 NYS2d 575 (1st Dept 2003); see *Uribe v Merchants Bank of New York*, 239 AD2d 128, 657 NYS2d 613 (1st Dept 1997), *aff'd*, 91 NY2d 336, 670 NYS2d 393, 693 NE2d 740 (1998); *Matter of Disston Co. (Sandvik Aktiebolag)*, 187 AD2d 283, 589 NYS2d 442 (1st Dept 1992); *Colin v Altman*, 39 AD2d 200, 333 NYS2d 432 (1st Dept 1972). However, some New York appellate courts have recognized "reverse piercing," in

which the controlled corporation or limited liability company is held liable to third parties for the debts or obligations of its owners, *Colonial Sur. Co. v Lakeview Advisors, LLC*, 93 AD3d 1253, 941 NYS2d 371 (4th Dept 2012); *Spinnell v JP Morgan Chase Bank, N.A.*, 59 AD3d 361, 873 NYS2d 626 (1st Dept 2009); see *Sweeney, Cohn, Stahl & Vaccaro v Kane*, 6 AD3d 72, 773 NYS2d 420 (2d Dept 2004) (discussing reverse-piercing doctrine under New York and Florida law).

As a related matter, the doctrine that a corporation may be the “alter ego” of its parent or sibling corporation has been affirmatively invoked by defendant corporations seeking to associate themselves with the employer of an injured plaintiff and thereby benefit from the Workers’ Compensation bar, *Thomas v Dunkirk Resort Properties, LLC*, 101 AD3d 1721, 957 NYS2d 542 (4th Dept 2012); *Gonzalez v Woodbourne Arboretum, Inc.*, 100 AD3d 694, 954 NYS2d 113 (2d Dept 2012); *Lee v Arnan Development Corp.*, 77 AD3d 1261, 909 NYS2d 826 (3d Dept 2010); *Shelley v Flow Intern. Corp.*, 283 AD2d 958, 724 NYS2d 244 (4th Dept 2001). Similarly, for purposes of Workers’ Compensation exclusivity, a partnership and its partners are considered one entity when acting in furtherance of partnership business, *Kelsey v Hourigan*, 175 AD3d 918, 106 NYS3d 540 (4th Dept 2019); see *Gerardi v I.J. Litwak Realty Limited Partnership*, 177 AD3d 679, 113 NYS3d 254 (2d Dept 2019); *Landaverde v Lin-Ann Enterprises, Inc.*, 177 AD3d 864, 110 NYS3d 579 (2d Dept 2019).

I. LIABILITY OVER

PJI 2:275. Comparative Fault—Apportionment of Fault Between Defendants

[Where the case presents an issue of fact as to the apportionment of fault among one or more defendants and the plaintiff, see the charge, verdict sheets and Comment to PJI 2:36]

If you find that both the defendant CD and the defendant EF are at fault, you must decide what part of the total fault each bears.

In making that decision, you will weigh the degree of the fault of each defendant. Once you have considered all the facts and circumstances, you will decide what is a fair share of the fault of each defendant for bringing about (the accident, injury, [or other appropriate characterization of the event]).

In your verdict, you will state the percentage of fault of each defendant. The total of those percentages must add up to 100 per cent.

Comment

Caveat 1: This charge is meant to be used where there is no issue as to plaintiff's fault. If there is such an issue, plaintiff's degree of fault will become part of the apportionment. As to that, see PJI 2:36, Special Verdict Form III.

Caveat 2: The charge deals with liability between or among defendants. CPLR 1404(a) and *Dole v Dow Chemical Co.*, 30 NY2d 143, 331 NYS2d 382, 282 NE2d 288 (1972), make it clear that the right of contribution among defendants has no effect on the defendant's liability to plaintiff, see *Kavanaugh by Gonzales v Nussbaum*, 71 NY2d 535, 528 NYS2d 8, 523 NE2d 284 (1988); *Nicholas v Consolidated Edison Co. of New York*, 100 AD2d 957, 475 NYS2d 100 (2d Dept 1984).

Caveat 3: The charge assumes that the contribution claim arises between co-defendants (i.e., by cross claims), but contribution may also be sought through impleader, counterclaim by defendant against one of several plaintiffs, or in a separate action, CPLR 1403. In such cases, the charge should be modified accordingly. Additionally, this charge may be used in a case involving CPLR Article 16, see the Comment to this sec-

tion and the supplemental charges, *infra*, or a case involving General Obligations Law § 15-108, see PJI 2:275A, 2:275B and 2:275C.

Caveat 4: The apportionment charge should be the last component of the liability portion of the charge.

Based on CPLR 1401-1402; *Dole v Dow Chemical Co.*, 30 NY2d 143, 331 NYS2d 382, 282 NE2d 288 (1972); see *Sommer v Federal Signal Corp.*, 79 NY2d 540, 583 NYS2d 957, 593 NE2d 1365 (1992); *Insurance Co. of North America v Dayton Tool & Die Works, Inc.*, 57 NY2d 489, 457 NYS2d 209, 443 NE2d 457 (1982); *D'Ambrosio v New York*, 55 NY2d 454, 450 NYS2d 149, 435 NE2d 366 (1982); *Kelly v Long Island Lighting Co.*, 31 NY2d 25, 334 NYS2d 851, 286 NE2d 241 (1972); *Green Bus Lines, Inc. v Consolidated Mut. Ins. Co.*, 74 AD2d 136, 426 NYS2d 981 (2d Dept 1980); Annot: 57 ALR3d 867; 57 ALR3d 927; 53 ALR3d 184; 46 ALR3d 801; 95 ALR2d 1096; 34 ALR2d 1107. As to choice of law principles that may affect the loss-allocation rules applicable to a case, see *Shaw v Carolina Coach*, 82 AD3d 98, 918 NYS2d 120 (2d Dept 2011); see generally *Edwards v Erie Coach Lines Co.*, 17 NY3d 306, 929 NYS2d 41, 952 NE2d 1033 (2011).

I. Apportionment & Contribution

A. Generally

In an appropriate case, apportionment of fault is necessary to ascertain a defendant's right to contribution against another tortfeasor. In contribution, the loss is distributed among tortfeasors by requiring them to pay a proportionate share of the loss to one who has discharged their joint liability, *Rosado v Proctor & Schwartz, Inc.*, 66 NY2d 21, 494 NYS2d 851, 484 NE2d 1354 (1985). Apportionment is also necessary to determine the applicability of CPLR Article 16, which modified the common law rule of joint and several liability of a tortfeasor.

Generally, apportionment among tortfeasors, rather than a shifting of the entire loss through indemnification, is appropriate when two or more tortfeasors share in responsibility for an injury, in violation of duties they respectively owe to the injured person, *Guzman v Haven Plaza Housing Development Fund Co., Inc.*, 69 NY2d 559, 516 NYS2d 451, 509 NE2d 51 (1987); *Rosner v Paley*, 65 NY2d 736, 492 NYS2d 13, 481 NE2d 553 (1985); see *Rogers v Dorchester Associates*, 32 NY2d 553, 347 NYS2d 22, 300 NE2d 403 (1973). Apportionment may also be appropriate in a multi-tortfeasor case where one defendant breached a duty it owed to another defendant, *Sommer v Federal Signal Corp.*, 79 NY2d 540, 583 NYS2d 957, 593 NE2d 1365 (1992); see *Garrett v Holiday Inns, Inc.*, 58 NY2d 253, 460 NYS2d 774, 447 NE2d 717 (1983); *Trustees of Columbia University in City of N.Y. v Mitchell/Giurgola Associates*, 109 AD2d 449, 492 NYS2d 371 (1st Dept 1985). The critical requirement for apportionment under *Dole v Dow Chemical Co.*, 30 NY2d 143, 331 NYS2d 382, 282 NE2d 288 (1972), and CPLR Article 14 is that the breach of duty by the contributing party must have had a

part in causing or augmenting the injury for which contribution is sought, *Nassau Roofing & Sheet Metal Co., Inc. v Facilities Development Corp.*, 71 NY2d 599, 528 NYS2d 516, 523 NE2d 803 (1988); *Alpha/Omega Concrete Corp. v Ovation Risk Planners, Inc.*, 197 AD3d 1274, 154 NYS3d 113 (2d Dept 2021); *Santoro v Poughkeepsie Crossings, LLC*, 180 AD3d 12, 115 NYS3d 368 (2d Dept 2019); *Oursler v Brennan*, 67 AD3d 36, 884 NYS2d 534 (4th Dept 2009). Under Dole and CPLR Article 14, a party's right to contribution is not dependent on the characterization of the negligence of the tortfeasors, i.e., "active" or "passive," or "primary" or "secondary," see *Kelly v Long Island Lighting Co.*, 31 NY2d 25, 334 NYS2d 851, 286 NE2d 241 (1972); *Moreno v Galdorisi*, 39 AD2d 450, 336 NYS2d 646 (2d Dept 1972); see also *Rogers v Dorchester Associates*, *supra*; *Santoro v Poughkeepsie Crossings, LLC*, *supra* (right to contribution applies only to joint tortfeasors, but may also apply to concurrent, successive, independent, alternative, and even intentional tortfeasors); *Rosenbach v Diversified Group, Inc.*, 85 AD3d 569, 926 NYS2d 49 (1st Dept 2011) (same).

A defendant may seek contribution from a third party even if the injured plaintiff has no direct right of recovery against that party, either because of a procedural bar or because of a substantive legal rule, *Mowczan v Bacon*, 92 NY2d 281, 680 NYS2d 431, 703 NE2d 242 (1998) (right of contribution allowed against owner of automobile even though plaintiff's claim against owner barred by statute of limitations); *Raquet v Braun*, 90 NY2d 177, 659 NYS2d 237, 681 NE2d 404 (1997); *Dole v Dow Chemical Co.*, 30 NY2d 143, 331 NYS2d 382, 282 NE2d 288 (1972). That plaintiff is precluded from suit against a tortfeasor due to the provisions of the no-fault insurance law does not preclude a defendant, whose liability to plaintiff is not dependent upon the provisions of the no-fault law, from asserting a contribution claim against the covered tortfeasor, *Hill v Metropolitan Suburban Bus Authority*, 157 AD2d 93, 555 NYS2d 803 (2d Dept 1990).

As indicated above, a contribution claim can be made even when the contributor has no duty to the injured plaintiff, *Raquet v Braun*, 90 NY2d 177, 659 NYS2d 237, 681 NE2d 404 (1997); *Sommer v Federal Signal Corp.*, 79 NY2d 540, 583 NYS2d 957, 593 NE2d 1365 (1992); *Garrett v Holiday Inns, Inc.*, 58 NY2d 253, 460 NYS2d 774, 447 NE2d 717 (1983). In such situations, a claim for contribution may be asserted if there has been a breach of a duty that runs from the contributor to the defendant who has been held liable, *Guzman v Haven Plaza Housing Development Fund Co., Inc.*, 69 NY2d 559, 516 NYS2d 451, 509 NE2d 51 (1987); *Garrett v Holiday Inns, Inc.*, *supra*; see *O'Gara v Alacci*, 67 AD3d 54, 887 NYS2d 106 (2d Dept 2009) (driver of a vehicle that struck intoxicated person may seek contribution from violator of Dram Shop Act, General Obligations Law § 11-101, who unlawfully provided alcohol to that person). Thus, apportionment may be sought from one who owes no duty to plaintiff, but does owe the other wrongdoer an independent obligation to prevent foreseeable harm, see *Nolechek v Gesuale*, 46 NY2d 332, 413 NYS2d 340, 385 NE2d 1268 (1978); *Stewart v Brown*, 104 AD2d 127, 483 NYS2d 788 (3d Dept 1984); *Haseley Trucking Co.*,

Inc. v Great Lakes Pipe Co., Inc., 101 AD2d 1019, 476 NYS2d 702 (4th Dept 1984); Dutton v Mitek Realty Corp., 95 AD2d 769, 463 NYS2d 471 (2d Dept 1983); this Comment, *infra*. For a discussion of contribution from family members, see this comment, *infra*.

Contribution is available even though the parties to the contribution claim breached different duties to plaintiff, see *Raquet v Braun*, 90 NY2d 177, 659 NYS2d 237, 681 NE2d 404 (1997); *Rosenbach v Diversified Group, Inc.*, 85 AD3d 569, 926 NYS2d 49 (1st Dept 2011); *Oursler v Brennan*, 67 AD3d 36, 884 NYS2d 534 (4th Dept 2009); *Comi v Breslin & Breslin*, 257 AD2d 754, 683 NYS2d 345 (3d Dept 1999) (law firm charged with malpractice had contribution claim against codefendant seller for alleged fraud); *Cresswell v Warden*, 164 AD2d 855, 559 NYS2d 361 (2d Dept 1990) (intoxicated person, who assaulted plaintiff, may seek contribution from seller under the Dram Shop Act); *Crow-Crimmins-Wolff & Munier v Westchester*, 90 AD2d 785, 455 NYS2d 390 (2d Dept 1982); *Helmrich v Eli Lilly & Co.*, 89 AD2d 441, 455 NYS2d 460 (4th Dept 1982); see also *Zona v Oatka Restaurant and Lounge, Inc.*, 68 NY2d 824, 507 NYS2d 615, 499 NE2d 869 (1986); *Westchester County v Welton Becket Associates*, 102 AD2d 34, 478 NYS2d 305 (2d Dept 1984), *aff'd*, 66 NY2d 642, 495 NYS2d 364, 485 NE2d 1029 (1985); *Jakobleff v Cerrato, Sweeney and Cohn*, 97 AD2d 786, 468 NYS2d 894 (2d Dept 1983); but see *Coughlin v Barker Ave. Associates*, 202 AD2d 622, 609 NYS2d 646 (2d Dept 1994) and *Bartlett v Grande*, 103 AD2d 671, 481 NYS2d 566 (4th Dept 1984) (vendor who violates Dram Shop Act is not entitled to contribution from deceased vendee's estate in action by vendee's dependents). However, contribution is not available in the absence of a breach of a duty, owed either to plaintiff, cross-claimant or third-party plaintiff, which caused or augmented the injury for which contribution is sought, *Nassau Roofing & Sheet Metal Co., Inc. v Facilities Development Corp.*, 71 NY2d 599, 528 NYS2d 516, 523 NE2d 803 (1988); *DiMarco v New York City Health and Hospitals Corp.*, 187 AD2d 479, 589 NYS2d 580 (2d Dept 1992); see *Raquet v Braun*, *supra*; *Siegl v New Plan Excel Realty Trust, Inc.*, 84 AD3d 1702, 922 NYS2d 899 (4th Dept 2011); *Johnson v Johnson Chemical Co., Inc.*, 183 AD2d 64, 588 NYS2d 607 (2d Dept 1992); *Sutherland v Hallen Const. Co., Inc.*, 183 AD2d 887, 585 NYS2d 55 (2d Dept 1992); *Petrucchi v New York*, 167 AD2d 29, 569 NYS2d 624 (1st Dept 1991). Thus, contribution is not available where the third-party defendant owed no duty to defendant and breached no duty owed to plaintiff, or breached no duty to either plaintiff or defendant, see *Sommer v Federal Signal Corp.*, 79 NY2d 540, 583 NYS2d 957, 593 NE2d 1365 (1992); *Alpha/Omega Concrete Corp. v Ovation Risk Planners, Inc.*, 197 AD3d 1274, 154 NYS3d 113 (2d Dept 2021); *Rodriguez v Suffolk*, 305 AD2d 574, 760 NYS2d 515 (2d Dept 2003); *DiMarco v New York City Health and Hospitals Corp.*, *supra*.

Pursuant to CPLR 1401, a basic requirement for contribution is that the culpable parties must be subject to liability for damages for the same personal injury, *Raquet v Braun*, 90 NY2d 177, 659 NYS2d 237, 681 NE2d 404 (1997); *DiMarco v New York City Health and Hospitals Corp.*, 187 AD2d 479, 589 NYS2d 580 (2d Dept 1992). Where the contri-

bution claim is based on the breach of a duty owed the plaintiff, if one of the alleged wrongdoers is found not liable to the plaintiff in the main action, that finding is normally a bar to an apportionment of liability under Dole. This rule applies where an alleged wrongdoer was found not liable at trial, *Sirigiano v Otis Elevator Co.*, 118 AD2d 920, 499 NYS2d 486 (3d Dept 1986), or on a motion, see *Carmona v Mathisson*, 92 AD3d 492, 938 NYS2d 300 (1st Dept 2012); *Johnson v Peloro*, 62 AD3d 955, 880 NYS2d 129 (2d Dept 2009); *Jehle v Adams Hotel Associates*, 264 AD2d 354, 695 NYS2d 22 (1st Dept 1999); *Kramme v Hempstead*, 100 AD2d 447, 474 NYS2d 108 (2d Dept 1984).

Apportionment is available despite the fact that the joint or concurrent wrongdoer has a special defense, in which case immunity from suit by the plaintiff will not bar apportionment between the wrongdoers, *Dole v Dow Chemical Co.*, 30 NY2d 143, 331 NYS2d 382, 282 NE2d 288 (1972); see *Raquet v Braun*, 90 NY2d 177, 659 NYS2d 237, 681 NE2d 404 (1997); *Sommer v Federal Signal Corp.*, 79 NY2d 540, 583 NYS2d 957, 593 NE2d 1365 (1992); *Graphic Arts Mut. Ins. Co. v Bakers Mut. Ins. Co.*, 45 NY2d 551, 410 NYS2d 571, 382 NE2d 1347 (1978); *Hill v Metropolitan Suburban Bus Authority*, 157 AD2d 93, 555 NYS2d 803 (2d Dept 1990); *Di Bernardo v Heimroth*, 58 AD2d 344, 396 NYS2d 904 (3d Dept 1977); see also *Durandette v City of Syracuse Fire Dept.*, 238 AD2d 924, 661 NYS2d 117 (4th Dept 1997) (fact that plaintiff fire fighter may not sue fire department directly does not foreclose plaintiff's fellow employee, although an intentional wrongdoer, from seeking apportionment of liability and contribution from fire department for negligently hiring fellow employee); *American White Cross Laboratories, Inc. v North River Ins. Co.*, 101 AD2d 780, 475 NYS2d 865 (1st Dept 1984).

Even if one of several defendants is "judgment proof," the jury must assess that defendant's share of the total fault, *Gannon Personnel Agency, Inc. v New York*, 55 AD2d 548, 390 NYS2d 62 (1st Dept 1976).

If one of the tortfeasors settles with plaintiff, the right of contribution and plaintiff's ultimate recovery is affected by General Obligations Law § 15-108, as to which see PJI 2:275A, 2:275B, 2:275C.

B. Cases raising apportionment

Apportionment is implicated in cases (1) arising out of joint or concurrent negligence, *Raquet v Braun*, 90 NY2d 177, 659 NYS2d 237, 681 NE2d 404 (1997); *Guzman v Haven Plaza Housing Development Fund Co., Inc.*, 69 NY2d 559, 516 NYS2d 451, 509 NE2d 51 (1987); *Zona v Oatka Restaurant and Lounge, Inc.*, 68 NY2d 824, 507 NYS2d 615, 499 NE2d 869 (1986); *Schauer v Joyce*, 54 NY2d 1, 444 NYS2d 564, 429 NE2d 83 (1981); *Oursler v Brennan*, 67 AD3d 36, 884 NYS2d 534 (4th Dept 2009); *Scheu v High-Forest Corp.*, 129 AD2d 366, 517 NYS2d 798 (3d Dept 1987) (between defendants liable under Dram Shop Act and another tortfeasor); *Smith v Guli*, 106 AD2d 120, 484 NYS2d 740 (4th Dept 1985) (successive sellers under Dram Shop Act); *Doyle v Happy Tumbler Wash-O-Mat, Inc.*, 90 AD2d 366, 457 NYS2d 85

(2d Dept 1982) (laundromat operator and washing machine manufacturer); see *Sachaleli v Zdrasil*, 182 AD3d 620, 120 NYS3d 804 (2d Dept 2020) (plaintiff's award of summary judgment against two tortfeasors required court to direct jury to consider only question of apportionment); (2) arising out of successive negligence where the causation of one injury cannot be reasonably ascertained between the original and successive tortfeasors, *Ravo by Ravo v Rogatnick*, 70 NY2d 305, 520 NYS2d 533, 514 NE2d 1104 (1987); *Dubrey v Champlain Valley Physicians Hosp. Medical Center*, 189 AD2d 950, 592 NYS2d 149 (3d Dept 1993); *Stathis v Jamaica Hosp.*, 187 AD2d 499, 589 NYS2d 606 (2d Dept 1992); see *Daniele v Pain Management Center of Long Island*, 168 AD3d 672, 91 NYS3d 496 (2d Dept 2019); (3) involving absolute liability claims, *Doundoulakis v Hempstead*, 42 NY2d 440, 398 NYS2d 401, 368 NE2d 24 (1977); (4) involving joint intentional tort liability, *Corva v United Services Auto. Ass'n*, 108 AD2d 631, 485 NYS2d 264 (1st Dept 1985) (fraud); *Pine v Solow*, 69 AD2d 760, 415 NYS2d 3 (1st Dept 1979) (conspiracy); and (5) involving joint tort liability where only one party has committed an intentional wrong, *Durandette v City of Syracuse Fire Dept.*, 238 AD2d 924, 661 NYS2d 117 (4th Dept 1997); see *Rosenbach v Diversified Group, Inc.*, 85 AD3d 569, 926 NYS2d 49 (1st Dept 2011).

If the negligence of a later tortfeasor increases the damages payable by an earlier tortfeasor, the later tortfeasor is answerable to the earlier tortfeasor for the later tortfeasor's portion of the plaintiff's damages, *Hill v St. Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904, 490 NE2d 823 (1986) (referring to original tortfeasor's rights against later tortfeasor as subrogation); *Melodee Lane Lingerie Co. v American Dist. Tel. Co.*, 18 NY2d 57, 271 NYS2d 937, 218 NE2d 661 (1966); see *Elkins v Eastern Air Lines, Inc.*, 122 AD2d 104, 504 NYS2d 500 (2d Dept 1986); *Musco v Conte*, 22 AD2d 121, 254 NYS2d 589 (2d Dept 1964); *Clark v Halstead*, 276 App Div 17, 93 NYS2d 49 (3d Dept 1949). The latter of two tortfeasors ordinarily is not entitled to contribution from the earlier, *Bergan v Home for Incurables*, 75 AD2d 762, 427 NYS2d 817 (1st Dept 1980); *Pezzella v Catholic Medical Center of Brooklyn & Queens, Inc.*, 52 AD2d 596, 382 NYS2d 113 (2d Dept 1976); *Zillman v Meadowbrook Hospital Co., Inc.*, 45 AD2d 267, 358 NYS2d 466 (2d Dept 1974). It has been held or suggested, however, that such contribution may be available in a case where the earlier tortfeasor's negligence made the later tortfeasor's negligence more likely, *Gray v Sandoz Pharmaceuticals, Div. of Sandoz, Inc.*, 123 AD2d 829, 507 NYS2d 444 (2d Dept 1986); *Lopez v Precision Papers, Inc.*, 69 AD2d 832, 415 NYS2d 396 (2d Dept 1979), or in a case where the causation of the injuries are incapable of any reasonable or practicable division, *Ravo by Ravo v Rogatnick*, 70 NY2d 305, 520 NYS2d 533, 514 NE2d 1104 (1987); *Dubrey v Champlain Valley Physicians Hosp. Medical Center*, 189 AD2d 950, 592 NYS2d 149 (3d Dept 1993); *Innvar v Liviu Schapira, M.D., P.C.*, 166 AD2d 632, 561 NYS2d 60 (2d Dept 1990). This is because the successive tortfeasor is liable only for the aggravation of plaintiff's condition and is ordinarily not liable for the original injury, *Glaser v M. Fortunoff of Westbury Corp.*, 71 NY2d 643, 529 NYS2d 59, 524 NE2d 413 (1988); *Derby v*

Prewitt, 12 NY2d 100, 236 NYS2d 953, 187 NE2d 556 (1962). But if both the original and successive tortfeasors are responsible for causing the same injuries or death of the decedent there is a right to contribution between them, *Wiseman v 374 Realty Corp.*, 54 AD2d 119, 387 NYS2d 612 (1st Dept 1976). If the pleadings create an ambiguity about the relationship among the tortfeasors, resolution of the availability of contribution should await development upon trial, *Frederic v St. John's Episcopal Hosp. (South Shore)*, 100 AD2d 571, 473 NYS2d 502 (2d Dept 1984); *Helmrich v Eli Lilly & Co.*, 89 AD2d 441, 455 NYS2d 460 (4th Dept 1982); *Getzelman v Lacovara*, 82 AD2d 823, 439 NYS2d 433 (2d Dept 1981). In the unusual case of successive exacerbation of the original injury, the jury should be instructed to report its finding of damages to reflect (a) those caused solely by the original wrongdoer, (b) those caused solely by the second (exacerbating) wrongdoer, and (c) those caused solely by the third (exacerbating) wrongdoer, *Dubicki v Maresco*, 64 AD2d 645, 407 NYS2d 66 (2d Dept 1978). The jury should also be instructed to apportion the damages attributable solely to the second wrongdoer between it and the first wrongdoer, and then to apportion the damages attributable solely to the third wrongdoer among all three, *id.*

Where the injuries sustained by plaintiff cannot be reasonably allocated between the original tortfeasor and the successive tortfeasor, the successive tortfeasor is liable to plaintiff for the entire injury, *Ravo by Ravo v Rogatnick*, 70 NY2d 305, 520 NYS2d 533, 514 NE2d 1104 (1987); *Innvar v Liviu Schapira, M.D., P.C.*, 166 AD2d 632, 561 NYS2d 60 (2d Dept 1990); see *Wiwigac v Snedaker*, 282 AD2d 801, 723 NYS2d 248 (3d Dept 2001) (concurrent liability theory inapplicable in action where only one defendant remains in action following dismissal against codefendants); PJI 2:307, and the initial wrongdoer cannot escape liability merely by showing that a subsequent tortfeasor was also negligent, *Datiz by Datiz v Shoob*, 71 NY2d 867, 527 NYS2d 749, 522 NE2d 1047 (1988). In such cases, the jury's apportionment of relative culpability is controlling only as to the tortfeasors' rights to contribution and, subject to the provisions of CPLR Article 16, discussed *infra*, does not limit the liability of the tortfeasors to plaintiff, *Ravo by Ravo v Rogatnick*, *supra*.

Contribution is not available with respect to economic losses resulting from a breach of contract, *Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 523 NYS2d 475, 517 NE2d 1360 (1987); *United Services Auto. Ass'n v R. Maurice Associates, Inc.*, 188 AD2d 1021, 591 NYS2d 912 (4th Dept 1992); *Gordon J. Phillips, Inc. v Concrete Materials, Inc.*, 187 AD2d 1024, 590 NYS2d 344 (4th Dept 1992); *Lawrence Development Corp. v Jobin Waterproofing, Inc.*, 186 AD2d 634, 588 NYS2d 422 (2d Dept 1992); *Briar Contracting Corp. v New York*, 156 AD2d 628, 550 NYS2d 717 (2d Dept 1989); see *Bristol-Myers Squibb, Indus. Div. v Delta Star, Inc.*, 206 AD2d 177, 620 NYS2d 196 (4th Dept 1994). Merely alleging a breach of a duty of due care, employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim, *Board of*

Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Foley, *supra*; Clark-Fitzpatrick, Inc. v Long Island R. Co., 70 NY2d 382, 521 NYS2d 653, 516 NE2d 190 (1987); see Pilewski v Solymosy, 266 AD2d 83, 698 NYS2d 660 (1st Dept 1999) (contribution not allowed in legal malpractice action based on contract theory); Hasbro Bradley, Inc. v Coopers & Lybrand, 128 AD2d 218, 515 NYS2d 461 (1st Dept 1987) (no apportionment in action for fraud or gross negligence in preparation of financial statements). But contribution is available where defendant's liability to plaintiff sounds in tort, even though the tort duty arises from a contractual relationship, Sommer v Federal Signal Corp., 79 NY2d 540, 583 NYS2d 957, 593 NE2d 1365 (1992); see Santoro v Poughkeepsie Crossings, LLC, 180 AD3d 12, 115 NYS3d 368 (2d Dept 2019) (discussing principle that contractually imposed duty of reasonable care may be basis for contribution). Thus, contribution was allowed against a central station operator liable to a building owner in tort for gross negligence, even though the relationship between the central station operator and the building owner was established by contract, Sommer v Federal Signal Corp., *supra*.

The public policy considerations that prohibit a plaintiff from profiting from his or her own wrong or recovering where he or she committed a serious violation of law, see Introductory Statement to PJI 2:36 and Comment thereto, do not apply to third-party actions involving contribution between joint, concurrent, or successive tortfeasors, Smith v Guli, 106 AD2d 120, 484 NYS2d 740 (4th Dept 1985); see Zona v Oatka Restaurant and Lounge, Inc., 68 NY2d 824, 507 NYS2d 615, 499 NE2d 869 (1986) (contribution from vendee to vendor for injury to third person does not violate the Dram Shop Act).

To the extent that civil or criminal fines or similar penalties were imposed on a party seeking contribution, "public policy considerations preclude either indemnification or contribution for the consequences of the illegal acts . . . However, to the extent that the payment represented clean-up costs and other similar expenses, as opposed to either civil or criminal fines, contribution or indemnity may be obtained against a party alleged to be a joint tortfeasor," Elican Holdings, Inc. v Hudson Oil Refining Corp., 96 AD2d 792, 466 NYS2d 22 (1st Dept 1983). Likewise, punitive damages are in the nature of a penalty and are not subject to contribution, Felice v Delporte, 136 AD2d 913, 524 NYS2d 919 (4th Dept 1988); Smith v Guli, 106 AD2d 120, 484 NYS2d 740 (4th Dept 1985).

C. Contribution from plaintiff's family members

One who injures an infant cannot obtain contribution from the infant's parents or minor siblings entrusted with the care of the infant if the parent or sibling breached only a duty to the infant based upon the familial relationship, LaTorre v Genesee Management, Inc., 90 NY2d 576, 665 NYS2d 1, 687 NE2d 1284 (1997); Smith v Sapienza, 52 NY2d 82, 436 NYS2d 236, 417 NE2d 530 (1981); Nolechek v Gesuale, 46 NY2d 332, 413 NYS2d 340, 385 NE2d 1268 (1978); Holodook v

Spencer, 36 NY2d 35, 364 NYS2d 859, 324 NE2d 338 (1974); *Kelchner v John Deere Co.*, 149 AD2d 911, 540 NYS2d 390 (4th Dept 1989), unless the injury occurred in a jurisdiction that permits claims for contribution and the contacts with that jurisdiction mandate application of its law, *Reale by Reale v Herco, Inc.*, 183 AD2d 163, 589 NYS2d 502 (2d Dept 1992); *Hotaling v Smith*, 63 AD2d 219, 406 NYS2d 627 (3d Dept 1978). As to contribution from an infant's grandparents, see *Broome v Horton*, 53 AD2d 1030, 386 NYS2d 156 (4th Dept 1976); as to those standing in a relation equivalent to a "primary parent," see *Rapisarda v Banco*, 69 AD2d 876, 415 NYS2d 686 (2d Dept 1979); see also *McCabe v Dutchess*, 72 AD3d 145, 895 NYS2d 446 (2d Dept 2010) (foster parents). Where the duty allegedly breached by a parent does not arise from the parent/child relationship, but is a duty "owed to the world at large," such as the "duty to drive carefully," a contribution claim will lie against the parent by a person whose negligent conduct, together with the parent's negligent conduct, caused injury to the child, *Holodook v Spencer*, 36 NY2d 35, 364 NYS2d 859, 324 NE2d 338 (1974); *Maldonado v Newport Gardens, Inc.*, 91 AD3d 731, 937 NYS2d 260 (2d Dept 2012); see *Grivas v Grivas*, 113 AD2d 264, 496 NYS2d 757 (2d Dept 1985) (parent, as operator of dangerous instrumentality, a power mower, owed a duty to all, including her own children, not to leave the instrumentality running and unattended).

Parents owe a duty to protect others from harm caused by an infant's use of a dangerous instrument improvidently provided to the infant by a parent who is aware of and able to control its use, *LaTorre v Genesee Management, Inc.*, 90 NY2d 576, 665 NYS2d 1, 687 NE2d 1284 (1997); *Nolechek v Gesuale*, 46 NY2d 332, 413 NYS2d 340, 385 NE2d 1268 (1978); PJI 2:260. Therefore, one who injures an infant who was using a dangerous instrument at the time of injury may seek contribution on the ground that the parent's negligence in permitting use of the instrument exposed the other tortfeasor to liability, *Nolechek v Gesuale*, supra; see *Rios v Smith*, 95 NY2d 647, 722 NYS2d 220, 744 NE2d 1156 (2001); *LaTorre v Genesee Management, Inc.*, supra. In such a case PJI 2:260 should be used. The infant may not recover against the parent for injuries caused by the instrumentality, *Chiccino v Hartman*, 87 AD2d 1002, 450 NYS2d 452 (4th Dept 1982), *aff'd*, 57 NY2d 732, 454 NYS2d 986, 440 NE2d 1333 (1982); see also *Kelchner v John Deere Co.*, 149 AD2d 911, 540 NYS2d 390 (4th Dept 1989) (manufacturer of mower not entitled to contribution from parent where grandparent allowed child to ride on mower's rake attachment). The older minor siblings of an injured child who are employees of the owner of the premises where the injury occurred, while owing no duty of supervision to the injured child, may be subject to contribution to the owner since they owe a duty to refrain from conduct which would make the owner liable, *Stewart v Brown*, 104 AD2d 127, 483 NYS2d 788 (3d Dept 1984).

A child has no common-law duty to care for a parent, *Santoro v Poughkeepsie Crossings, LLC*, 180 AD3d 12, 115 NYS3d 368 (2d Dept 2019). In *Santoro v Poughkeepsie Crossings, LLC*, the court held that the decedent's adult daughter could not be held liable for contribution

for allegedly failing to adhere to the defendant residential health care facility's instructions for caring for the decedent at home, *id.*

D. Mechanisms designed to circumvent equitable apportionment

The plaintiff derives no right from the judgment over between the defendant and the third-party defendant, *Klinger v Dudley*, 41 NY2d 362, 393 NYS2d 323, 361 NE2d 974 (1977). The judgment over permits the defendant alone to have payment, and then only after the defendant has paid more than his or her apportioned share, *id.*; see *Rock v Reed-Prentice Division of Package Machinery Co.*, 39 NY2d 34, 382 NYS2d 720, 346 NE2d 520 (1976). The Court of Appeals has approved a loan agreement plan between a plaintiff, a defendant and a third-party lender that circumvented the holding in *Klinger v Dudley*, *supra*, see *Feldman v New York City Health & Hospitals Corporation*, 56 NY2d 1011, 453 NYS2d 683, 439 NE2d 398 (1982). However, the plan approved in *Feldman* may not be used in a case where the third-party defendant is the original plaintiff's employer because such a plan directly conflicts with the public policy considerations of the exclusivity of the workers' compensation remedy, *Reich v Manhattan Boiler & Equipment Corp.*, 91 NY2d 772, 676 NYS2d 110, 698 NE2d 939 (1998).

Another potential means of circumventing an equitable apportionment is through a "Mary Carter" agreement. That agreement is a contract by which one or more defendants in a multiparty case secretly conspires with plaintiff to feign an active role in the litigation in exchange for assurances that its own liability will be diminished proportionately by increasing the liability of the non-agreeing defendants, see *Booth v Mary Carter Paint Co.*, 202 So 2d 8 (Fla App 2nd Dist 1967). A Mary Carter agreement may be void and failure to disclose it may require a new trial, see *Stiles v Batavia Atomic Horseshoes, Inc.*, 174 AD2d 287, 579 NYS2d 790 (4th Dept 1992), *rev'd* on other grounds, 81 NY2d 950, 597 NYS2d 666, 613 NE2d 572 (1993); see also *Mahoney v Turner Const. Co.*, 61 AD3d 101, 872 NYS2d 433 (1st Dept 2009); *Meleo v Rochester Gas and Elec. Corp.*, 72 AD2d 83, 423 NYS2d 343 (4th Dept 1979). However, the existence of such an agreement must be shown by appropriate evidence, *Stiles v Batavia Atomic Horseshoes, Inc.*, *supra* (facts that plaintiff encouraged defendant to implead third-party, that defendant did not vigorously defend, and that defendant's counsel was not paid and later moved his practice to the office of plaintiff's attorney not sufficient to show existence of "Mary Carter" agreement). Similarly, the failure of parties in a multi-party action to disclose a high-low agreement, pursuant to which a plaintiff and a defendant agree that if the defendant is found liable its liability will fall into a predetermined range, may require a new trial, *Matter of Eighth Judicial Dist. Asbestos Litigation*, 8 NY3d 717, 840 NYS2d 546, 872 NE2d 232 (2007). The Court of Appeals has observed that in a multi-defendant litigation a high-low agreement between a plaintiff and fewer than all defendants has the potential of prejudicing the rights of the nonagreeing defendant if all parties are not apprised of the agreement's existence, and that secretive agreements may result in prejudice to the

nonagreeing defendant at trial, distort the true adversarial nature of the litigation process, and cast a cloud over the judicial system, *id.*

The doctrine of unclean hands does not bar a contribution claim, *Rosenbach v Diversified Group, Inc.*, 85 AD3d 569, 926 NYS2d 49 (1st Dept 2011). As to the possibility that the equitable defense of laches may be asserted to bar a contribution claim, see *Tetens v Elston Realty Corp.*, 108 AD2d 981, 484 NYS2d 966 (3d Dept 1985); *Blum v Good Humor Corp.*, 57 AD2d 911, 394 NYS2d 894 (2d Dept 1977).

E. Procedural considerations

The charge assumes that the contribution claim arises in the context of a cross claim by one defendant against another, but contribution also may be sought through impleader, or counterclaim by defendant against one of several plaintiffs, or in a separate action, CPLR 1403. Although there is some authority that the apportionment issue may be raised by the trial judge, *sua sponte*, see *Stein v Whitehead*, 40 AD2d 89, 337 NYS2d 821 (2d Dept 1972), the better practice is to serve a formal pleading or to make a motion to amend the pleadings to interpose the issue, see CPLR 3025(c); see also *Lopato v Kinney Rent-A-Car, Inc.*, 73 AD2d 565, 423 NYS2d 42 (1st Dept 1979) (error to charge apportionment when pre-trial motion to add that claim was denied).

Except as to CPLR article 16, where plaintiff's right to recover has been affirmed, but issues remain for determination with respect to cross-claims for apportionment, plaintiff may move to sever the cross-claims, enter a separate judgment on the main claim, and seek satisfaction from one or all of the defendant tortfeasors, see *Dufur v Lavin*, 65 NY2d 830, 493 NYS2d 123, 482 NE2d 919 (1985); *Kelly v Long Island Lighting Co.*, 31 NY2d 25, 334 NYS2d 851, 286 NE2d 241 (1972). Indeed, even where all the issues are resolved in a single judgment, the judgment must separately address the right of plaintiff to recover from defendants and the right of defendants to recover on cross-claims or third-party actions in contribution or indemnification upon payment of the apportioned share of damages to plaintiff. The use of a net judgment is reversible error, see *DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 483 NYS2d 383 (2d Dept 1984); *Nicholas v Consolidated Edison Co. of New York*, 100 AD2d 957, 475 NYS2d 100 (2d Dept 1984).

Apportionment is a jury question, except in the rarest of circumstances, *Johnson v Hallam Enterprises Ltd.*, 208 AD2d 1110, 617 NYS2d 405 (3d Dept 1994); *Steenrod v Doubrava*, 116 AD2d 927, 498 NYS2d 225 (3d Dept 1986), and the apportionment arrived at by the jury will not be disturbed unless it is clearly erroneous or contrary to the weight of the evidence, see *Aragon v A & L Refrigeration Corp.*, 209 AD2d 268, 618 NYS2d 345 (1st Dept 1994); *Schildkraut v Eagle Lines, Inc.*, 126 AD2d 480, 511 NYS2d 13 (1st Dept 1987); *Sabre v Rutland Plywood Corp.*, 111 AD2d 1049, 490 NYS2d 354 (3d Dept 1985); *Mass v Leinker*,

46 AD2d 383, 362 NYS2d 552 (2d Dept 1975); see also *Leyva v Levy*, 120 AD2d 444, 502 NYS2d 457 (1st Dept 1986), *aff'd*, 69 NY2d 847, 514 NYS2d 718, 507 NE2d 311 (1987). In a medical malpractice action, where the defendants were improperly precluded from cross-examining plaintiff's experts regarding the alleged negligence of two nonparty physicians, the verdict, which apportioned fault only between the party defendants, was set aside and the defendants were awarded a new trial, see *Daniele v Pain Management Center of Long Island*, 168 AD3d 672, 91 NYS3d 496 (2d Dept 2019). If the court concludes that the apportionment of responsibility between defendants is contrary to the weight of the evidence, the court may grant a motion for a new trial, see CPLR 4404(a), absent a stipulation agreeing to the apportionment proposed by the court, see *Traverso v Austin Place Leasing Corp.*, 250 AD2d 492, 672 NYS2d 878 (1st Dept 1998); *Schildkraut v Eagle Lines, Inc.*, *supra*; *Robinson v New York City Transit Authority*, 105 AD2d 614, 481 NYS2d 85 (1st Dept 1984).

As to whether a claimant in the Court of Claims is collaterally estopped by apportionment of fault made in prior Supreme Court litigation, see *O'Connor v State*, 126 AD2d 120, 512 NYS2d 536 (3d Dept 1987), *aff'd*, 70 NY2d 914, 524 NYS2d 391, 519 NE2d 302 (1987).

F. Special verdicts

A special verdict is required in a case in which there is a contribution claim, see PJI 1:26, in cases subject to collateral source reductions, see CPLR 4111, where the comparative fault of plaintiff is involved, see *Russo v Jess R. Rifkin, D.D.S., P.C.*, 113 AD2d 570, 497 NYS2d 41 (2d Dept 1985), and where CPLR Article 16 applies. If a bifurcated trial is held, apportionment should be decided with liability, see *Greenberg v Yonkers*, 37 NY2d 907, 378 NYS2d 382, 340 NE2d 744 (1975), *affg* 45 AD2d 314 358 NYS2d 453. When the special verdict form is prepared for use, signature lines should be included after each question, see Comment, PJI 1:26. The completed special verdict form should be marked as a court exhibit, see PJI 1:26, 2:102.

If the case also presents an issue of the plaintiff's comparative fault, the special verdict form suggested in the Comment to PJI 2:36, Special Verdict Form III, should be used. Where the plaintiff has been awarded summary judgment on the issue of liability against all of the defendants, the issues of negligence and proximate cause are decided, and, therefore the court must be careful to direct the jury only to apportion fault as between the defendants so as not to relitigate negligence or proximate cause, *Sachaleli v Zdrazil*, 182 AD3d 620, 120 NYS3d 804 (2d Dept 2020).

Special Verdict Form PJI 2:275 SV-I Apportionment of Fault

1. Was the defendant CD negligent?

At least five jurors must agree on the answer to this question.

Yes____ No____

[Insert signature lines]

If you have answered Question "1" "Yes," proceed to Question "2." If you have answered Question "1" "No," proceed to Question "3."

2. Was defendant CD's negligence a substantial factor in bringing about (plaintiff's injury, the accident [or other appropriate characterization of the event])?

At least five jurors must agree on the answer to this question.

Yes____ No____

[Insert signature lines]

Proceed to Question "3."

3. Was the defendant EF negligent?

At least five jurors must agree on the answer to this question.

Yes____ No____

[Insert signature lines]

If you have answered Question "3" "Yes," proceed to Question "4." If you have answered Question "3" "No," proceed no further and report to the court.

4. Was defendant EF's negligence a substantial factor in bringing about (plaintiff's injury, the accident [or other appropriate characterization of the event])?

At least five jurors must agree on the answer to this Question.

Yes____ No____

[Insert signature lines]

If you have answered Question "1," "2," "3" and "4" "Yes,"

proceed to Question “5.” If your answer to any one of the Questions is “No,” proceed no further and report to the court.

5. What was the percentage of fault of defendant CD and what was the percentage of fault of defendant EF?

At least five jurors must agree on the answer to this question.

CD ____%

EF ____%

Total must equal 100%

[Insert signature lines]

II. Indemnification

A. Generally

While only ratable or proportional reimbursement is sought through contribution, full, not partial, reimbursement is sought through indemnification, see *McDermott v New York*, 50 NY2d 211, 428 NYS2d 643, 406 NE2d 460 (1980). A cause of action for indemnification must be based upon either an express contract or a common law theory of implied indemnity, *Gordon J. Phillips, Inc. v Concrete Materials, Inc.*, 187 AD2d 1024, 590 NYS2d 344 (4th Dept 1992); see *Nassau Roofing & Sheet Metal Co., Inc. v Facilities Development Corp.*, 71 NY2d 599, 528 NYS2d 516, 523 NE2d 803 (1988).

B. Contractual indemnification

Contractual indemnification arises not out of an agreement to perform work, but out of an agreement to indemnify, see *Cox v Cordice*, 90 AD2d 297, 457 NYS2d 2 (1st Dept 1982), *aff'd*, 60 NY2d 723, 469 NYS2d 80, 456 NE2d 1203 (1983); see also *Thompson-Starrett Co. v Otis Elevator Co.*, 271 NY 36, 2 NE2d 35 (1936) (*ovrld* in part, *Levine v Shell Oil Co.*, 28 NY2d 205, 321 NYS2d 81, 269 NE2d 799 (1971)). The intention to indemnify a party against his or her own negligence must be unequivocally expressed, *Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 397 NYS2d 602, 366 NE2d 263 (1977); *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 344 NYS2d 336, 297 NE2d 80 (1973); *Twitchell v Pittsford*, 106 AD2d 903, 483 NYS2d 524 (4th Dept 1984), *aff'd* for reasons in AD opinion, 66 NY2d 824, 498 NYS2d 363, 489 NE2d 250 (1985); *Arocho v Brookhaven*, 71 AD2d 635, 418 NYS2d 474 (2d Dept 1979), *aff'd*, 51 NY2d 778, 432 NYS2d 697, 412 NE2d 384 (1980); *Grumman American Aviation Corp. v International Business Machines Corp.*, 77 AD2d 582, 429 NYS2d 921 (2d Dept 1980); *Kelly v M. C. Elec. Co., Inc.*, 68 AD2d 657, 418 NYS2d 28 (1st Dept 1979); *Morgan v Good Humor Corp.*, 54 AD2d 560, 386 NYS2d 888 (2d Dept 1976); *Tilkins v*

Niagara Falls, 52 AD2d 306, 383 NYS2d 758 (4th Dept 1976); see *Great Northern Ins. Co. v Interior Const. Corp.*, 7 NY3d 412, 823 NYS2d 765, 857 NE2d 60 (2006) (courts will construe contract to provide indemnity to party for its own negligence only where contractual language evinces “unmistakable intent” to indemnify). If the words of the agreement, given their ordinary meaning, show intent to indemnify for “all” claims, loss or liability, then there will be indemnity, even if the party to be indemnified has been guilty of affirmative acts of negligence, *Levine v Shell Oil Co.*, 28 NY2d 205, 321 NYS2d 81, 269 NE2d 799 (1971), see *Hawthorne v South Bronx Community Corp.*, 78 NY2d 433, 576 NYS2d 203, 582 NE2d 586 (1991); *Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 521 NYS2d 216, 515 NE2d 902 (1987); *Emery v Depot Const. Co.*, 75 AD2d 102, 429 NYS2d 54 (3d Dept 1980), *aff’d*, 53 NY2d 971, 441 NYS2d 669, 424 NE2d 556 (1981); *Amelio v New York City Housing Authority*, 74 AD2d 752, 425 NYS2d 587 (1st Dept 1980), *aff’d*, 51 NY2d 885, 434 NYS2d 210, 414 NE2d 709 (1980); *Ruhland v John W. Cowper Co., Inc.*, 72 AD2d 907, 422 NYS2d 182 (4th Dept 1979), *aff’d*, 52 NY2d 756, 436 NYS2d 277, 417 NE2d 571 (1980); *Weinstock v Jenkin Contracting Co., Inc.*, 134 AD2d 254, 520 NYS2d 589 (2d Dept 1987); *Williams v Mobil Oil Corp.*, 83 AD2d 434, 445 NYS2d 172 (2d Dept 1981); *Murray v Rupp Rental Corp.*, 39 AD2d 637, 332 NYS2d 552 (4th Dept 1972). Generally, the rule of the *Levine* case does not include an indemnitor who never undertook to do the work from which the injury resulted, *Lopez v Consolidated Edison Co. of New York, Inc.*, 40 NY2d 605, 389 NYS2d 295, 357 NE2d 951 (1976). Where there is a broad indemnity agreement providing for indemnification “against all claims, acts, damages and costs,” the indemnitee is entitled to costs, including counsel fees, incurred in the defense of the primary action even though that action was dismissed, *Perchinsky v State*, 232 AD2d 34, 660 NYS2d 177 (3d Dept 1997).

The construction of the contract is for a court unless the contract is ambiguous. Thus, where the contract is unambiguous, there is no need for a charge on this subject, see *Lopez v Consolidated Edison Co. of New York, Inc.*, 40 NY2d 605, 389 NYS2d 295, 357 NE2d 951 (1976); *Buckland v Avella Const. Co., Inc.*, 47 AD2d 785, 365 NYS2d 279 (3d Dept 1975). If the rights of the parties are governed by an indemnity contract, there can be no apportionment of responsibility between indemnitor and indemnitee based on relative degree of fault, *Haman v Humble Oil & Refining Co.*, 34 NY2d 557, 354 NYS2d 940, 310 NE2d 538 (1974); *Williams v D. A. H. Const. Corp.*, 42 AD2d 877, 346 NYS2d 862 (2d Dept 1973), except with respect to cases governed by GOL § 5-322.1 (see this Comment, *infra*). However, a contractual duty to indemnify does not supersede a common law duty to indemnify, and the ability of a contractor to limit its contractual obligation to indemnify does not necessarily affect its duty to provide indemnification under the common law, *Felker v Corning Inc.*, 90 NY2d 219, 660 NYS2d 349, 682 NE2d 950 (1997); *Hawthorne v South Bronx Community Corp.*, 78 NY2d 433, 576 NYS2d 203, 582 NE2d 586 (1991). Where separate insurance policies are issued to cover contractual and common law liability to indemnify, the insured may avail itself of both coverages and, where

coverage limitations are not implicated, each insurance company is equally responsible for indemnifying the insured, *Hawthorne v South Bronx Community Corp.*, supra.

Public policy interdicts enforcement of an indemnity agreement where the agreement purports to indemnify a party for damages occasioned by the intentional causation of injury, *Austro v Niagara Mohawk Power Corp.*, 66 NY2d 674, 496 NYS2d 410, 487 NE2d 267 (1985). Thus, an agreement to indemnify may not provide indemnity against future criminal or illegal acts, *Feuer v Menkes Feuer, Inc.*, 8 AD2d 294, 187 NYS2d 116 (1st Dept 1959), nor may a landlord obtain from a tenant indemnity for the landlord's negligence injuring the tenant, *Redding v Gulf Oil Corp.*, 38 AD2d 850, 330 NYS2d 158 (2d Dept 1972), although GOL § 5-321 notwithstanding (see this Comment, *infra*), a landlord may be indemnified by the tenant if a third party is injured through the landlord's negligence, *Levine v Shell Oil Co.*, 28 NY2d 205, 321 NYS2d 81, 269 NE2d 799 (1971); see *Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 397 NYS2d 602, 366 NE2d 263 (1977); *La Vack v National Shoes, Inc.*, 124 AD2d 352, 507 NYS2d 293 (3d Dept 1986); see also *Brown v Clarence*, 181 AD2d 1055, 582 NYS2d 315 (4th Dept 1992) (GOL § 5-321 inapplicable to license for use of facility). Public policy also precludes contractual indemnification for punitive damage awards, *Home Ins. Co. v American Home Products Corp.*, 75 NY2d 196, 551 NYS2d 481, 550 NE2d 930 (1990); *McCabe v St. Paul Fire and Marine Ins. Co.*, 79 AD3d 1612, 914 NYS2d 814 (4th Dept 2010); see *Biondi v Beekman Hill House Apartment Corp.*, 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 (2000); *Zurich Ins. Co. v Shearson Lehman Hutton, Inc.*, 84 NY2d 309, 618 NYS2d 609, 642 NE2d 1065 (1994); *Soto v State Farm Ins. Co.*, 83 NY2d 718, 613 NYS2d 352, 635 NE2d 1222 (1994); *Massena v Healthcare Underwriters Mut. Ins. Co.*, 281 AD2d 107, 724 NYS2d 107 (3d Dept 2001), mod, 98 NY2d 435, 749 NYS2d 456, 779 NE2d 167 (2002); see also *Rental & Management Associates, Inc. v Hartford Ins. Co.*, 206 AD2d 288, 614 NYS2d 513 (1st Dept 1994).

The right to contractual indemnification under a broad indemnity agreement includes the right to recover not only the costs of defending the main claim, but also the costs of pursuing third-party actions where such actions were an essential component of the defense of the main action, pursued in good faith, and were not contrary to the language of the contractual indemnity provision, *Perchinsky v State*, 232 AD2d 34, 660 NYS2d 177 (3d Dept 1997).

C. General Obligations Law § 5-322.1

GOL § 5-322.1, among other things, prohibits owners and contractors from obtaining indemnification for their own negligence based on contracts relative to the construction, alteration, repair or maintenance of buildings, structures, appurtenances, and appliances, see *Quain v Buzzetta Const. Corp.*, 69 NY2d 376, 514 NYS2d 701, 507 NE2d 294 (1987) (denying full indemnification and reinstating jury apportionment); *Spoto v S.D.R. Const., Inc.*, 226 AD2d 202, 641 NYS2d 20 (1st

Dept 1996); *Walsh v Morse Diesel, Inc.*, 143 AD2d 653, 533 NYS2d 80 (2d Dept 1988); see also *Robert DeFilippis Crane Service, Inc. v Joannco Contracting Corp.*, 132 AD2d 517, 517 NYS2d 259 (2d Dept 1987) (statute applies to equipment leases where the equipment is leased incident to a construction contract). Where the work performed under the contract involves delivery and mere installation of certain devices, the contract is not governed by the statute, *Pierre v Crown Fire Protection Corp.*, 240 AD2d 386, 658 NYS2d 119 (2d Dept 1997). A snow removal contract is not a contract for the maintenance of a “building, structure, appurtenances and appliances” and, therefore, GOL § 5-322.1 is inapplicable to such a contract, *Pieri v Forest City Enterprises, Inc.*, 238 AD2d 911, 661 NYS2d 133 (4th Dept 1997); *Morales v Asarese Matters Community Center*, 103 AD3d 1262, 959 NYS2d 790 (4th Dept 2013) (GOL § 5-322.1 inapplicable to agreement to provide lifeguards for municipal swimming pool). To invoke the statute, the party seeking to avoid the agreement must come forward with facts sufficient to infer actual negligence on the part of the party seeking indemnification, *Walsh v Morse Diesel, Inc.*, *supra*; see *Brown v U.S. Vanadium Corp.*, 198 AD2d 863, 604 NYS2d 432 (4th Dept 1993).

As it read between 1975 and 1981, the statute prohibited only those agreements to indemnify the owner/contractor where it was solely negligent, *Quevedo v New York*, 56 NY2d 150, 451 NYS2d 651, 436 NE2d 1253 (1982). The statute was amended in 1981 to prohibit indemnification, other than through insurance, for sole or partial negligence of the owner/contractor. Therefore, an agreement between a general contractor and subcontractor that imposes an indemnification obligation on a subcontractor without limitation in terms of the negligence of the general contractor is void where the general contractor has been found partially negligent, *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 658 NYS2d 903, 680 NE2d 1200 (1997); see *Padilla v Absolute Realty Inc.*, 195 AD3d 422, 150 NYS3d 243 (1st Dept 2021) (indemnification provision unenforceable if contractor is found partially negligent); *Cavanaugh v 4518 Associates*, 9 AD3d 14, 776 NYS2d 260 (1st Dept 2004) (presence of both indemnification clause and insurance-procurement provision in contract does not allow contractor to be indemnified for its own negligence).

There is caselaw in the Second Department that states that GOL § 5-322.1 prohibits enforcement of a contractual indemnification clause if the party seeking indemnification was negligent “or had the authority to supervise, direct or control the manner of the work that causes the injury,” *Damiani v Federated Dept. Stores, Inc.*, 23 AD3d 329, 804 NYS2d 103 (2d Dept 2005); see also *Castilla v K.A.B. Realty, Inc.*, 37 AD3d 510, 829 NYS2d 691 (2d Dept 2007); *Naranjo v Star Corrugated Box Co., Inc.*, 11 AD3d 436, 783 NYS2d 607 (2d Dept 2004). Other Second Department caselaw, however, makes clear that authority to supervise, direct, or control the injury-producing work is related to whether the party seeking indemnification was negligent, and not a separate and independent ground prohibiting enforcement of a contractual indemnification provision, see *Reisman v Bay Shore Union*

Free School Dist., 74 AD3d 772, 902 NYS2d 167 (2d Dept 2010); *Armentano v Broadway Mall Properties, Inc.*, 70 AD3d 614, 897 NYS2d 113 (2d Dept 2010); *Quilliams v Half Hollow Hills School Dist.*, 67 AD3d 763, 892 NYS2d 397 (2d Dept 2009); *Stein v Yonkers Contracting, Inc.*, 244 AD2d 476, 664 NYS2d 328 (2d Dept 1997); *Dawson v Pavarini Const. Co., Inc.*, 228 AD2d 466, 644 NYS2d 285 (2d Dept 1996).

Where an agreement contemplates full indemnification even in cases where the general contractor is found to be negligent, and contains no language limiting the subcontractor's obligation to that permitted by law, courts will not partially enforce the agreement, *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 658 NYS2d 903, 680 NE2d 1200 (1997); see *Padilla v Absolute Realty Inc.*, 195 AD3d 422, 150 NYS3d 243 (1st Dept 2021); *Cavanaugh v 4518 Associates*, 9 AD3d 14, 776 NYS2d 260 (1st Dept 2004); *Murphy v Columbia University*, 4 AD3d 200, 773 NYS2d 10 (1st Dept 2004). The statute does permit a partially negligent general contractor to seek contractual indemnification from a subcontractor for that portion of damages attributable to the negligence of the subcontractor so long as the indemnification provision does not purport to indemnify the general contractor for its own negligence, *Brooks v Judlau Contracting, Inc.*, 11 NY3d 204, 869 NYS2d 366, 898 NE2d 549 (2008). Because the statute expresses an important public policy, where an agreement violates GOL § 5-322.1, the New York courts will not enforce it, see *Adams v Glass Fab, Inc.*, 212 AD2d 972, 624 NYS2d 705 (4th Dept 1995), even if it provides for interpretation under the laws of a jurisdiction where such agreements are valid, *Fox v Ashland Oil, Inc.*, 134 AD2d 850, 521 NYS2d 594 (4th Dept 1987).

The statute does not interdict the enforcement of indemnity agreements at the behest of an owner/contractor held strictly liable pursuant to statute without a showing of fault, *Brown v Two Exchange Plaza Partners*, 76 NY2d 172, 556 NYS2d 991, 556 NE2d 430 (1990); *Conley v Salt City Energy Venture, L.P.*, 234 AD2d 909, 651 NYS2d 790 (4th Dept 1996); *Kozerski v Deer Run Homeowners Ass'n Inc.*, 217 AD2d 841, 629 NYS2d 518 (3d Dept 1995); see *Padilla v Absolute Realty Inc.*, 195 AD3d 422, 150 NYS3d 243 (1st Dept 2021) (under Labor Law § 240 [1] contractor not barred from seeking indemnification unless found at least partially negligent). The statute does not void an agreement by a contractor to indemnify a tenant of premises and the owner from claims arising from the contractor's own negligence, *Knaak v Kravetz*, 106 AD2d 876, 483 NYS2d 531 (4th Dept 1984); see *Kennelty v Darlind Const., Inc.*, 260 AD2d 443, 688 NYS2d 584 (2d Dept 1999).

An agreement to procure insurance for the benefit of another is to be distinguished from an indemnity agreement, *Murray v Wilbur Curtis Co. Inc.*, 189 AD2d 980, 592 NYS2d 837 (3d Dept 1993). When an agreement to provide insurance is breached and an accident occurs, the party who failed to provide insurance is liable to the other contracting party for payments to the injured person up to the agreed policy limits and for costs of defense of the tort action, *Roblee v Corning Community College*,

134 AD2d 803, 521 NYS2d 861 (3d Dept 1987); see *Amoco Oil Co. v Gino Lucadamo & Sons, Inc.*, 260 AD2d 516, 688 NYS2d 632 (2d Dept 1999). If, however, the other contracting party has obtained insurance covering the risk at issue, the proper measure of damages is the full cost of insurance to the other contracting party, including, to the extent pertinent, the premiums it paid for its own insurance, any out-of-pocket costs that may have been incurred incidental to the policy, and any increase in its future insurance premiums resulting from the accident, *Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 725 NYS2d 627, 749 NE2d 196 (2001); *Sheppard v Blitman/Atlas Building Corp.*, 288 AD2d 33, 734 NYS2d 1 (1st Dept 2001). In sum, the other contracting party for whom insurance was to be procured is entitled to be placed in as good a position as it would have been in had the party who failed to provide the insurance performed, *Inchaustegui v 666 5th Ave. Ltd. Partnership*, *supra*. General Obligations Law § 5-322.1 does not apply to agreements by subcontractors to provide insurance for the protection of the owner and other contractors, *Kinney v G.W. Lisk Co., Inc.*, 76 NY2d 215, 557 NYS2d 283, 556 NE2d 1090 (1990); see *Inchaustegui v 666 5th Ave. Ltd. Partnership*, *supra*; *Williamson v Borg Florman Development Corp.*, 191 AD2d 335, 594 NYS2d 778 (1st Dept 1993) (GOL § 5-322.1 does not void agreements by general contractors to provide insurance for protection of owner). If a party breaches such an agreement, it is responsible for all resulting damages, including the liability of the general contractor and the owner to the plaintiff, *Kinney v G.W. Lisk Co., Inc.*, *supra*; *Kenelty v Darlind Const., Inc.*, 260 AD2d 443, 688 NYS2d 584 (2d Dept 1999).

D. General Obligations Law § 5-321

To be contrasted with GOL § 5-322.1 is GOL § 5-321. Although they have been described as “parallel provisions,” *Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 397 NYS2d 602, 366 NE2d 263 (1977), GOL § 5-322.1 prohibits owners and contractors from obtaining indemnification for their own negligence based on contracts relative to the construction, alteration, repair or maintenance of buildings, structures, or appurtenances, while GOL § 5-321 renders void and unenforceable lease provisions that purport to exempt a lessor from liability for its own acts of negligence, see *Great Northern Ins. Co. v Interior Const. Corp.*, 7 NY3d 412, 823 NYS2d 765, 857 NE2d 60 (2006); *Hogeland v Sibley, Lindsay & Curr Co.*, *supra*; *Wagner v Ploch*, 85 AD3d 1547, 925 NYS2d 273 (4th Dept 2011); *Mendieta v 333 Fifth Ave. Ass’n*, 65 AD3d 1097, 885 NYS2d 350 (2d Dept 2009); *Metropolitan Art Associates, Div. of Metro Art Sales, Inc. v Wexler*, 118 AD2d 548, 499 NYS2d 164 (2d Dept 1986); *Graphic Arts Supply, Inc. v Raynor*, 91 AD2d 827, 458 NYS2d 115 (4th Dept 1982); see *Bandbox Sportswear, Inc. v Fashion Wear Realty Co.*, 33 AD2d 537, 304 NYS2d 275 (1st Dept 1969). GOL § 5-321 also forbids lease clauses that would have the effect of requiring the lessee to indemnify the lessor from liability for injuries to the lessee caused by the lessor’s negligence, *Redding v Gulf Oil Corp.*, 38 AD2d 850, 330 NYS2d 158 (2d Dept 1972) (noting that effect of GOL § 5-321 was not considered in *Levine v Shell Oil Co.*, 28 NY2d 205, 321 NYS2d 81, 269 NE2d 799 (1971), which upheld lease clause requiring lessee to

indemnify lessor for injuries sustained by third parties resulting from lessor's negligence). Further, a lease provision requiring the lessor to maintain the sidewalk and landscaping did not create a duty to the public that would not otherwise exist, *Taubenfeld v Starbucks Corp.*, 48 AD3d 310, 851 NYS2d 512 (1st Dept 2008). However, such a provision can impose liability on the lessor for an unsafe condition on a portion of the sidewalk on which the tenant has maintained a special use, *id.*

A lease containing a clause releasing the lessor from liability for intentional acts of third parties is not barred by GOL § 5-321, *Segale v Nu Wave Marine, Inc.*, 244 AD2d 326, 663 NYS2d 872 (2d Dept 1997).

An owner cannot circumvent GOL § 5-321 by inserting a provision into the lease that shifts liability to a lessee by requiring the lessee to maintain liability insurance and pay premiums on the owner's behalf, *Cuomo v Storrie Street Realty Inc.*, 255 AD2d 797, 680 NYS2d 316 (3d Dept 1998); *A to Z Applique Die Cutting, Inc. v* 319 McKibbin Street Corp., 232 AD2d 512, 649 NYS2d 26 (2d Dept 1996).

GOL § 5-321 does not apply to agreements that are denominated "leases" but are, in reality, licenses, *Bennett v Genesee Marina, Inc.*, 237 AD2d 908, 656 NYS2d 1013 (4th Dept 1997) (space at marina); *Brown v Clarence*, 181 AD2d 1055, 582 NYS2d 315 (4th Dept 1992) (agreement authorizing use of clubhouse facility).

Notwithstanding GOL § 5-321, where the parties to a commercial lease negotiated between two sophisticated parties allocate the risk of liability to third parties by providing for insurance, GOL § 5-321 is not violated, *Great Northern Ins. Co. v Interior Const. Corp.*, 7 NY3d 412, 823 NYS2d 765, 857 NE2d 60 (2006); *Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 397 NYS2d 602, 366 NE2d 263 (1977); see *Brentano's, Inc. v Charter Management Corp.*, 46 AD2d 861, 361 NYS2d 665 (1st Dept 1974). A limitation of liability to proceeds of insurance is valid and not contrary to GOL § 5-323, which is to the same effect as GOL § 5-321 but pertains to building service or maintenance contractors, see *Board of Ed., Union Free School Dist. No. 3, Town of Brookhaven v Valden Associates, Inc.*, 46 NY2d 653, 416 NYS2d 202, 389 NE2d 798 (1979).

E. Common law indemnification

Indemnification may be implied by law to prevent unjust enrichment or an unfair result, *McCarthy v Turner Const., Inc.*, 17 NY3d 369, 929 NYS2d 556, 953 NE2d 794 (2011); *Mas v Two Bridges Associates by Nat. Kinney Corp.*, 75 NY2d 680, 555 NYS2d 669, 554 NE2d 1257 (1990); *Westchester County v Welton Becket Associates*, 66 NY2d 642, 495 NYS2d 364, 485 NE2d 1029 (1985), *affg* for reasons in AD opinion, 102 AD2d 34, 478 NYS2d 305; *Rosado v Proctor & Schwartz, Inc.*, 66 NY2d 21, 494 NYS2d 851, 484 NE2d 1354 (1985). The key element of a common law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is a separate duty owed the indemnitee by the indemnitor, *Raquet v Braun*, 90 NY2d 177, 659

NYS2d 237, 681 NE2d 404 (1997); see *Mas v Two Bridges Associates by Nat. Kinney Corp.*, supra; *Santoro v Poughkeepsie Crossings, LLC*, 180 AD3d 12, 115 NYS3d 368 (2d Dept 2019). The duty that forms the basis for liability arises from the principle that every party is responsible for the consequences of that party's own negligence, and if another person has been compelled to pay the damages that ought to have been paid by the wrongdoer, they may be recovered from the wrongdoer, *Raquet v Braun*, supra; *Oceanic Steam Nav. Co. v Compania Transatlantica Espanola*, 134 NY 461, 31 NE 987 (1892); see *McCarthy v Turner Const., Inc.*, supra; *Santoro v Poughkeepsie Crossings, LLC*, supra. Common law indemnification is available only against those who are actually at fault, *Bigelow v General Elec. Co.*, 120 AD3d 938, 991 NYS2d 497 (4th Dept 2014).

The common law rule relating to indemnification of one held only vicariously liable has not been modified, CPLR 1404(b); *Guzman v Haven Plaza Housing Development Fund Co., Inc.*, 69 NY2d 559, 516 NYS2d 451, 509 NE2d 51 (1987); *Kelly v Diesel Const. Division of Carl A. Morse, Inc.*, 35 NY2d 1, 358 NYS2d 685, 315 NE2d 751 (1974); *Logan v Esterly*, 34 NY2d 648, 355 NYS2d 381, 311 NE2d 512 (1974); *Rogers v Dorchester Associates*, 32 NY2d 553, 347 NYS2d 22, 300 NE2d 403 (1973). Thus, under CPLR Article 14, common law or implied indemnity permits one held vicariously liable solely because of the negligence of another to shift the burden of the entire loss to the actual wrongdoer, see *Rosado v Proctor & Schwartz, Inc.*, 66 NY2d 21, 494 NYS2d 851, 484 NE2d 1354 (1985); *Riviello v Waldron*, 47 NY2d 297, 418 NYS2d 300, 391 NE2d 1278 (1979). When the liability of the third-party plaintiff is wholly vicarious, there may be recovery from the party whose negligence was imputed to the party liable, as when (1) an employer is held liable to the prime plaintiff solely because of his or her employee's negligence, see *Oceanic Steam Nav. Co. v Compania Transatlantica Espanola*, 134 NY 461, 31 NE 987 (1892); *Opper v Tripp Lake Estates*, 274 App Div 422, 84 NYS2d 461 (1st Dept 1948), *aff'd*, 300 NY 572, 89 NE2d 527 (1949), (2) an automobile owner is held liable solely because of the negligence of one using the automobile with his or her permission, *Traub v Dinzler*, 309 NY 395, 131 NE2d 564 (1955); *Hertz Corp. v Dahill Moving and Storage Co., Inc.*, 79 AD2d 589, 434 NYS2d 386 (1st Dept 1980), *aff'd*, 54 NY2d 619, 442 NYS2d 502, 425 NE2d 890 (1981); *Baron v Grant*, 48 AD3d 608, 852 NYS2d 374 (2d Dept 2008), (3) the hirer of an independent contractor is held liable solely because the duty violated by the contractor was non-delegable, *Kelly v Diesel Const. Division of Carl A. Morse, Inc.*, supra; *Rogers v Dorchester Associates*, supra. Where there is no scenario under which the proposed indemnitee could be held vicariously or statutorily liable for the proposed indemnitor's conduct, indemnification is unavailable, *Santoro v Poughkeepsie Crossings, LLC*, 180 AD3d 12, 115 NYS3d 368 (2d Dept 2019); see *Alpha/Omega Concrete Corp. v Ovation Risk Planners, Inc.*, 197 AD3d 1274, 154 NYS3d 113 (2d Dept 2021) (predicate of common-law indemnity is vicarious liability without fault on part of indemnitee).

In Denton Leasing Corp. v Breezy Point Surf Club, Inc., 133 AD2d

95, 518 NYS2d 634 (2d Dept 1987), the court observed that where the owner of an automobile involved in an accident was liable to an injured plaintiff by virtue of Vehicle and Traffic Law § 388, which imposed liability on an owner solely because it leased or rented a vehicle to one who operated it negligently, the owner could seek indemnification from the driver and his or her employer. In light of the Graves Amendment, 49 USC § 30106 (effective August 10, 2005), situations in which the owner of a vehicle can be held liable under VTL § 388 will be rare and, therefore, situations in which such an owner will seek indemnification from a driver or his or her employer will also be rare, see PJI 2:245.

Where the liability of the third-party plaintiff is not solely derivative and the third-party plaintiff is found to have directly breached a duty owed to the prime plaintiff, common law indemnification is not available and contribution is the applicable remedy, *Guzman v Haven Plaza Housing Development Fund Co., Inc.*, 69 NY2d 559, 516 NYS2d 451, 509 NE2d 51 (1987) (liability of out of possession landlord held not to be entirely derivative since lease reserved right to inspect and repair); *Alpha/Omega Concrete Corp. v Ovation Risk Planners, Inc.*, 197 AD3d 1274, 154 NYS3d 113 (2d Dept 2021) (proposed indemnitor submitted evidence demonstrating that proposed indemnitee failed to fulfill duty, and indemnitee failed to establish it was free from fault); see *Santoro v Poughkeepsie Crossings, LLC*, 180 AD3d 12, 115 NYS3d 368 (2d Dept 2019); *Siegl v New Plan Excel Realty Trust, Inc.*, 84 AD3d 1702, 922 NYS2d 899 (4th Dept 2011). However, where the jury has apportioned damages on each of four separate theories of liability, implied indemnity is available to that portion of plaintiff's judgment against the third-party plaintiff that is based on derivative liability, *Mas v Two Bridges Associates by Nat. Kinney Corp.*, 75 NY2d 680, 555 NYS2d 669, 554 NE2d 1257 (1990); see *New York v Kalikow Realty Co.*, 71 NY2d 957, 529 NYS2d 62, 524 NE2d 416 (1988) (municipality held entitled to full indemnification from owner of premises that abutted sidewalk where owner induced it to delay repairing sidewalk defect). Where two defendants are each only vicariously liable to the plaintiff, there is no implied duty of indemnification between the two parties, *McNair v Morris Ave. Associates*, 203 AD2d 433, 610 NYS2d 314 (2d Dept 1994).

If an employer is sued solely because it was vicariously liable, the employer's "percentage" of fault must be that of the employee, *Cartagena v P & F Trucking, Inc.*, 73 AD2d 490, 426 NYS2d 486 (1st Dept 1980); see *Mead v Bloom*, 94 AD2d 423, 464 NYS2d 904 (4th Dept 1983), *aff'd*, 62 NY2d 788, 477 NYS2d 326, 465 NE2d 1262 (1984). A vicariously liable defendant/third-party plaintiff is permitted to seek contribution from a vicariously liable third-party defendant, *Graphic Arts Mut. Ins. Co. v Bakers Mut. Ins. Co.*, 45 NY2d 551, 410 NYS2d 571, 382 NE2d 1347 (1978); *Rivera v McCarthy*, 54 AD2d 757, 387 NYS2d 704 (2d Dept 1976), but the tortfeasor who causes the harm may not seek contribution from the person thereby vicariously liable to the plaintiff, *Graphic Arts Mut. Ins. Co. v Bakers Mut. Ins. Co.*, *supra*; *Maurillo v Park Slope U-Haul*, 194 AD2d 142, 606 NYS2d 243 (2d Dept 1993).

A party vicariously liable who has actually participated to some

degree in the wrongdoing cannot receive the benefit of the implied indemnity doctrine, *McCarthy v Turner Const., Inc.*, 17 NY3d 369, 929 NYS2d 556, 953 NE2d 794 (2011); *John W. Cowper Co., Inc. v Potomac Iron Works, Inc.*, 188 AD2d 1065, 591 NYS2d 668 (4th Dept 1992); *Gordon J. Phillips, Inc. v Concrete Materials, Inc.*, 187 AD2d 1024, 590 NYS2d 344 (4th Dept 1992); *Lim v 147 East 44th Street Corp.*, 186 AD2d 353, 588 NYS2d 168 (1st Dept 1992); absent an enforceable indemnity contract, contribution is the sole remedy, see *Rock v Reed-Prentice Division of Package Machinery Co.*, 39 NY2d 34, 382 NYS2d 720, 346 NE2d 520 (1976); *Trustees of Columbia University in City of N.Y. v Mitchell/Giurgola Associates*, 109 AD2d 449, 492 NYS2d 371 (1st Dept 1985).

A manufacturer of a defective product whose sales contract required the purchaser to install safety devices may not obtain indemnification from the purchaser for injuries sustained by the purchaser's employee, *Rosado v Proctor & Schwartz, Inc.*, 66 NY2d 21, 494 NYS2d 851, 484 NE2d 1354 (1985). A manufacturer liable under strict products liability is a wrongdoer and to allow implied indemnification would erode the economic incentive manufacturers have to maintain safety and give sanction to the marketing of dangerous, stripped down, machines, *id.* When a manufacturer releases a defective product into the stream of commerce, the manufacturer is a wrongdoer, and an innocent seller who merely distributes the defective product is entitled to common law indemnification from the at-fault manufacturer, *Bigelow v General Elec. Co.*, 120 AD3d 938, 991 NYS2d 497 (4th Dept 2014). In the absence of fault on the part of the manufacturer for producing a product, a downstream distributor has no right to common law indemnification for the defense costs it assumed, *id.*

Where a tortfeasor has been held liable for a portion of plaintiff's recovery because of its own fault and held jointly and severally liable for another portion, the tortfeasor may obtain indemnity for that portion based on vicarious liability, *Mas v Two Bridges Associates by Nat. Kinney Corp.*, 75 NY2d 680, 555 NYS2d 669, 554 NE2d 1257 (1990). In *Mas*, plaintiff was injured in an elevator accident in a multiple dwelling. The jury apportioned fault 5% against plaintiff for her comparative negligence, 10% against the premises owner for failure to provide assistance, and 85% against the elevator contractor for failure to maintain and repair the elevator. The owner, who was subject to a non-delegable statutory duty of maintenance (Multiple Dwelling Law § 78), was held entitled to indemnification from the elevator contractor of the 85% portion of the verdict attributable to negligent maintenance and repair of the elevator.

A joint venturer who was held liable to plaintiff for fraud, an intentional wrong, is not entitled to implied indemnification from a joint venturer who did not authorize or participate in the fraud, although such a joint venturer could be held jointly and severally liable to plaintiff, *Gramercy Equities Corp. v Dumont*, 72 NY2d 560, 534 NYS2d 908, 531 NE2d 629 (1988).

Where the original tortfeasor has paid all the damages, including those caused by successive tortfeasors, the original tortfeasor may recover from the successive tortfeasors for the amount of the total damages they caused, see *Hill v St. Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904, 490 NE2d 823 (1986).

The common law right of indemnification against the party actually at fault encompasses the right to recover attorneys' fees, costs, and disbursements incurred in connection with defending the suit brought by the injured party, *Chapel v Mitchell*, 84 NY2d 345, 618 NYS2d 626, 642 NE2d 1082 (1994); *Bigelow v General Elec. Co.*, 120 AD3d 938, 991 NYS2d 497 (4th Dept 2014). The legal expenses incurred in the prosecution of a claim for indemnification are not recoverable by the party entitled to indemnification, *id*; see *Baker v Health Management Systems, Inc.*, 98 NY2d 80, 745 NYS2d 741, 772 NE2d 1099 (2002) (BCL §§ 722-724 do not independently provide for recovery of attorneys' fees incurred by corporate officer in obtaining indemnification for attorneys' fees).

F. Settlement by indemnitee

A vicariously liable party may settle with the injured party and then seek indemnification from the party responsible for the injury, as long as the settling party establishes that it cannot be held liable in any degree, *Cunha v New York*, 12 NY3d 504, 882 NYS2d 674, 910 NE2d 422 (2009); see *Rosado v Proctor & Schwartz, Inc.*, 66 NY2d 21, 494 NYS2d 851, 484 NE2d 1354 (1985). Settlement of the main action, when the indemnitor was neither notified of it nor given an opportunity to defend it, is not binding upon the indemnitor; the party seeking indemnity for such settlement must establish that he or she was legally obligated to pay, *Nantasket, Inc. v E. F. Raboy & Co.*, 31 AD2d 804, 297 NYS2d 684 (1st Dept 1969). If the indemnitor has notice and declines to defend, the indemnitor is bound by any reasonable settlement made in good faith by the indemnitee, *Gray Mfg. Co. v Pathe Industries, Inc.*, 33 AD2d 739, 305 NYS2d 794 (1st Dept 1969), *aff'd*, 26 NY2d 1045, 312 NYS2d 200, 260 NE2d 821 (1970); *Baker v Northeastern Indus. Park, Inc.*, 73 AD2d 753, 423 NYS2d 308 (3d Dept 1979); *Delaware & H. R. Corp. v Adirondack Farmers Co-op. Exchange, Inc.*, 33 AD2d 962, 306 NYS2d 1002 (3d Dept 1970); *Feuer v Menkes Feuer, Inc.*, 8 AD2d 294, 187 NYS2d 116 (1st Dept 1959). Settlement with the prime plaintiff by the indemnity plaintiff during the trial in which the indemnity defendant is a third-party defendant does not require dismissal of the third-party action, but imposes on the indemnity plaintiff the obligation to establish in the third-party action (1) that it was liable to the prime plaintiff, (2) that its liability was such that it could recover over against the indemnity defendant, and (3) that the settlement was reasonable in amount, see *Greenberg v Yonkers*, 45 AD2d 314, 358 NYS2d 453 (2d Dept 1974), *aff'd*, 37 NY2d 907, 378 NYS2d 382, 340 NE2d 744 (1975); *Trojcek v Wrynn*, 45 AD2d 770, 357 NYS2d 32 (2d Dept 1974); *Hain v Hewlett Arcade, Inc.*, 40 AD2d 991, 338 NYS2d 791 (2d Dept 1972).

Where GOL § 15-108(c) applies, settlement by the original tortfea-

sor with the injured party will entirely preclude the original tortfeasor from maintaining an action in indemnity against a successive tortfeasor who aggravated plaintiff's initial injuries, see *Glaser v M. Fortunoff of Westbury Corp.*, 71 NY2d 643, 529 NYS2d 59, 524 NE2d 413 (1988).

G. Considerations in Labor Law actions

A party cannot obtain common law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part, *McCarthy v Turner Const., Inc.*, 17 NY3d 369, 929 NYS2d 556, 953 NE2d 794 (2011). But a party's authority to supervise the work and implement safety procedures is not alone a sufficient basis for requiring common law indemnification, *id.* Liability for indemnification may only be imposed against those parties who exercise actual supervision, *id.*; see *Brown v Sagamore Hotel*, 184 AD2d 47, 590 NYS2d 934 (3d Dept 1992) (owners and general contractors who exercise no control or supervision of the worksite responsible for plaintiff's damages solely through strict liability provisions of Labor Law § 240 may recover pursuant to common law indemnification against party who was solely responsible for construction methods, safety practices, and the furnishing of safety equipment to workers on the job); see also *Damiani v Federated Dept. Stores, Inc.*, 23 AD3d 329, 804 NYS2d 103 (2d Dept 2005); *Stimson v Lapp Insulator Co.*, 186 AD2d 1052, 588 NYS2d 494 (4th Dept 1992); *Brust v Estee Lauder Inc.*, 184 AD2d 474, 585 NYS2d 432 (1st Dept 1992).

Whether an owner or a general contractor held vicariously liable to plaintiff under Labor Law § 240 is entitled to indemnification from a subcontractor depends upon whether the subcontractor was responsible for the occurrence, *McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 87 NYS3d 86 (2d Dept 2018); *Marek v De Poalo & Son Bldg. Masonry Inc.*, 240 AD2d 1007, 659 NYS2d 331 (3d Dept 1997); *Seecharran v 100 West 33rd Street Realty Corp.*, 198 AD2d 121, 603 NYS2d 308 (1st Dept 1993) ("defective materials or safety devices"); *Damon v Starkweather*, 185 AD2d 633, 585 NYS2d 906 (4th Dept 1992) (same). Where the evidence indicates that the plaintiff's employer was solely and completely responsible for plaintiff's work, judgment granting the owner or general contractor indemnification from the employer should be directed, *Murphy v Islat Associates Graft Hat Mfg. Co.*, 264 AD2d 583, 695 NYS2d 80 (1st Dept 1999); see *Workers' Compensation Law § 11* (this section, *infra*).

Where the employer is found to be 50% or less culpable for the injuries, CPLR article 16 mandates that the owner's indemnification recovery be limited to the employer's proportionate share of the injured employee's non-economic loss together with the total economic loss, *Frank v Meadowlakes Development Corp.*, 6 NY3d 687, 816 NYS2d 715, 849 NE2d 938 (2006). Article 16 and its limitation on the amount of common-law indemnification that may be required of a party who was less than 50% culpable was held inapplicable where the jury apportioned 40% of the fault to the indemnifying party but there was, in actuality, no other tortfeasor who could have been found responsible for

plaintiff's injuries, *Cunha v New York*, 12 NY3d 504, 882 NYS2d 674, 910 NE2d 422 (2009).

Where the accident is caused both by the fault of an owner or general contractor vicariously liable to plaintiff and by the fault of one or more contractors, contribution is available to both the owner and the contractor(s), see *Kelly v Diesel Const. Division of Carl A. Morse, Inc.*, 35 NY2d 1, 358 NYS2d 685, 315 NE2d 751 (1974); *Burgos v 213 West 23rd Street Group LLC*, 48 AD3d 283, 851 NYS2d 185 (1st Dept 2008); *Marte v St. John's University, New York*, 249 AD2d 373, 671 NYS2d 495 (2d Dept 1998).

Case law under Labor Law § 240(1) has allowed for a consideration of plaintiff's negligence in determining the liability of plaintiff's employer in an indemnification/contribution action based on the theory of respondeat superior, *LaFleur v Consolidated Edison Co. of New York, Inc.*, 245 AD2d 36, 665 NYS2d 861 (1st Dept 1997). In *LaFleur*, although third-party plaintiff owner was found to be vicariously liable under Labor Law § 240(1), there was no evidence of active negligence on its part, *id.* Therefore, the owner was allowed recovery in its third-party action against plaintiff's employer because there was ample evidence to support the employer's liability on theories of respondeat superior and negligent supervision and control, *id.* In *Guiga v JLS Const. Co., Inc.*, 255 AD2d 244, 685 NYS2d 1 (1st Dept 1998), there was evidence that plaintiff was warned not to use the ladder at issue and that plaintiff was negligent in failing to heed that warning. The court held that, based on this evidence, the jury's apportionment of ten percent of the liability for negligence to plaintiff was proper, *id.* In addition, the court held that it was proper to impute plaintiff's negligence to plaintiff's employer based on respondeat superior principles for purposes of the contribution/indemnification claims, *id.* Similarly, in *Bieber v Tower Builder and Contractor Corp.*, 216 AD2d 431, 628 NYS2d 368 (2d Dept 1995), where plaintiff recovered damages pursuant to Labor Law § 240(1), the court determined that plaintiff's employer, of which plaintiff was president as well as shareholder and employee, could be liable for contribution and/or indemnification to the defendants to the extent that their damages were attributable to the injured plaintiff's negligence. In *Bieber*, the injured plaintiff and his employer were distinct legal entities and, therefore, contribution and/or indemnification by the employer, which was not free from vicarious liability of its employee, was not precluded because the injured plaintiff was not being penalized for his own culpable conduct, *id.* The *Bieber* court distinguished *Rose v Mount Ebo Associates, Inc.*, 170 AD2d 766, 565 NYS2d 578 (3d Dept 1991), where the injured employee was essentially self-employed and, as a result, the third-party action against him was dismissed since any indemnification or contribution by the unincorporated third-party defendant employer would have effectively reduced the recovery of the injured employee in violation of the policies underlying the Labor Law, see *Di Vincenzo v Tripart Development, Inc.*, 278 AD2d 903, 718 NYS2d 544 (4th Dept 2000); *Schaefer v RCP Associates*, 232 AD2d 286, 649 NYS2d 13 (1st Dept 1996) (there is no bar to imput-

ing plaintiff's negligence to third-party defendant employer; however, third-party defendant's attempt to recover that allocable share back from plaintiff is not permitted because to do so would defeat plaintiff's right to compensation for injuries under the Labor Law).

It is important to note that any third-party action may be subject to the Workers' Compensation Law requiring a "grave injury" or a written agreement preserving the right to contribution or indemnification entered into prior to the accident, to sustain a claim for contribution or indemnity against plaintiff's employer, Workers' Compensation Law § 11; see *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 673 NYS2d 966, 696 NE2d 978 (1998); *Potter v M.A. Bongiovanni Inc.*, 271 AD2d 918, 707 NYS2d 689 (3d Dept 2000); Comment to PJI 2:275.1. A premises owner subject to liability to plaintiff under the Labor Law is not precluded by the Workers' Compensation Law from seeking indemnification or contribution from plaintiff's employer, provided, of course, there exists a grave injury, or a written agreement preserving the right to contribution or indemnification entered into prior to the accident, see Workers' Compensation Law § 11; *Potter v M.A. Bongiovanni Inc.*, *supra*.

Labor Law § 240 does not provide any independent basis for imposing liability upon a subcontractor in a third-party action brought by a general contractor, *Young v Casabonne Bros., Inc.*, 145 AD2d 244, 538 NYS2d 348 (3d Dept 1989).

III. Statute of Limitations

An action for contribution or indemnification is governed by a six-year statute of limitations, CPLR 213(2); *McDermott v New York*, 50 NY2d 211, 428 NYS2d 643, 406 NE2d 460 (1980); *State v Griffith Oil Co., Inc.*, 299 AD2d 894, 750 NYS2d 685 (4th Dept 2002). The claim for contribution accrues when the party entitled to contribution pays more than the apportioned share of the original judgment, *Bay Ridge Air Rights, Inc. v State*, 44 NY2d 49, 404 NYS2d 73, 375 NE2d 29 (1978); *Scaccia v Wallin*, 121 AD2d 709, 503 NYS2d 894 (2d Dept 1986); *Tetens v Elston Realty Corp.*, 108 AD2d 981, 484 NYS2d 966 (3d Dept 1985); *Alside, Inc. v Spancrete Northeast, Inc.*, 84 AD2d 616, 444 NYS2d 241 (3d Dept 1981); *Georchelle Enterprises, Inc. v Public Service Mut. Ins. Co.*, 67 AD2d 633, 412 NYS2d 143 (1st Dept 1979). That plaintiff's suit against a tortfeasor has been dismissed as time barred does not preclude the assertion of contribution claims against that tortfeasor, *Scaccia v Wallin*, 121 AD2d 709, 503 NYS2d 894 (2d Dept 1986).

Similarly, for the purpose of the statute of limitations, an indemnification claim does not accrue until payment by the party seeking indemnity, *Bellevue South Associates v HRH Const. Corp.*, 78 NY2d 282, 574 NYS2d 165, 579 NE2d 195 (1991); *McDermott v New York*, 50 NY2d 211, 428 NYS2d 643, 406 NE2d 460 (1980); *Office of Irwin G. Cantor, P.C. v Swanke Hayden Connell & Partners*, 186 AD2d 71, 588 NYS2d 19 (1st Dept 1992); *Union Carbide Corp. v Ogden Allied Eastern*

States Maintenance Corp., 186 AD2d 386, 588 NYS2d 179 (1st Dept 1992).

IV. Limitations on Joint and Several Liability—CPLR Article 16

A. CPLR Article 16; generally

New York has partially modified the rule that a plaintiff may enforce the full judgment against any and all defendants held jointly and severally liable, see CPLR Article 16; *Artibee v Home Place Corp.*, 28 NY3d 739, 49 NYS3d 638, 71 NE3d 1205 (2017); *Rangolan v Nassau*, 96 NY2d 42, 725 NYS2d 611, 749 NE2d 178 (2001); *Morales v Nassau*, 94 NY2d 218, 703 NYS2d 61, 724 NE2d 756 (1999). Under CPLR 1601, if the liability of a defendant is found to be fifty (50%) percent or less “of the total liability assigned to all persons liable,” then the liability of that defendant to plaintiff for non-economic loss is limited to the percentage of fault assigned to that defendant by the trier of the facts, see *Artibee v Home Place Corp.*, *supra*; *Morales v Nassau*, *supra*; *Cole v Mandell Food Stores, Inc.*, 93 NY2d 34, 687 NYS2d 598, 710 NE2d 244 (1999); see also *Matter of New York City Asbestos Litigation (Dummitt)*, 27 NY3d 765, 37 NYS3d 723, 59 NE3d 458 (2016) (CPLR 1601’s equitable limitation does not apply where jury determines that defendant’s liability exceeds 50% of total liability of all tortfeasors). “[N]on-economic loss’ includes but is not limited to pain and suffering, mental anguish, loss of consortium or other damages for non-economic loss,” CPLR 1600; see Introductory Statement preceding PJI 2:75. As to “economic loss,” Article 16 leaves plaintiffs rights unaffected, i.e., plaintiff can enforce the full judgment by recourse against any of the defendants held jointly and severally liable, regardless of their apportioned shares of fault. Since wrongful death actions seek recovery for pecuniary loss, EPTL 5-4.3; see PJI 2:320, Article 16 does not apply to such actions, see *Ryan v Beavers*, 170 AD2d 1045, 566 NYS2d 112 (4th Dept 1991). The limitation of liability prescribed by article 16 is subject to numerous exceptions, including where the action arises out of a defendant’s use, operation or ownership of a motor vehicle, or where a defendant’s liability arises under Labor Law §§ 240 or 241, see Comment to this section, *infra*.

Under CPLR 1601, in determining equitable shares of fault, the jury may be required to apportion fault among an expanded number of persons. In addition to apportioning fault among plaintiff, defendants, third-party defendants and persons who have settled, the jury may have to consider the culpability of persons who are not parties to the action. If, however, the plaintiff proves that with due diligence he or she was unable to obtain jurisdiction over a third party, the culpable conduct of that person shall not be considered in determining any equitable share of fault, CPLR 1601(1); *Artibee v Home Place Corp.*, 28 NY3d 739, 49 NYS3d 638, 71 NE3d 1205 (2017); *Kennedy v Yonkers*, 264 AD2d 507, 694 NYS2d 715 (2d Dept 1999). The word “jurisdiction” in CPLR 1601(1) refers to both subject matter and personal jurisdiction, *Artibee v Home Place Corp.*, *supra*. In cases where the relative culpabil-

ity of a person not a party to the action is in issue, PJI 2:275B and 2:275C may be adapted as if apportionment were required by GOL § 15-108. CPLR Article 16 does not affect or impair any rights under GOL § 15-108, CPLR 1601(2).

While the provisions of Article 16 apply to claims for contribution and indemnification, CPLR 1602(1), the Article does not abrogate rights created by a written contract entered into prior to the accident or occurrence on which the claim is based in which the tortfeasor has expressly agreed to indemnify the claimant, see CPLR 1602(1)(a), or by CPLR Article 14, see CPLR 1602(2)(iii). Article 16 shall not be construed to create or enlarge actions for contribution or indemnity barred because of the applicability of the Workers' Compensation Law of New York State, any other state or the Federal Government, or § 18-201 of the General Obligations Law (specifications of liability for employers and employees), CPLR 1602(12).

B. Effect of plaintiff's fault

CPLR 1601 provides that a defendant's share of fault is taken as a percentage "of the total liability assigned to all persons liable" and, if the share is 50% or less, liability for non-economic loss is limited to defendant's share, CPLR 1601. The First Department has concluded that a plaintiff is not a "person liable" under CPLR 1601 and a plaintiff's share of fault is excluded from the CPLR 1601 calculation, *Risko v Alliance Builders Corp.*, 40 AD3d 345, 835 NYS2d 551 (1st Dept 2007); see also *Frank v Meadowlakes Development Corp.*, 6 NY3d 687, 816 NYS2d 715, 849 NE2d 938 (2006). Notably, in *Frank v Meadowlakes Development Corp.*, *supra*, the court considered whether a tortfeasor whose liability is determined to be 50% or less can be found responsible for total indemnification of non-economic loss despite CPLR Article 16. The court answered that question in the negative and, in calculating the subject indemnitor's liability to the indemnitee, divided indemnity among the potential indemnitors and excluded a plaintiff's share of fault since a plaintiff could not be an indemnitor. If plaintiff's fault were to be excluded from the computation and if defendants' percentages of fault for joint and several liability purposes were arrived at by applying the percentage of each defendant solely against the total of all defendants' percentages of fault, a defendant whose share of the total fault (including that of plaintiff) was 50% or less might find that his or her percentage of the total of all defendants' percentages of fault is greater than 50%.

C. Fault of non-parties

CPLR 1601(1) requires that the culpable conduct of a non-party be included in the apportionment unless plaintiff establishes that, despite due diligence, jurisdiction could not be obtained over the non-party in the action, *Artibee v Home Place Corp.*, 28 NY3d 739, 49 NYS3d 638, 71 NE3d 1205 (2017). The word "jurisdiction" in CPLR 1601(1) refers to both subject matter and personal jurisdiction, *id.* In *Kennedy v Yonkers*, 264 AD2d 507, 694 NYS2d 715 (2d Dept 1999), the court declined to

charge the jury regarding CPLR Article 16 in light of the evidence that the plaintiff exercised due diligence in his failed attempt to obtain personal jurisdiction over his assailant.

The due diligence question is complex. Separate from the question of who should be brought into the action is the question of whether a non-party could have been joined through the use of due diligence. Whether plaintiff could have obtained jurisdiction over a person not a party through the use of due diligence is a question for the court to decide. The court should, if possible, seek to dispose of the due diligence issue in advance of the trial. It may be contended that the non-party, though subject to personal jurisdiction under CPLR 301 or 302, could not be served with due diligence. To show due diligence, however, plaintiff may have had to attempt expedient service pursuant to CPLR 308(5), which allows the court, upon application, to fashion a method of service, see *Dobkin v Chapman*, 21 NY2d 490, 289 NYS2d 161, 236 NE2d 451 (1968). Upon such application CPLR 308(5) personal jurisdiction would be obtained. If plaintiff makes no attempt to secure such an order or, if such an order is obtained but service is not made pursuant to its terms, that might be a factor in establishing lack of due diligence.

In *Kharmah v Metropolitan Chiropractic Center*, 288 AD2d 94, 733 NYS2d 165 (1st Dept 2001), the court held that a bankrupt defendant's share of fault can be included in the Article 16 apportionment, even though the automatic bankruptcy stay will prohibit the bankrupt defendant from participating in the trial, see *Matter of New York City Asbestos Litigation [Tancredi]*, 6 AD3d 352, 775 NYS2d 520 (1st Dept 2004); see also *Moy v St. Vincent's Hosp. and Medical Center of New York*, 92 AD3d 651, 938 NYS2d 328 (2d Dept 2012).

In *Mancuso v Kaleida Health*, 172 AD3d 1931, 100 NYS3d 469 (4th Dept 2019), *aff'd*, 34 NY3d 1020, 114 NYS3d 773, 138 NE3d 502 (2019), a medical malpractice action, the defendant stipulated to sever its third-party action for contribution from the main action, and represented to the plaintiff and the court that the third-party defendant's conduct would not be raised at the trial. The trial court denied the defendant's request, made after the plaintiff rested, to introduce evidence of the third-party defendant's negligence and to include that entity on the verdict sheet. The Fourth Department affirmed, holding that, although severance of a third-party action does not extinguish a defendant's CPLR article 16 defense, because of the defendant's representation that the third-party defendant's conduct would not be raised at trial, the plaintiff would be prejudiced by allowing the defendant to assert a CPLR article 16 defense.

D. Considerations where State is culpable party

Special rules exist in situations where the State is involved as a culpable party, see *Artibee v Home Place Corp.*, 28 NY3d 739, 49 NYS3d 638, 71 NE3d 1205 (2017). A party injured by the State's negligence may recover directly against the State only in the Court of Claims, NY

Const., Art. VI, § 9; Court of Claims Act § 8. However, a tort action may be brought in Supreme Court (or any appropriate trial court) against any State employee for breach of a duty owed directly to the injured party, even though the State may be vicariously liable for such acts and may be required to defend the Supreme Court action and indemnify the defendant, *Morell v Balasubramanian*, 70 NY2d 297, 520 NYS2d 530, 514 NE2d 1101 (1987) (medical malpractice claim against physicians employed by the State).

Pursuant to CPLR 1602(2), if the State contracts for the discharge of a duty for which it is legally responsible, such as the maintenance of its roads, to an independent contractor, it remains vicariously liable for the contractor's negligence. CPLR 1602(2) is, however, a savings clause; thus it does not preclude the State or a municipality from seeking apportionment between itself and other joint tortfeasors for whose liability it is not answerable, *Faragiano ex rel. Faragiano v Concord*, 96 NY2d 776, 725 NYS2d 609, 749 NE2d 184 (2001).

If plaintiff commences a negligence action against a defendant who is a State employee, defendant may invoke the provisions of CPLR Article 16 to limit liability and may assert claims for contribution or apportionment against any other tortfeasor except a fellow State employee entitled to indemnification under Public Officers Law § 17, see *State v Popricki*, 89 AD2d 391, 456 NYS2d 850 (3d Dept 1982). If the injured party pursues a claim directly against the State in the Court of Claims, special provisions are made in CPLR Article 16 to allow for the fact that the State is precluded from joining third parties in the Court of Claims for purposes of indemnification or contribution, CPLR 1601(1); see *Artibee v Home Place Corp.*, 28 NY3d 739, 49 NYS3d 638, 71 NE3d 1205 (2017); *O'Connor v State*, 70 NY2d 914, 524 NYS2d 391, 519 NE2d 302 (1987) (claimant not bound in Court of Claims by apportionment made in prior Supreme Court action).

In light of the limitations on the jurisdiction of the Court of Claims, CPLR 1601 provides that where the claim is against the State, the conduct of a non-party is apportioned in the Court of Claims unless claimant establishes that despite due diligence, jurisdiction over the non-party could not be obtained "in a court" of this State. The term "a court" of this State means any New York court, see *Siegel*, *New York Practice* §§ 168A, C (5th ed). Thus, the conduct of a non-party must be considered by the Court of Claims unless claimant demonstrates that despite due diligence, jurisdiction over the non-party could not have been obtained in any New York court. This aspect of Article 16 permits the State to apportion its liability for non-economic loss by asserting the culpability of tortfeasors who are not parties in the Court of Claims. It should be noted, however, that the State cannot rely on CPLR 1601(1) to limit its liability for the acts of an independent contractor for whom it remains vicariously liable, *Rangolan v Nassau*, 96 NY2d 42, 725 NYS2d 611, 749 NE2d 178 (2001); *Faragiano ex rel. Faragiano v Concord*, 96 NY2d 776, 725 NYS2d 609, 749 NE2d 184 (2001).

In a Supreme Court action, defendants are precluded from joining

the State for the purposes of indemnification or contribution since the State may be sued only in the Court of Claims, see *Artibee v Home Place Corp.*, 28 NY3d 739, 49 NYS3d 638, 71 NE3d 1205 (2017). Likewise, plaintiff is precluded from asserting a claim against the State in the Supreme Court action. Unlike the provision addressed in the preceding paragraph, Article 16 does not specifically address the problem of obtaining jurisdiction over the State in a Supreme Court action. In *Artibee v Home Place Corp.*, 28 NY3d 739, 49 NYS3d 638, 71 NE3d 1205 (2017), the Court concluded that fault cannot be apportioned against the State in a Supreme Court action because no plaintiff can obtain jurisdiction over the State in Supreme Court and CPLR 1601 does not authorize such apportionment.

E. Examples of application of Article 16

Special verdicts must be used to enable the court to enter an appropriate judgment. Such verdicts are needed to obtain apportionment of fault and itemization of “economic” and “non-economic” losses. Where the special verdict reflects that a defendant’s percentage is 50% or less of the “total liability assigned to all persons liable,” the court must, in entering judgment, limit that defendant’s liability for non-economic loss to that defendant’s percentage. Defendant’s joint and several liability for economic loss is not affected. For example:

Plaintiff sues defendants A and B as joint tortfeasors and the jury fixes non-economic damages at \$100,000 and apportions fault at 10% for the plaintiff, 50% for defendant A and 40% for defendant B. The total amount payable to plaintiff for non-economic loss would be \$90,000. Excluding plaintiff’s fault and applying the percentage of each defendant against the total of all defendants’ percentages, defendant A’s percentage of fault would be 55.556% ($50\% \div 90\% = 55.556\%$) and defendant B’s percentage of fault would be 44.444% ($40\% \div 90\% = 44.444\%$). Thus, under Article 16, defendant A can be held for the entire \$90,000 because A’s percentage was apportioned at a figure larger than 50%, while defendant B, whose percentage is 44.444%, cannot be compelled to pay more than \$39,999.60 of the non-economic loss.

As noted above, Article 16 is further complicated by its reference to the relative culpability of persons who are not joined as parties. The culpable conduct of such nonjoined tortfeasors may be considered by the jury and their percentages of fault fixed, as it is under GOL § 15-108, if plaintiff fails to prove an inability to join these tortfeasors despite due diligence, see *Siler v 146 Montague Associates*, 228 AD2d 33, 652 NYS2d 315 (2d Dept 1997). The effect of the unjoined tortfeasors’ culpability may be illustrated as follows:

Where plaintiff sues defendants A and B as joint tortfeasors

and fails to sue joint tortfeasor C, who could have been joined with due diligence, the fault of plaintiff and A, B, and C must be apportioned by the jury. If the jury fixes non-economic damages at \$100,000 and apportions fault, 45% to A, 30% to B, and 25% to unjoined tortfeasor C, since neither A nor B's percentage exceeds 50%, plaintiff may recover from them only to the extent of their individual proportions. Since C is not a party, there can be no recovery by plaintiff from C.

Since a CPLR Article 16 verdict may include percentages of fault with respect to nonparties, the question may arise as to whether a separate verdict is required for the apportionment of economic loss from which nonparties must be excluded. Because of the confusion and inconsistency that would be inherent in asking the jury to make two different sets of apportionments, potentially involving different persons, it is clear that the court should ask the jury to make only one apportionment, taking into account the conduct of all culpable persons. The court, for purposes of entering judgment, may then make the necessary calculations based on the existing jury apportionment. This process may be best illustrated by an example:

Where plaintiff sues defendants A and B as joint tortfeasors and fails to sue joint tortfeasor C, who could have been joined with due diligence, the fault of plaintiff, and A, B, and C must be apportioned by the jury. If the jury fixes non-economic damages at \$100,000, and apportions fault 20% to plaintiff, 40% to A, 20% to B, and 20% to unjoined tortfeasor C, since neither A's nor B's percentage exceeds 50%, plaintiff may recover non-economic damages from A and B only to the extent of their individual proportions. Since C is not a party, there can be no recovery by plaintiff from C.

If the jury fixes economic damages at \$100,000, that sum is reduced to \$80,000 because of plaintiff's 20% comparative fault, which sum can be collected from either A or B because there is full joint and several liability for economic damages. Thus, A's total liability to plaintiff is \$120,000 (\$40,000 non-economic; \$80,000 economic) and B's total liability to plaintiff is \$100,000 (\$20,000 non-economic; \$80,000 economic). Because only A and B are liable for the payment of economic damages and since C is not a party and not affected by contribution, the rights of A and B to contribution must be determined by the ratio of their percentages of fault, disregarding the percentage of the absent C. Since A's 40% is two-thirds of the 60% of fault apportioned to both defendants, then A's equitable share of the economic losses should be two-thirds and B's share should be one-third.

The following special verdict form is suggested for use in actions subject to the limitations of Article 16. This form is adapted from the special verdict forms suggested for use with respect to comparative fault, see PJI 2:36, and apportionment of fault, see Special Verdict Form PJI 2:275 SV-I.

Special Verdict Form PJI 2:275 SV-II Apportionment of Fault and Limitations on Liability

1. As to the defendant CD:

a. Was the defendant CD negligent?

At least five jurors must agree on the answer to this question.

Yes_____ No_____

[Insert signature lines]

If your answer to part “a” is “Yes,” proceed to part “b.”

If your answer to part “a” is “No,” do not answer part “b” and proceed to question 2.

b. Was defendant CD’s negligence a substantial factor in causing (the plaintiff’s injury, the accident or other appropriate characterization of the event)?

At least five jurors must agree on the answer to this question.

Yes_____ No_____

[Insert signature lines]

Proceed to question 2.

2. As to the defendant EF:

a. Was the defendant EF negligent?

At least five jurors must agree on the answer to this question.

Yes_____ No_____

[Insert signature lines]

If your answer to part “a” is “Yes,” proceed to part “b.”

If your answer to part “a” is “No,” do not answer part “b” and proceed to question 3.

b. Was EF’s negligence a substantial factor in causing (the

plaintiff's injury, the accident or other appropriate characterization of the event)?

At least five jurors must agree on the answer to this question.

Yes_____ No_____

[Insert signature lines]

If you answered "Yes" to both parts "a" and "b" of either question 1 or question 2, then proceed to question 3. Otherwise, report to the Court.

3. As to the plaintiff (decedent):

a. Was the plaintiff (decedent) negligent?

At least five jurors must agree on the answer to this question.

Yes_____ No_____

[Insert signature lines]

If your answer to part "a" is "Yes," proceed to part "b."

If your answer to part "a" is "No," do not answer part "b" and proceed to question 4.

b. Was plaintiff's (decedent's) negligence a substantial factor in causing (the plaintiff's injury, the accident or other appropriate characterization of the event)?

At least five jurors must agree on the answer to this question.

Yes_____ No_____

[Insert signature lines]

If you answered "Yes" to both parts "a" and "b" of any question 1, 2 or 3, then proceed to question 4. Otherwise, report to the Court.

4. As to GH (a third-party defendant or a non-party whose percentage of fault must be determined either because of Article 16 or GOL § 15-108):

a. Was GH negligent?

At least five jurors must agree on the answer to this question.

Yes_____ No_____

[Insert signature lines]

If your answer to part “a” is “Yes,” proceed to part “b.”

If your answer to part “a” is “No,” do not answer part “b” and proceed to question 5.

b. Was GH’s negligence a substantial factor in causing (the plaintiff’s injury, the accident or other appropriate characterization of the event)?

At least five jurors must agree on the answer to this question.

Yes_____ No_____

[Insert signature lines]

If you answered “Yes” to both parts “a” and “b” of any two of questions 1, 2, 3, and 4 then proceed to question 5. Otherwise, report to the Court.

5. What is the percentage of fault of:

Defendant CD _____%

Defendant EF _____%

Plaintiff _____%

GH _____%

Total must be 100%

Do not assign any percentage of fault to a person unless you have answered “Yes” to both parts “a” and “b” of the question involving that person.

Where an exception to Article 16 contained in CPLR 1602 is claimed by plaintiff, the court may need to provide additional instruction to the jury and require answers to additional questions in the Special Verdict. The exceptions contained in CPLR 1602 are discussed at length in the latter part of this Comment. The completed special verdict form should be marked as a Court exhibit. In a unified trial, the special verdict form

above should be supplemented by the insertion of questions with respect to damages, see the special verdict forms suggested in connection with PJI 2:301 (itemized verdict in personal injury action); and PJI 2:151A(1) and (2) (itemized verdict in medical, dental and podiatric malpractice actions).

F. Competing burdens of proof

CPLR Article 16 does not change plaintiff's burden of proof in establishing defendant's liability. However, a party who seeks to limit liability under Article 16 has the burden of proving his or her equitable share of the total liability by a preponderance of the evidence, CPLR 1603. Thus, while plaintiff must prove that a defendant is liable, the defendant bears the burden of establishing his or her percentage of liability to obtain the benefits of Article 16.

Defendant also bears the burden of establishing plaintiff's comparative fault, see CPLR 1412; PJI 2:36. The jury should be instructed as to the allocation of these burdens of proof. The jury will, of course, be separately instructed as to plaintiff's burden of proof in establishing a right of recovery, see PJI 1:60, 1:61, 1:62, and as to defendant's burden in establishing plaintiff's comparative fault, see PJI 2:36, but CPLR Article 14 contains no express provision as to the burden of proof applicable to contribution claims between tortfeasors, see CPLR 1401-1402 and pattern charge above. Taking these considerations into account, the following charge as to burden of proof is suggested in any case in which Article 14 and Article 16 may apply:

PJI 2:275.1

The plaintiff AB claims that the defendants CD and EF were at fault and the defendants claim that AB was at fault. Each defendant also claims that the other defendant(s) (was) (were) at fault. The defendants also claim that NP (who is not a party to this lawsuit) was at fault in causing the occurrence.

AB has the burden of proving by a preponderance of the evidence that each defendant was at fault. CD and EF each has the burden of proving by a preponderance of the evidence that the other defendant was at fault. CD and EF have the burden of proving by a preponderance of the evidence that AB was at fault.

You must decide what part, if any, of the total fault AB, CD, EF, and NP should bear. In making that decision, you will weigh the degree of fault of

each and determine the fault of each of them for causing the [injury/accident]. In your verdict you will state the percentage of fault, if any, of the plaintiff, each defendant, and NP. The total of these percentages must add up to 100 percent. Each defendant that you find was at fault has the burden of proving by a preponderance of the evidence (his, her, its) percentage of fault. Each defendant that you find was at fault also has the burden of proving by a preponderance of the evidence the fault of NP and its percentage.

G. Exceptions

The limitation of liability prescribed in CPLR 1601(1) is inapplicable when any of the following exceptions, delineated in CPLR 1602, applies:

(1) actions based on violation of a non-delegable duty or by reason of respondeat superior; but this provision applies only to the extent that it insures that a defendant is liable to the same extent as its delegate or employee, *Rangolan v Nassau*, 96 NY2d 42, 725 NYS2d 611, 749 NE2d 178 (2001).

(2) administrative proceedings;

(3) workers' compensation claims;

(4) claims against a defendant where plaintiff has sustained a "grave injury" as defined in Section 11 of the Workers' Compensation Law to the extent of the equitable share of plaintiff's employer;

(5) actions requiring proof of intent;

(6) actions in which defendant's liability arises out of defendant's use, operation, or ownership of a motor vehicle or motorcycle as defined in VTL §§ 311 and 125 (Police and Fire vehicles, not being within the statutory definition, are within CPLR Article 16);

(7) actions in which defendant acted with reckless disregard for the safety of others;

(8) actions in which defendant's liability arises from Article 10 of the Labor Law (i.e., Labor Law §§ 240, 241, 241-a, 241-b, 242);

(9) actions in which defendant's liability arises from the unlawful release of hazardous substances into the environment;

(10) products liability actions in which the manufacturer is not a

party and plaintiff demonstrates by a preponderance of the evidence that jurisdiction over the manufacturer could not be obtained with due diligence and that, if the manufacturer had been a party, liability would have been imposed upon the manufacturer by the doctrine of strict liability, but this exception applies only to the extent of the manufacturer's percentage of fault (see PJI 2:141);

(11) actions in which parties are found to have acted knowingly or intentionally, and in concert, to cause the acts or failures upon which liability is based;

(12) actions in which a defendant is responsible for the disposal or presence of hazardous or dangerous materials that is the result of the unlawful manufacture of methamphetamine, when such person has been convicted of §§ 220.73, 220.74, 220.75 or 220.76 of the penal law.

1. Pleading Exceptions

Pursuant to CPLR 1603, a party asserting an exception to Article 16 has the affirmative obligation of pleading and proving that exception by a preponderance of the evidence, see *Morales v Nassau*, 94 NY2d 218, 703 NYS2d 61, 724 NE2d 756 (1999); *Cole v Mandell Food Stores, Inc.*, 93 NY2d 34, 687 NYS2d 598, 710 NE2d 244 (1999). The party asserting the limitation of liability has the burden of proving by a preponderance of the evidence that its share of the liability is 50% or less, CPLR 1603. Since CPLR 1603 does not articulate when a plaintiff must plead an exception to CPLR 1601(1), courts have generally permitted plaintiffs to amend the pleadings at various points throughout an action to comply with CPLR 1603, *Morales v Nassau*, supra; *Cole v Mandell Food Stores, Inc.*, supra. Generally, a motion to amend a pleading should be granted in the absence of prejudice to defendant, i.e., that plaintiff's delay in asserting the exception hindered the preparation of the defense, see *Detrinca v De Fillippo*, 165 AD2d 505, 568 NYS2d 586 (1st Dept 1991); see also *Lucido v Mancuso*, 49 AD3d 220, 851 NYS2d 238 (2d Dept 2008) (party seeking to amend pleading is not required to show merit of amendment; court need only determine whether proposed amendment is patently devoid of merit), and the application may be made at various stages of the proceeding so long as notice is given, see *Miller v Staples Office Superstore East, Inc.*, 52 AD3d 309, 860 NYS2d 51 (1st Dept 2008). Where plaintiff concededly never pleaded an exception in CPLR 1602 as required by CPLR 1603, and failed to amend the pleadings during the course of the action to notify defendants of the allegations that the exceptions to CPLR 1601 applied, plaintiff is barred from asserting the exception on appeal, *Morales v Nassau*, supra; *Cole v Mandell Food Stores, Inc.*, supra.

While it is clear that plaintiff must plead and prove an exception to Article 16, there is a division of authority as to whether a defendant must plead and prove the Article 16 defense. The Second Department, in *Marsala v Weinraub*, 208 AD2d 689, 617 NYS2d 809 (2d Dept 1994),

has held that, where plaintiff sues multiple defendants, Article 16 applies unless plaintiff establishes an exception and, therefore, defendants are not required to assert Article 16 as an affirmative defense. The court held that, since defendants do not have the burden of pleading they may not be required to supply a bill of particulars regarding the identity of possible additional tortfeasors. On the other hand, the Fourth Department, in *Ryan v Beavers*, 170 AD2d 1045, 566 NYS2d 112 (4th Dept 1991), held that defendants, as parties seeking to limit their liability under CPLR 1603, have the burden of proof and must, therefore, plead Article 16 as an affirmative defense, see CPLR 3018(b), and provide a bill of particulars as to that defense.

The applicability of several of the exceptions appears to turn on questions of law exclusively. Where, however, a jury is involved in the determination of these issues, separate questions should be submitted in the special verdict.

2. Individual exceptions

Several of the statutory exceptions require elaboration and are treated in seriatim except for CPLR 1602(4) (“grave injury” exception), which, due to the length of the commentary addressing that provision, is dealt with at the end of this sub-section.

CPLR 1602(2)(iv) provides that Article 16 shall “not be construed to impair, alter, limit, modify, enlarge, abrogate or restrict . . . any liability arising by reason of a non-delegable duty or by reason of the doctrine of respondeat superior.” In *Rangolan v Nassau*, 96 NY2d 42, 725 NYS2d 611, 749 NE2d 178 (2001), the Court held that this provision is not an exception to the application of Article 16 but, rather, is one of four provisions in CPLR 1602(2) that reaffirm “certain pre-existing statutory and common law limitations on liability.” The Court held that CPLR 1602(2)(iv) is a savings provision that preserves principles of vicarious liability, *id*; see *Frank v Meadowlakes Development Corp.*, 6 NY3d 687, 816 NYS2d 715, 849 NE2d 938 (2006); *Boyd v Trent*, 297 AD2d 301, 746 NYS2d 191 (2d Dept 2002). It ensures that a defendant is liable to the same extent as its delegate or employee, and that CPLR Article 16 is not construed to alter this liability, *Rangolan v Nassau*, *supra*; *Boyd v Trent*, *supra*. Therefore, a municipality that contracts for the discharge of a duty for which the municipality is legally responsible, such as the maintenance of its roads, remains vicariously liable for the contractor’s negligence, and cannot rely on CPLR 1601(1) to limit its liability for the acts of the contractor, *Rangolan v Nassau*, *supra*; *Faragiano ex rel. Faragiano v Concord*, 96 NY2d 776, 725 NYS2d 609, 749 NE2d 184 (2001).

CPLR 1602(2)(iv) also prevents an employer from disclaiming respondeat superior liability under Article 16 by arguing that the true tortfeasor was its employee, *Rangolan v Nassau*, 96 NY2d 42, 725 NYS2d 611, 749 NE2d 178 (2001). In *Rangolan*, the court held that nothing in CPLR 1602(2)(iv) precludes a municipality, landowner or

employer from seeking the protections of Article 16 based on the fault of other tortfeasors “for whose liability [it] is not answerable.” The Second Department has ruled that the “non-delegable duty” provision does not apply to police failure to arrest plaintiff’s husband, who subsequently injured the plaintiff, *Morales v Nassau*, 256 AD2d 608, 683 NYS2d 127 (2d Dept 1998), *aff’d* on other grounds, 94 NY2d 218, 703 NYS2d 61, 724 NE2d 756 (1999); see *Grant v Ore*, 284 AD2d 302, 725 NYS2d 386 (2d Dept 2001) (“non-delegable duty” provision does not preclude apportionment of damages between municipality and defendant driver for accident on public roadway that municipality had non-delegable duty to maintain). Therefore, the municipality was entitled to plead the husband’s share of fault and to receive an apportionment charge and the benefits of Article 16, *Morales v Nassau*, *supra*. The Rangolan court expressly rejected the interpretations of other courts holding that CPLR 1602(2)(iv) creates a non-delegable duty exception to Article 16, see *Nwaru v Leeds Management Co.*, 236 AD2d 252, 654 NYS2d 338 (1st Dept 1997); *Cortes v Riverbridge Realty Co.*, 227 AD2d 430, 642 NYS2d 692 (2d Dept 1996).

In *Rangolan v Nassau*, 96 NY2d 42, 725 NYS2d 611, 749 NE2d 178 (2001), plaintiff was an inmate at defendant’s jail who was seriously beaten by a fellow inmate with whom he was improperly housed. The trial court granted plaintiff’s motion for judgment as a matter of law on his negligence claim and denied the county’s request to instruct the jury on apportionment of damages between the county and the fellow inmate, concluding that CPLR 1602(2)(iv) rendered apportionment under Article 16 unavailable where the county’s liability arose from a breach of a non-delegable duty, *id.* Applying the reasoning in the previous paragraph, the Court of Appeals concluded that the county was entitled to a jury charge on apportionment between itself and the fellow inmate and could seek the benefits of Article 16, *id.* In *Faragiano ex rel. Faragiano v Concord*, 96 NY2d 776, 725 NYS2d 609, 749 NE2d 184 (2001), plaintiff commenced an action against the driver of the car in which he was a passenger, a contractor that resurfaced the road and a Town charged with maintaining the road in a reasonably safe condition. The Court held that plaintiffs could not rely on the exception in CPLR 1602(2)(iv) to preclude the Town from seeking the protections of the limited liability in Article 16. The Court noted, however, that to the extent plaintiffs alleged that the Town was vicariously liable for the negligence of the contractor that resurfaced the road, CPLR 1602(2)(iv) precludes the Town from avoiding its vicarious liability for the negligence of the contractor.

CPLR 1602(5) provides that CPLR Article 16 does not apply to actions requiring proof of intent. Problems have arisen in cases where there are multiple tortfeasors and only one has acted intentionally. In *Chianese v Meier*, 98 NY2d 270, 746 NYS2d 657, 774 NE2d 722 (2002), the Court of Appeals sustained an apportionment of liability among defendant building owner, defendant managing agent and the non-party assailant, who had acted intentionally. The Court held that the exception in CPLR 1602(5) applies to prevent defendants who are found to have committed an intentional act from invoking the benefits of

Article 16. The Court noted, however, that in the multiple party hybrid situation presented in *Chianese*, plaintiff's claims against the named defendants did not require a showing of intent. To prove her case, plaintiff only had to show that she was injured as a result of the defendants' negligent failure to provide adequate security on their premises. A non-party tortfeasor's intentional conduct did not bring this pure negligence action within the scope of the exception in CPLR 1602(5), see *Roseboro v New York City Transit Authority*, 286 AD2d 222, 729 NYS2d 472 (1st Dept 2001); *Concepcion v New York City Health and Hospitals Corp.*, 284 AD2d 37, 729 NYS2d 478 (1st Dept 2001); *Siler v 146 Montague Associates*, 228 AD2d 33, 652 NYS2d 315 (2d Dept 1997).

CPLR 1602(6) provides that Article 16 does not apply to actions that arise out of defendant's use, operation, or ownership of a motor vehicle or motorcycle, as those terms are defined in Vehicle & Traffic Law §§ 311 and 125, see *Duffy v Chautauqua*, 225 AD2d 261, 649 NYS2d 297 (4th Dept 1996) (where defendant's liability arose solely by reason of his operation of pick-up truck, Article 16 not applicable). A home attendant accompanying the plaintiff in an ambulette in which plaintiff was being transported was not "using" the vehicle within the meaning of the exception to limited liability contained in CPLR 1602(6), *Sweeney v Future Ambulette*, 224 AD2d 285, 638 NYS2d 613 (1st Dept 1996). Since police and fire vehicles are not within the Vehicle and Traffic Law definitions, actions which arise out of defendant's use, operation, or ownership of police and fire vehicles are subject to limitation of liability under Article 16. However, other types of government-owned vehicles fall outside the scope of Article 16, see Vehicle & Traffic Law §§ 311(2) and 125.

Article 16 does not apply where defendant acted with reckless disregard for the safety of others, see CPLR 1602(7). Whether the defendant so acted is plainly a question for the jury and the following is suggested.

PJI 2:275.2

In this case AB claims not only that CD was negligent but that CD also acted with reckless disregard for the safety of others. Reckless disregard is not the same thing as negligence. Negligence is failing to exercise reasonable care under the circumstances. On the other hand, a person acts with reckless disregard for the safety of others when (he, she) intentionally does an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow. The act must have been done with conscious indifference to the

outcome. AB has the burden of proving by a preponderance of the evidence that CD acted with reckless disregard for the safety of others.

The above definition of recklessness is based upon *Matter of New York City Asbestos Litigation* [Maltese v Westinghouse Elec. Corp.; Stallone v Westinghouse Corp.], 89 NY2d 955, 655 NYS2d 855, 678 NE2d 467 (1997); *Application of Kafka*, 272 App Div 364, 71 NYS2d 179 (1st Dept 1947); *Sheridan v Fletcher*, 270 App Div 29, 58 NYS2d 466 (3d Dept 1945); see *Matter of Eighth Judicial Dist. Asbestos Litigation* (Pienta), 141 AD3d 1127, 35 NYS3d 615 (4th Dept 2016); *Restatement, Torts, Second*, § 500; see also PJI 2:10A (charge and comment concerning gross negligence or willful misconduct). For a case holding that plaintiff had made a sufficient showing to create a jury question as to the applicability of the reckless disregard exception, see *Detrinca v De Fillippo*, 165 AD2d 505, 568 NYS2d 586 (1st Dept 1991). For a case holding that evidence was insufficient to support a jury's finding of reckless disregard under CPLR 1602(7), see *Matter of New York City Asbestos Litigation* [Maltese v Westinghouse Elec. Corp.; Stallone v Westinghouse Corp.], *supra*. In situations where this issue is relevant, the Special Verdict Form PJI 2:275 SV-II, appearing earlier in this comment, should include the following question:

Special Verdict Form PJI 2:275 SV-III Apportionment of fault; CPLR article 16; reckless disregard

Question _____	Did defendant CD act with reckless disregard for the safety of others? Yes _____ No _____
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CPLR 1602(8) provides that Article 16 “shall not apply” to any person held liable for violating Article 10 of the Labor Law, which imposes on owners and contractors a non-delegable duty to maintain a safe workplace, see *Rangolan v Nassau*, 96 NY2d 42, 725 NYS2d 611, 749 NE2d 178 (2001).

CPLR 1602(10) provides that the limitations on liability will not apply to the equitable share of a nonparty manufacturer in a “product liability action” where the plaintiff establishes that personal jurisdiction over the manufacturer could not have been obtained with due diligence and that if the manufacturer had been a party the manufacturer would have been liable to plaintiff by reason of strict liability.

This statutory exception must be contrasted with the general principle in Article 16 that the culpable conduct of a non-party may not be considered where plaintiff demonstrates that jurisdiction over the non-party could not have been obtained with due diligence, CPLR 1601, see the Comment, *supra*. Under the strict products liability exception, it is not sufficient for plaintiff to demonstrate only that personal jurisdiction

tion over the manufacturer could not have been obtained with due diligence; plaintiff must also demonstrate that the manufacturer would have been liable to plaintiff in strict products liability. If plaintiff fails to demonstrate the validity of a strict products liability claim against the manufacturer, the culpable conduct of the non-party manufacturer may be asserted by defendants for Article 16 purposes.

The limitations on joint and several liability do not apply to defendants found to have acted knowingly or intentionally, and in concert, to cause the acts or failures upon which liability is based, CPLR 1602(11). However, the statute does not create, alter, enlarge, modify, or restrict any theory of liability, *id.* Nor does the different treatment afforded intentional tortfeasors necessarily entitle negligent tortfeasors to be released from joint and several liability whenever an intentional tortfeasor is also partially responsible for the harm, *Nash v Port Authority of New York and New Jersey*, 51 AD3d 337, 856 NYS2d 583 (1st Dept 2008), *rev'd on other grounds*, 17 NY3d 428, 933 NYS2d 164, 957 NE2d 733 (2011). In such instances, the negligent tortfeasor is relieved of joint and several liability only if the trier of fact finds that that tortfeasor was 50% or less at fault, *id.* For the CPLR 1602(11) exception for intentional tortfeasors to be applicable, there must be two discrete factual findings: first, that the defendant acted knowingly or intentionally and, second, that the defendant acted in concert with another to cause the acts or failures upon which liability is based. In cases in which the applicability of this exception is claimed, the following pattern charge should be given:

PJI 2:275.3

In this case you must decide whether the defendant CD acted knowingly or intentionally, and in concert with someone else [identify if known] when [insert acts or failures to act on which liability is alleged]. Knowledge or intent involves the state of mind with which a person's conduct is undertaken. A person acts knowingly or intentionally when the person desires to bring about a particular result or acts or fails to act with substantial certainty that the result will follow.

If you decide that CD acted knowingly or intentionally, then you must further decide whether CD acted in concert with someone else [identify if known]. Two or more persons act in concert when they actively take part in a common plan or further such plan by cooperating with one another or by one requesting or giving assistance or encouraging the other's action. AB has the

burden of proving by a preponderance of the evidence that defendant acted knowingly or intentionally and in concert with someone else.

The definition of intentional and knowing is based in part on PJI 3:1; the definition of concerted action is based in part on *Blakeslee v Wadsworth*, 37 AD3d 1021, 831 NYS2d 556 (3d Dept 2007); *Harris v Stanley*, 21 AD3d 612, 799 NYS2d 837 (3d Dept 2005); see *Bichler v Eli Lilly and Co.*, 55 NY2d 571, 450 NYS2d 776, 436 NE2d 182 (1982). The special verdict should include the following questions:

Special Verdict Form PJI 2:275 SV-IV Apportionment of fault; CPLR article 16; concerted action

1. Did CD act knowingly or intentionally? Yes ____ No ____

If your answer is "Yes" to Question 1, proceed to Question 2. If your answer is "No" [*state next appropriate action jury is to take*].

2. Did CD act in concert with someone else? Yes ____ No ____

The statutory exception for knowing or intentional concerted action raises considerations as to the treatment of conspiracy as a matter of civil law. In New York there is no tort of conspiracy, *Alexander & Alexander of New York, Inc. v Fritzen*, 68 NY2d 968, 510 NYS2d 546, 503 NE2d 102 (1986); *Brackett v Griswold*, 112 NY 454, 20 NE 376 (1889); *SRW Associates v Bellport Beach Property Owners*, 129 AD2d 328, 517 NYS2d 741 (2d Dept 1987). But while conspiracy to commit a tort is not independently actionable, wrongful acts committed in furtherance of an arrangement by a number of persons to injure a third person are actionable, *Green v Davies*, 182 NY 499, 75 NE 536 (1905); see *Blakeslee v Wadsworth*, 37 AD3d 1021, 831 NYS2d 556 (3d Dept 2007); *Harris v Stanley*, 21 AD3d 612, 799 NYS2d 837 (3d Dept 2005); *Miller v Spitzer*, 224 App Div 39, 229 NYS 526 (1st Dept 1928). Conspiracy therefore may be alleged and proved for the purpose of establishing the common liability of all conspirators for each other's acts, *Alexander & Alexander of New York, Inc. v Fritzen*, *supra*; *SRW Associates v Bellport Beach Property Owners*, *supra*.

The provisions of CPLR Article 16 with respect to knowing or intentional concerted acts do not create or enlarge any theory for establishing the liability of defendants, CPLR 1602(11). Thus, the statute does not create a new substantive tort of conspiracy. However, as under prior law, plaintiff may assert the existence of a conspiracy or agreement among tortfeasors in order to hold each liable for acts of the others. Where plaintiff establishes that a defendant acted knowingly or intentionally, and in concert with another, the defendant is precluded from limiting liability under the statute.

The statutory exception for knowing or intentional actions in concert may overlap with the statutory exception for intentional torts,

CPLR 1602(5); see *Chianese v Meier*, 98 NY2d 270, 746 NYS2d 657, 774 NE2d 722 (2002). CPLR 1601 does not apply where plaintiff is required to prove intent in order to establish liability. To illustrate, CPLR 1601 would not be applicable to defendants held jointly and severally liable for battery or assault committed by both.

There is also the separate exception from Article 16 for any person who acted with reckless disregard for the safety of others, CPLR 1602(7); see *Matter of New York City Asbestos Litigation* [*Maltese v Westinghouse Elec. Corp.*; *Stallone v Westinghouse Corp.*], 89 NY2d 955, 655 NYS2d 855, 678 NE2d 467 (1997).

3. “Grave injury” exception

CPLR 1602(4) addresses the issue of limitation of liability when an employee injured while at work sues someone other than the employer, see *Workers’ Compensation Law* § 29. Such a defendant can implead the employer and obtain contribution provided the employee sustained a “grave injury,” see CPLR Article 14; *Workers’ Compensation Law* § 11; *Dole v Dow Chemical Co.*, 30 NY2d 143, 331 NYS2d 382, 282 NE2d 288 (1972); PJI 2:218. Under CPLR 1602(4), where defendant can establish that plaintiff has sustained a “grave injury” as defined in § 11 of the *Workers’ Compensation Law*, CPLR Article 16 will not apply “to the extent of the equitable share” of the employer. As a result, in such cases, a defendant remains fully liable to plaintiff for all economic and non-economic loss caused by the defendant and the employer, see *Matter of New York City Asbestos Litigation*, 170 AD3d 611, 96 NYS3d 565 (1st Dept 2019), and apportionment will be made between defendant and the employer only for contribution purposes. Under CPLR Article 16, where the employer is found to be 50% or less culpable for the plaintiff’s injuries, the defendant’s recovery against the employer is limited to the employer’s proportionate share of the plaintiff’s non-economic loss, see *Frank v Meadowlakes Development Corp.*, 6 NY3d 687, 816 NYS2d 715, 849 NE2d 938 (2006).

Workers’ Compensation Law § 11 provides, in pertinent part, that an “employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a ‘grave injury.’” The law substantially curtails the rights of a third-party tortfeasor, who is sued by an employee, to commence a third-party action against the employer as illustrated in *Dole v Dow Chemical Co.*, 30 NY2d 143, 331 NYS2d 382, 282 NE2d 288 (1972) and codified in CPLR Article 14, see *Castro v United Container Machinery Group, Inc.*, 96 NY2d 398, 736 NYS2d 287, 761 NE2d 1014 (2001). The law shielding employers from third-party actions is not available to employers who have not secured workers’ compensation coverage for the injured worker, *Boles v Dormer Giant, Inc.*, 4 NY3d 235, 792 NYS2d 375, 825 NE2d 590 (2005). The *Workers’ Compensation Law* applies to claims governed by the *Volunteer Firefighters’ Benefit Law* and, thus, an injured volunteer firefighter-

er's company cannot be held liable for contribution or indemnity absent a showing of grave injury, *Theodoreu v Chester Fire Dist.*, 12 AD3d 499, 785 NYS2d 91 (2d Dept 2004), citing *Volunteer Firefighters' Benefit Law* § 20.

A "grave injury" is narrowly defined to "mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability," *Workers' Compensation Law* § 11. The only determination to be made is whether the injury falls within the statute's objective requirements, *Castro v United Container Machinery Group, Inc.*, 96 NY2d 398, 736 NYS2d 287, 761 NE2d 1014 (2001). The statutory list of grave injuries is intended to be exhaustive rather than illustrative, *Fleming v Graham*, 10 NY3d 296, 857 NYS2d 8, 886 NE2d 769 (2008); *Rubeis v Aqua Club Inc.*, 3 NY3d 408, 788 NYS2d 292, 821 NE2d 530 (2004); *Castro v United Container Machinery Group, Inc.*, supra; *Dunn v Smithtown Bancorp.*, 286 AD2d 701, 730 NYS2d 150 (2d Dept 2001).

A defendant suing plaintiff's employer need not prove a grave injury for a cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence, *Workers' Compensation Law* § 11; see *Pena v Chateau Woodmere Corp.*, 304 AD2d 442, 759 NYS2d 451 (1st Dept 2003) (contract executed after plaintiff's accident may be applied retroactively where made "as of" a pre-accident date and parties intended that it apply to date prior to accident).

a. Acquired brain injury

In *Rubeis v Aqua Club Inc.*, 3 NY3d 408, 788 NYS2d 292, 821 NE2d 530 (2004), the Court of Appeals held that a grave injury consisting of "an acquired injury to the brain caused by an external physical force resulting in permanent total disability," as enumerated in *Workers' Compensation Law* § 11, requires that the injured be unemployable in any capacity and not that he or she be totally incapacitated or unable to function in the other aspects of his or her life.

A triable question of fact was raised as to whether plaintiff had sustained a grave injury based on an acquired brain injury resulting in total permanent disability by deposition testimony in which plaintiff stated that he had experienced memory loss, anxiety, vision deficits, forgetfulness and personality changes due to the accident, *Sergeant v Murphy Family Trust*, 292 AD2d 761, 739 NYS2d 790 (4th Dept 2002); see *Miranda v Norstar Building Corp.*, 79 AD3d 42, 909 NYS2d 802 (3d Dept 2010) (conflicting expert opinions regarding whether plaintiff permanently unemployable). In contrast, in *Tassone v Mid-Valley Oil*

Co. Inc., 291 AD2d 623, 738 NYS2d 103 (3d Dept 2002) (pre-Rubeis decision), evidence that plaintiff suffered a “severe closed head injury and traumatic encephalopathy” and continued to experience undiagnosed pain in his back and lower extremities was insufficient where his medical tests revealed normal results and provided no support for the conclusion that he suffered total and permanent disability as a result of his brain injury.

The grave injury issue is not resolved by a guardianship order, a plaintiff’s eligibility for Social Security disability benefits, or by a determination of the Workers’ Compensation Board that plaintiff is permanently and totally disabled, *Miranda v Norstar Building Corp.*, 79 AD3d 42, 909 NYS2d 802 (3d Dept 2010). While such orders and determinations may be sufficient to raise a question of fact as to whether a grave injury has occurred, they are not dispositive on the issue, *id.*

Where a triable question of fact is raised as to whether plaintiff had sustained a grave injury based on an acquired brain injury resulting in permanent total disability, the following charge should be given:

PJI 2:275.4

The defendant-third-party plaintiff CD claims that the plaintiff AB sustained a brain injury resulting in permanent and total disability. Permanent and total disability means inability to engage in any employment. It does not require that AB lack all capacity to perform personal or household activities. You must consider whether the evidence establishes that AB is unable to return to, or engage in, any employment. CD has the burden of proving by a preponderance of the evidence that AB sustained a brain injury resulting in permanent and total disability.

Where the foregoing charge is given, the following question should be included in the special verdict form:

Special Verdict Form PJI 2:275 SV-V Apportionment of fault; CPLR article 16; acquired brain injury

Did AB sustain a brain injury resulting in permanent and total disability preventing AB from engaging in any employment? Yes ____ No ____

b. Permanent and severe facial disfigurement

The “permanent and severe facial disfigurement” category of the

grave injury requirement is unlike the other enumerated categories, which are readily amenable to “‘objectively ascertainable’ determinations,” *Fleming v Graham*, 10 NY3d 296, 857 NYS2d 8, 886 NE2d 769 (2008) (quoting *Rubeis v Aqua Club Inc.*, 3 NY3d 408, 788 NYS2d 292, 821 NE2d 530 (2004)). While the element of permanency may generally be determined by the court through competent medical evidence, the question whether the injury is severely disfiguring is more difficult, see *Fleming v Graham*, *supra*.

In *Fleming v Graham*, 10 NY3d 296, 857 NYS2d 8, 886 NE2d 769 (2008), the Court of Appeals held that “an injury disfigures the face when it detrimentally alters the plaintiff’s natural beauty, symmetry or appearance, or otherwise deforms.” Further, a disfigurement meets the requisite level of “severity” if “a reasonable person viewing the plaintiff’s face in its altered state would regard the condition as abhorrently distressing, highly objectionable, shocking or extremely unsightly,” *id.* A facial disfigurement is sufficiently “severe” to satisfy the statutory standard if it “greatly alters the appearance of the face from its appearance before the accident,” *id.* Thus, a scar underneath plaintiff’s chin, extending beneath the jaw to a point below his ear, did not constitute “permanent and severe facial disfigurement,” *Sergeant v Murphy Family Trust*, 292 AD2d 761, 739 NYS2d 790 (4th Dept 2002); see *Krollman v Food Automation Service Techniques, Inc.*, 13 AD3d 1209, 787 NYS2d 581 (4th Dept 2004) (3 mm. scar above eyebrow not visible in photographs and some mottling of cheeks not “severe disfigurement”); *Rosen v Nygren Dahly Co.*, 1 AD3d 998, 768 NYS2d 255 (4th Dept 2003) (scar that is slightly lighter than injured’s normal skin tone and runs along hair line not “severe disfigurement”). The loss of an eye does not constitute severe facial disfigurement where plaintiff had a prosthetic eye that needed to be removed only once or twice a year for cleaning, *Pilato v Nigel Enterprises, Inc.*, 48 AD3d 1133, 850 NYS2d 799 (4th Dept 2008); *Giblin v Pine Ridge Log Homes, Inc.*, 42 AD3d 705, 840 NYS2d 196 (3d Dept 2007).

The application of the standard for “permanent and severe facial disfigurement” articulated in *Fleming v Graham*, 10 NY3d 296, 857 NYS2d 8, 886 NE2d 769 (2008), is ordinarily a question of law for the court, *id.* However, as the *Fleming* Court observed, there are some cases in which the question is properly for the jury. In such cases, the following charge should be given:

PJI 2:275.5

The defendant-third-party plaintiff CD claims that the plaintiff AB sustained permanent and severe facial disfigurement as a result of the accident in that [state condition that CD claims is disfiguring, such as scarring]. An injury disfigures the face when it alters the injured person’s face in a way that impairs the person’s natural beauty, symmetry or

appearance or otherwise deforms it. A disfigurement is severe if a reasonable person viewing AB's face in its present state would regard the condition as abhorrently distressing, highly objectionable, shocking or extremely unsightly.

Where the foregoing charge is given, the following question should be included in the special verdict form:

Special Verdict Form PJI 2:275 SV-VI Apportionment of fault; CPLR article 16; permanent and severe facial scarring

Has plaintiff AB sustained a permanent and severe facial disfigurement? Yes ____ No ____

c. Other "grave injuries"

The amputation of the tips of fingers on one hand does not constitute "loss of multiple fingers" and, therefore, is not a grave injury under § 11 of the Workers' Compensation Law, *Castro v United Container Machinery Group, Inc.*, 96 NY2d 398, 736 NYS2d 287, 761 NE2d 1014 (2001). The Court held that the term "loss of multiple fingers" cannot sensibly be read to mean partial loss of multiple fingers, *id*; see *Vincenty v Cincinnati Inc.*, 14 AD3d 392, 788 NYS2d 92 (1st Dept 2005) (plaintiff, who had two fingers completely amputated in workplace accident, did not sustain grave injury, where both fingers were surgically reattached so that plaintiff regained their use, at least partially). Workers' Compensation Law § 11 does not list the loss of a thumb as a grave injury. In *Meis v ELO Organization, LLC.*, 97 NY2d 714, 740 NYS2d 689, 767 NE2d 146 (2002), the court held that plaintiff failed to demonstrate that the amputation of his thumb constituted a "permanent and total loss of use" of the hand. The *Meis* court rejected plaintiff's argument that the loss of his thumb automatically rendered his hand totally useless, *id*. The loss of both interphalangeal joints of an index finger constitutes the "loss of an index finger" and is therefore a grave injury under Workers' Compensation Law § 11, at least where the injury left a "painful amputation stump" requiring two corrective surgeries to desensitize, *Castillo v 711 Group, Inc.*, 10 NY3d 735, 853 NYS2d 273, 882 NE2d 885 (2008). The loss of the upper third of the index finger does not constitute "loss of an index finger" and is, therefore, not a grave injury, *McCoy v Queens Hydraulic Co., Inc.*, 286 AD2d 425, 729 NYS2d 733 (2d Dept 2001). The injured plaintiff's retention of only "passive movement" of the hand or arm may qualify as a total loss of use of the hand or arm, *Millard v Alliance Laundry Systems, LLC*, 28 AD3d 1145, 814 NYS2d 433 (4th Dept 2006)³. Relying on *Castro v United Container Machinery Group, Inc.*, *supra*, the court held in *Hansen v 510 Manhattan Affordable Housing, LP*, 2 AD3d 274, 770 NYS2d 21 (1st Dept 2003), that the loss of part of an ear is not a grave injury under Workers' Compensation Law § 11.

The loss of vision in one eye is not considered a grave injury, *Ibarra*

v Equipment Control, Inc., 268 AD2d 13, 707 NYS2d 208 (2d Dept 2000); see Hussein v Pacific Handy Cutter, Inc., 272 AD2d 223, 708 NYS2d 74 (1st Dept 2000). Internal injuries, fractures and non-total loss of hearing and vision are not considered grave injuries, Hilbert v Sahlen Packing Co., 267 AD2d 939, 701 NYS2d 564 (4th Dept 1999). Temporary paralysis resulting from a spinal injury does not constitute a grave injury within the purview of Workers' Compensation Law § 11, Bradt v Lustig, 280 AD2d 739, 721 NYS2d 114 (3d Dept 2001). The paralysis contemplated by the legislature is limited to permanent paraplegia or quadriplegia, *id.*

4. Miscellaneous issues

Third-party defendants frequently move to dismiss third-party complaints on the basis that plaintiff did not sustain a "grave injury." These motions have generated case law on the proper procedures for considering such motions. Although the motion is directed against the defendant/third-party plaintiff, plaintiff may submit evidence in opposition to third-party defendant's summary judgment motion, Way v George Grantling Chemung Contracting Corp., 289 AD2d 790, 736 NYS2d 424 (3d Dept 2001); see Mendez v Union Theological Seminary in City of New York, 26 AD3d 260, 809 NYS2d 77 (1st Dept 2006).

In Morales v Nassau, 94 NY2d 218, 703 NYS2d 61, 724 NE2d 756 (1999), the Court of Appeals refused to create an exemption in Article 16 for cases alleging negligent enforcement of orders of protection. The Court noted that although there is a strong public policy of encouraging enforcement of orders of protection, the legislature has not chosen to include such an exemption in Article 16, *id.*

Defendants held liable under General Obligations Law § 11-100, governing claims for injury or damage caused by the intoxication of a person under the age of 21, may benefit from the protection afforded by CPLR 1601, Van Vlack v Baker, 242 AD2d 704, 663 NYS2d 49 (2d Dept 1997). Where parties are held liable under § 11-100, there is no applicable exception to CPLR 1601 that is enumerated in CPLR 1602, *id.*

PJI 2:275A. Liability Over—Apportionment of Fault— Effect of Release—Before Trial

During the trial evidence may be presented to show that AB, who is not a party to this action, was responsible to some degree for (plaintiff's injury, causing the accident [or other appropriate characterization of the event]). Do not speculate why or draw any conclusion from the fact that AB is not a defendant.

At the end of the trial I will tell you how you may consider any evidence of AB's conduct.

Comment

Based on General Obligations Law § 15-108, and applicable to releases executed on or after 9/1/74, see *Krichmar v Krichmar*, 42 NY2d 858, 397 NYS2d 775, 366 NE2d 863 (1977); *Codling v Paglia*, 32 NY2d 330, 345 NYS2d 461, 298 NE2d 622 (1973); see also *Mitchell v New York Hosp.*, 61 NY2d 208, 473 NYS2d 148, 461 NE2d 285 (1984). The pattern charge is meant to be used as part of the general charge before trial (PJI 1:1–1:14) and, when appropriate, should be used as part of PJI 1:2 (parties). In the event the release is effected during trial, PJI 2:275B should be used. Regardless of when the release occurs, the final charge should contain PJI 2:275C.

Under the statute the release of one of several joint or concurrent tortfeasors produces several results: first, the released tortfeasor may not seek contribution from the other(s), GOL § 15-108(c); second, the other(s) may not seek contribution from the released tortfeasor, GOL § 15-108(b); and third, the plaintiff's recovery against the other(s) is to be reduced to the extent of: (i) the consideration paid for the release, (ii) the amount stipulated in the release, or (iii) the amount of the "released tortfeasor's equitable share of the damages," whichever is greatest, GOL § 15-108(a); see *Gonzales v Armac Industries, Ltd.*, 81 NY2d 1, 595 NYS2d 360, 611 NE2d 261 (1993) (citing PJI); see also Twelfth Annual Report of the Judicial Conference on the CPLR (1974 Session Laws 1791, 1803–1820). Therefore, the nature and extent of the released tortfeasor's fault must be considered by the jury in order to fix the amount of the reduction, even though the released tortfeasor is not, or is no longer, a party to the action, *Driscoll v New York City Transit Authority*, 53 AD2d 391, 385 NYS2d 540 (1st Dept 1976). However, release of one tortfeasor does not release other tortfeasors unless the terms of the release expressly so provide, GOL § 15-108; *Neenan v Kamalian*, 292 AD2d 433, 738 NYS2d 889 (2d Dept 2002); *Utter v South Brookhaven Obstetric & Gynecologic Associates, P.C.*, 135 AD2d 811, 522 NYS2d 915 (2d Dept 1987); see *Hill v St. Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904, 490 NE2d 823 (1986).

GOL § 15-108(d) (eff. July 4, 2007) limits the application of § 15-108 to certain releases and covenants not to sue. Under subdivision d, GOL § 15-108 applies to a release or covenant not to sue that (1) compensates the plaintiff with consideration greater than one dollar; (2) completely or substantially terminates the dispute between the plaintiff and the settling party; and (3) is provided prior to the entry of judgment. Because plaintiff's agreement with one of several defendants to arbitrate the issues between them was a continuation of the litigation in a difference forum the agreement did not constitute a release or covenant within the meaning of GOL § 15-108(d), *Nicotra v CNY Family Care, LLP*, 184 AD3d 1191, 125 NYS3d 213 (4th Dept 2020). Cases decided prior to the effective date of GOL § 15-108(d) that construe the terms "release" and "covenant not to sue," such as *Baca v HRH Const. Corp.*, 200 AD2d 538, 607 NYS2d 21 (1st Dept 1994) (high-low agreement that may not have completely or substantially terminated the dispute be-

tween plaintiffs and settling party was, nevertheless, a “release”) and *Killeen v Reinhardt*, 71 AD2d 851, 419 NYS2d 175 (2d Dept 1979) (GOL § 15-108 applicable “under circumstances at bar” even though no consideration was paid for voluntary discontinuance), should be viewed with caution.

It is now common for parties to enter into a “structured settlement” in which the settling defendant pays a lump sum to plaintiff and, in addition, purchases an annuity which will pay further sums to plaintiff over time. *Kwasny v Feinberg*, 157 AD2d 396, 557 NYS2d 381 (2d Dept 1990), held that, for purposes of GOL § 15-108, the value of the settlement is measured by the amounts paid by the settling defendant to plaintiff and to purchase the annuity, rather than by the total amount that plaintiff will have received at the expiration of the annuity. In *Kwasny*, the settling defendant paid plaintiff \$150,000 in a lump sum and purchased an annuity policy for \$125,000, with the result that over 20 years plaintiff would receive a total of \$510,000. The court held that the non-settling defendant was entitled to a set-off of \$275,000, not \$510,000. It reasoned that the non-settling defendant was not entitled to benefit from the annuity policy, any more than defendant would have been entitled to benefit from interest earned by plaintiff on the lump sum payment.

Nothing prohibits agreement among the parties to waive the provisions of GOL § 15-108(c) to permit the settlement of the claim of the plaintiff and leave the apportionment of fault among the alleged tortfeasors for resolution upon trial, *Mitchell v New York Hosp.*, 61 NY2d 208, 473 NYS2d 148, 461 NE2d 285 (1984).

The jury must not be informed that there has been a settlement, CPLR 4533-b; *Lettiere v Martin Elevator Co., Inc.*, 62 AD2d 810, 406 NYS2d 510 (2d Dept 1978), *aff'd*, 48 NY2d 662, 421 NYS2d 879, 397 NE2d 390 (1979). If the released tortfeasor does testify and the fact of settlement is elicited for impeachment purposes, the jury must be charged that the fact of settlement may be considered only on the witness’s credibility and not on the issue of liability, see Comment, PJI 1:25C. Counsel for previously released tortfeasors may not participate in the trial of the action, *Meleo v Rochester Gas and Elec. Corp.*, 72 AD2d 83, 423 NYS2d 343 (4th Dept 1979); see *Mielcarek v Knights*, 50 AD2d 122, 375 NYS2d 922 (4th Dept 1975) (citing PJI). Statements made by plaintiff in procuring a settlement may be utilized at trial as prior inconsistent statements to impeach plaintiff’s credibility, *Hayes v Henault*, 131 AD2d 930, 516 NYS2d 798 (3d Dept 1987). The fact of the settlement itself should not be disclosed and the statements may not be used to attempt to mitigate damages, see *Hayes v Henault*, *supra*.

Counsel may not advise the jury that plaintiff’s recovery will be reduced should it find that the settling defendants contributed to the injuries, *Bagailuk v Weiss*, 110 AD2d 284, 494 NYS2d 205 (3d Dept 1985).

A settlement entered into or memorialized in open court that ef-

fectively and finally terminates the action against the settling defendants is sufficient to invoke the remedial provisions of GOL § 15-108, *Pollicina v Misericordia Hosp. Medical Center*, 82 NY2d 332, 604 NYS2d 879, 624 NE2d 974 (1993); *Matter of New York City Asbestos Litigation [Didner v Keene Corp.]*, 82 NY2d 342, 604 NYS2d 884, 624 NE2d 979. Therefore, a settling tortfeasor need not actually receive a release in exchange for payment of the stipulated settlement sum before the statute applies, *id*; see CPLR 2104; *Matter of Dolgin Eldert Corp.*, 31 NY2d 1, 334 NYS2d 833, 286 NE2d 228 (1972). In addition, the approval of the Surrogate's Court under EPTL 5-4.6 is not necessary to render a settlement in a wrongful death action final and binding, *Pollicina v Misericordia Hospital Medical Center*, *supra*. EPTL 5-4.6 authorizes, but does not require, the court in which the wrongful death action is pending to refer the case to the Surrogate for the limited purpose of administering the proceeds of an approved settlement. Thus, GOL § 15-108(a) will apply to a settlement reached before judgment which did not receive the Surrogate's approval until after judgment was entered, *id*.

GOL § 15-108 applies to a pre-trial settlement notwithstanding agreement that judgment pursuant to the settlement is not to be entered until after trial, *Gonzales v Armac Industries, Ltd.*, 81 NY2d 1, 595 NYS2d 360, 611 NE2d 261 (1993) (citing PJI); *Lettiere v Martin Elevator Co., Inc.*, 62 AD2d 810, 406 NYS2d 510 (2d Dept 1978), *aff'd*, 48 NY2d 662, 421 NYS2d 879, 397 NE2d 390 (1979). Thus, the Court of Appeals has held that a defendant manufacturer's pretrial agreement with an injured plaintiff, admitting liability for two percent of any damages a jury might award, and preventing plaintiff from enforcing against defendant any judgment in excess of two percent of plaintiff's total damages, was a "release from liability" within the meaning of GOL § 15-108(c), requiring dismissal of the manufacturer's claim for contribution against the worker's employer, *Gonzales v Armac Industries, Ltd.*, 81 NY2d 1, 595 NYS2d 360, 611 NE2d 261 (1993); see *Baca v HRH Const. Corp.*, 200 AD2d 538, 607 NYS2d 21 (1st Dept 1994) ("high-low" agreement between plaintiffs and third-party plaintiff, by which third-party plaintiff guaranteed plaintiffs a minimum payment of \$400,000 in exchange for plaintiffs' promise not to enforce any judgment in excess of \$800,000 against it was release within meaning of GOL § 15-108). Discontinuance of the action against one of several defendants may not operate as a release of that defendant, see *Blasch v Chrysler Motors Corp.*, 93 AD2d 934, 462 NYS2d 313 (3d Dept 1983) (effect of payment incident to discontinuance of original lawsuit left for resolution upon trial); *Killeen v Reinhardt*, 71 AD2d 851, 419 NYS2d 175 (2d Dept 1979) (GOL § 15-108 applicable "under circumstances at bar" even though no consideration was paid for voluntary discontinuance); but see *Leone v Utica*, 66 AD2d 463, 414 NYS2d 412 (4th Dept 1979), *aff'd*, 49 NY2d 811, 426 NYS2d 980, 403 NE2d 964 (1980) (AD said GOL 15-108 inapplicable where no consideration was paid for voluntary discontinuance).

Hill v St. Clare's Hosp., 67 NY2d 72, 499 NYS2d 904, 490 NE2d 823 (1986) addressed the application of GOL § 15-108 to cases where

plaintiff has settled with the original tortfeasor but not with successive tortfeasors who aggravated the original injuries. Hill held that an inquiry must be made to determine what portion of the settlement sum, if any, was for the original injuries and what portion, if any, was attributable to the aggravation of injuries and, if so, whether the amounts allocated were arrived at in good faith. That portion of the settlement allocated to the aggravation of injuries must be deducted from any judgment against the successive tortfeasors. It is plaintiff's burden to prove what part of the settlement payment was for the aggravation of injuries. The hearing required by Hill should not be conducted unless and until a successive tortfeasor is held liable to plaintiff and the verdict exceeds the amount of the settlement, *Utter by Utter v South Brookhaven Obstetric & Gynecologic Associates, P.C.*, 135 AD2d 811, 522 NYS2d 915 (2d Dept 1987). Additionally, the settlement by the original tortfeasor with the plaintiff will preclude a claim by the original tortfeasor against the successive tortfeasor, *Glaser v M. Fortunoff of Westbury Corp.*, 71 NY2d 643, 529 NYS2d 59, 524 NE2d 413 (1988); *Salonia v Samsol Homes, Inc.*, 119 AD2d 394, 507 NYS2d 186 (2d Dept 1986); see also *Nielsen v Greenman Bros., Inc.*, 123 AD2d 850, 507 NYS2d 641 (2d Dept 1986). The Hill doctrine does not apply where plaintiff had an underlying degenerative condition which was worsened by the conduct of multiple tortfeasors, as distinguished from a distinct initial injury caused by an original tortfeasor and aggravated by a subsequent tortfeasor, *Kwasny v Feinberg*, 157 AD2d 396, 557 NYS2d 381 (2d Dept 1990).

Where plaintiff settles separate causes of action for conscious pain and suffering and wrongful death with fewer than all defendants for one total amount and the equitable liability of those defendants is less than the settlement amount, for the purposes of GOL § 15-108, the settlement amount is to be apportioned between the two causes of action by using the amounts fixed by the jury for each cause of action, *Casey v State*, 119 AD2d 363, 507 NYS2d 159 (2d Dept 1986); see also *Harrison v Dombrowski*, 175 AD2d 37, 573 NYS2d 87 (1st Dept 1991) (on facts, the entire amount paid by the settling defendant attributed to wrongful death claim). Fairness requires that the non-settling tortfeasors not be bound by any agreement between plaintiff and the settling tortfeasors as to the allocation of payments to the distinct claims. Likewise, the non-settling tortfeasors are not bound by the allocation made in Surrogate's Court since that forum is concerned with estate and taxation issues unrelated to the allocation for set-off purposes required by GOL § 15-108.

It should be noted that in *Williams by Williams v Niske by Niske*, 81 NY2d 437, 599 NYS2d 519, 615 NE2d 1003 (1993), the Court of Appeals held that GOL § 15-108 is not to be applied literally in an action involving more than two defendants. Thus, Williams affirmed a decision of the Appellate Division, First Department, which held that where there is no apportionment of fault with respect to a defendant who "settles and pays money," the amount of that settlement should be deducted from the verdict before the application of GOL § 15-108. In

Williams, the Appellate Division ruled that the verdict of \$2,600,000 was to be reduced first by \$900,000, the amount paid by defendants whose liability was not submitted to the jury, and the balance, \$1,700,000, further reduced by 65%, the equitable liability of the defendants whose settlement amounts were less than 65% of \$1,700,000. The non-settling defendant was obligated to pay, therefore, 35% of \$1,700,000 or \$595,000.

In *Matter of New York City Asbestos Litigation* [*Didner v Keene Corp.*], 82 NY2d 342, 604 NYS2d 884, 624 NE2d 979 and *Pollicina v Misericordia Hosp. Medical Center*, 82 NY2d 332, 604 NYS2d 879, 624 NE2d 974 (1993), the Court of Appeals ruled that the aggregate method of computing offsets under GOL § 15-108(a) should be used in an action with multiple defendants where two or more of the defendants have settled with the plaintiff prior to submission of the case to the jury. Under the aggregate approach, the verdict is reduced either by the total of the dollar amounts to be paid by the settling defendants or the total dollar amounts of their corresponding shares of the verdict, allocated in accordance with their apportioned liability, whichever is greater, *id*; see *Nemeth v Brenntag North America*, 183 AD3d 211, 123 NYS3d 12 (1st Dept 2020) (aggregate method when all settling tortfeasors have been included in apportionment).

A party may amend its pleadings to raise GOL § 15-108 as an affirmative defense at any time, even after trial, provided that the late amendment does not prejudice the other party, *Whalen v Kawasaki Motors Corp.*, 92 NY2d 288, 680 NYS2d 435, 703 NE2d 246 (1998). Prejudice may be found where a party has incurred some change in position or hindrance in the preparation of its case that could have been avoided had the original pleading contained the proposed amendment, *id*; *Loomis v Civetta Corinno Const. Corp.*, 54 NY2d 18, 444 NYS2d 571, 429 NE2d 90 (1981). Therefore, a non-settling defendant who fails to plead the fault of a settling defendant may, after a verdict, amend its answer to assert GOL § 15-108's set-off provisions as an affirmative defense. However, by failing to seek apportionment of liability against a defendant before a verdict, the non-settling defendant is foreclosed from reducing the verdict by the settling defendant's equitable share of the fault and is limited to a reduction by the amount stipulated or paid by the settling defendant, *Whalen v Kawasaki Motors Corp.*, *supra*.

In a case where plaintiff is comparatively negligent and a GOL § 15-108 claim is asserted, the Court should first apply the GOL § 15-108 reduction and then apply CPLR 1411 to discount the remaining sum by the proportion of plaintiff's comparative negligence, *Whalen v Kawasaki Motors Corp.*, 92 NY2d 288, 680 NYS2d 435, 703 NE2d 246 (1998).

Instances in Which GOL § 15-108 Does Not Apply

The right to indemnification is unaffected by GOL § 15-108; thus a release given by plaintiff to a defendant who may be obliged to indemnify a co-defendant does not prevent the unreleased defendant

from seeking indemnity from the released defendant, *McDermott v New York*, 50 NY2d 211, 428 NYS2d 643, 406 NE2d 460 (1980); *Aetna Cas. and Sur. Co. v Merchants Mut. Ins. Co.*, 78 AD2d 176, 435 NYS2d 125 (3d Dept 1980) (abrogated on other grounds by, *Motor Vehicle Acc. Indemnification Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 652 NYS2d 584, 674 NE2d 1349 (1996)); *Dallas & Mavis Forwarding Co., Inc. v Works*, 78 AD2d 966, 433 NYS2d 899 (4th Dept 1980). Likewise, the indemnitor is not entitled to have the amount of indemnity reduced by the indemnitee's share of fault, *Weinstock v Jenkin Contracting Co., Inc.*, 134 AD2d 254, 520 NYS2d 589 (2d Dept 1987). Pursuant to GOL § 15-108, where one of several tortfeasors has settled with plaintiff, a third party complaint by or against the settling tortfeasor may stand only if it asserts a claim for indemnity, and not contribution, *McDermott v New York*, supra; *Bradt v Lustig*, 280 AD2d 739, 721 NYS2d 114 (3d Dept 2001); *Aetna Cas. and Sur. Co. v Merchants Mut. Ins. Co.*, supra; *Grovenger v Laboratory Procedures, Inc.*, 132 AD2d 289, 522 NYS2d 356 (3d Dept 1987).

One of several tortfeasors may enjoy the protection of a pre-accident exculpatory agreement (e.g.: “[plaintiff] assumes full responsibility for any injury which might occur to [plaintiff] in or about [defendant’s] premises including but without limitation, any claim for personal injuries resulting from or arising out of the negligence of [defendant]”). While such an agreement may protect the tortfeasor from liability to the plaintiff, see PJI 2:10A, such an exculpatory agreement does not come within the ambit of GOL § 15-108, and thus does not serve to reduce the plaintiff’s judgment against other tortfeasors not covered by the agreement, nor does such an agreement prevent the other tortfeasors from seeking contribution from the protected tortfeasor, *Franzek v Calspan Corp.*, 78 AD2d 134, 434 NYS2d 288 (4th Dept 1980).

GOL § 15-108(d) (eff. July 4, 2007) limits the application of § 15-108 to certain releases and covenants not to sue. Under subdivision d, GOL § 15-108 applies to a release or covenant not to sue that (1) compensates the plaintiff with consideration greater than one dollar; (2) completely or substantially terminates the dispute between the plaintiff and the settling party; and (3) is provided prior to the entry of judgment. Cases decided prior to the effective date of GOL § 15-108(d) that construe the terms “release” and “covenant not to sue,” such as *Baca v HRH Const. Corp.*, 200 AD2d 538, 607 NYS2d 21 (1st Dept 1994) (high-low agreement that may not have completely or substantially terminated the dispute between plaintiffs and settling party was, nevertheless, a “release”) and *Killeen v Reinhardt*, 71 AD2d 851, 419 NYS2d 175 (2d Dept 1979) (GOL § 15-108 applicable “under circumstances at bar” even though no consideration was paid for voluntary discontinuance), should be viewed with caution.

GOL § 15-108 does not apply to a post-judgment settlement, *Chase Manhattan Bank v Akin, Gump, Strauss, Hauer & Feld L.L.P.*, 309 AD2d 173, 763 NYS2d 588 (1st Dept 2003); *Cover v Cohen*, 113 AD2d 502, 497 NYS2d 382 (2d Dept 1985); see *Karian v Anchor Motor Freight*,

Inc., 144 AD2d 777, 535 NYS2d 175 (3d Dept 1988). Thus, a tortfeasor who settles after judgment is not immunized from contribution claims from the non-settling tortfeasors, *Cover v Cohen*, supra. It appears that, under common law principles, the non-settling defendants would be entitled to have the judgment reduced by the actual amount of the settlement, see *Livant v Livant*, 18 AD2d 383, 239 NYS2d 608 (1st Dept 1963).

Applying the analysis in *Cover v Cohen*, 113 AD2d 502, 497 NYS2d 382 (2d Dept 1985), the First Department has held that the three subdivisions of GOL § 15-108 were intended to function as a unified whole and that the statute may not be invoked to extinguish a contribution claim asserted by a nonsettling tortfeasor against a settling tortfeasor where the settlement was agreed upon after entry of judgment against the nonsettling tortfeasor but before adjudication of the settling tortfeasor's liability, *Chase Manhattan Bank v Akin, Gump, Strauss, Hauer & Feld L.L.P.*, 309 AD2d 173, 763 NYS2d 588 (1st Dept 2003). Further, because GOL § 15-108(b) does not apply in these circumstances, the settling tortfeasor's "good faith" is not an issue in the prosecution of the nonsettling tortfeasor's contribution claim, *id.*

The statute does not apply to a discontinuances granted to a defendant where no monetary consideration is paid by defendant and plaintiff remains free to commence another action against defendant, *DeSano v Tower*, 129 AD2d 976, 514 NYS2d 153 (4th Dept 1987). In *De Sano*, plaintiff's judgment was not to be reduced by the proportionate share of a uninsured defendant against whom plaintiff discontinued the action upon condition that defendant not delay the trial by filing for bankruptcy.

The statute also does not apply if the release was not given in good faith, GOL § 15-108(c); see *Reynolds v Morka Enterprises, Inc.*, 82 AD2d 199, 442 NYS2d 664 (3d Dept 1981). "The 'good faith' requirement was imposed to assure that an injured party would not collusively release one wrongdoer for a small amount in return for a promise to cooperate improperly in an attempt to extract from the other wrongdoers more than their equitable share of the damages," *Torres v State*, 67 AD2d 814, 413 NYS2d 262 (4th Dept 1979); see *Meleo v Rochester Gas and Elec. Corp.*, 72 AD2d 83, 423 NYS2d 343 (4th Dept 1979); Twelfth Annual Report of the Judicial Conference on the CPLR (1974 Session Laws 1791, 1818-1819). Since the "good faith" question goes to the status of the "released" co-defendant as a party, that issue should be determined by the trial judge in advance of the personal injury trial, see CPLR 4011; *Torres v State*, supra. There may also be an issue of whether the subject claim is within the scope of the release. That issue, too, should be resolved by the trial judge in advance of the trial, see *Dury v Dunadee*, 52 AD2d 206, 383 NYS2d 748 (4th Dept 1976). A voluntary concession of facts relevant to liability made by a defendant during trial is not the "functional equivalent" of a settlement or release for purposes of GOL § 15-108 and does not mandate dismissal of a third party action brought by that defendant, *Moore v Johnson*, 147 AD2d 621, 538 NYS2d 28 (2d Dept 1989).

If the *defendant* asserts his own claim for personal injuries against a third party and then releases the third party from liability to defendant for these injuries, the release does not thereby, without more, insulate the third party from liability to the defendant for contribution with respect to plaintiff's claim, *Lanni v Smith*, 89 AD2d 782, 453 NYS2d 497 (4th Dept 1982).

GOL § 15-108 also does not apply where derivative claims remain pending after a settlement since the derivative claim does not belong to the main plaintiff and cannot be affected by the main plaintiff's settlement. Thus, where a child's personal injury action was settled but the parent's derivative action for medical expenses was left pending, the parent, upon succeeding in the action, was entitled to recover the full amount of proven damages, without reduction, *Gallina v State*, 115 AD2d 251, 495 NYS2d 831 (4th Dept 1985).

The opinion in *Lambert Houses Redevelopment Co. v HRH Equity Corp.*, 117 AD2d 227, 502 NYS2d 433 (1st Dept 1986), a breach of contract action, has raised the question as to whether the provisions of GOL § 15-108 may be circumvented by the use of liquidating agreements. Liquidating agreements are distinguished from settlements. In a settlement, defendant pays a consideration to plaintiff in order to obtain a release of defendant's liability. A liquidating agreement does not release a defendant from liability but fixes the amount of that liability to such amounts as may be recovered from other parties, e.g., subcontractors, *Lambert Houses Redevelopment Co. v HRH Equity Corp.*, *supra*. The defendant remains in the lawsuit and cooperates in the effort to obtain a recovery against others.

In *Lambert* the Court held that the provisions of GOL § 15-108, under which the settling tortfeasor is released and no longer remains in the lawsuit, do not apply to liquidating agreements. Liquidating agreements have historically been utilized in actions to recover for economic losses arising out of defects in the construction of buildings, see *Degnon Contracting Co. v New York*, 235 NY 481, 139 NE 580 (1923); *Mars Associates, Inc. v New York City Educational Const. Fund*, 126 AD2d 178, 513 NYS2d 125 (1st Dept 1987); *Ardsley Const. Co., Inc. v Port of New York Authority*, 61 AD2d 953, 403 NYS2d 43 (1st Dept 1978); *Whitmyer Bros., Inc. v State*, 47 NY2d 960, 419 NYS2d 954, 393 NE2d 1027 (1979). *Lambert* involved an action to recover damages for breach of a construction contract in which the Court upheld a liquidating agreement made between the owner and the general contractor and rejected the contention that the agreement violated the provisions of GOL § 15-108.

Contribution is a remedy that applies only in tort actions and is not available in contract actions, even where plaintiff alleges negligence in the performance of the contract, *Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 523 NYS2d 475, 517 NE2d 1360 (1987); *United Services Auto. Ass'n v R. Maurice Associates, Inc.*, 188 AD2d 1021, 591 NYS2d 912 (4th Dept 1992); see

Bristol-Myers Squibb, Indus. Div. v Delta Star, Inc., 206 AD2d 177, 620 NYS2d 196 (4th Dept 1994); Gordon J. Phillips, Inc. v Concrete Materials, Inc., 187 AD2d 1024, 590 NYS2d 344 (4th Dept 1992); Lawrence Development Corp. v Jobin Waterproofing, Inc., 186 AD2d 634, 588 NYS2d 422 (2d Dept 1992); Briar Contracting Corp. v New York, 156 AD2d 628, 550 NYS2d 717 (2d Dept 1989). Nevertheless, in Lambert, the Court appears to have assumed the substantive validity of crossclaims for "contribution." Lambert could have been decided on the ground that GOL § 15-108 applies only to contribution claims in personal injury actions, see McDermott v New York, 50 NY2d 211, 428 NYS2d 643, 406 NE2d 460 (1980); Riviello v Waldron, 47 NY2d 297, 418 NYS2d 300, 391 NE2d 1278 (1979), and since the subcontractors could not assert any such contribution claims, GOL § 15-108 did not apply to the liquidating agreement between the owner and the general contractor. Thus, Lambert may be subject to question on its precise facts. In fact, the Court of Appeals has noted that Lambert involved a contract dispute, rather than a personal injury action, and that GOL § 15-108 applies only to contribution claims in tort actions, Gonzales v Armac Industries, Ltd., 81 NY2d 1, 595 NYS2d 360, 611 NE2d 261 (1993) (citing PJI); see Ackerman v Price Waterhouse, 252 AD2d 179, 683 NYS2d 179 (1st Dept 1998) (GOL § 15-108 has no applicability to contract to causes of action). It is questionable whether a liquidating agreement in a personal injury action would be permissible since to permit such agreements would appear to defeat the statutory scheme established by the Legislature.

GOL § 15-108 only applies where parties are liable in tort for the same injury, Ackerman v Price Waterhouse, 252 AD2d 179, 683 NYS2d 179 (1st Dept 1998).

Vicarious Liability

The rules of vicarious liability may create problems under GOL § 15-108, unless it is borne in mind that the statute does not affect the right to indemnity, McDermott v New York, 50 NY2d 211, 428 NYS2d 643, 406 NE2d 460 (1980); Riviello v Waldron, 47 NY2d 297, 418 NYS2d 300, 391 NE2d 1278 (1979); see Rosado v Proctor & Schwartz, Inc., 66 NY2d 21, 494 NYS2d 851, 484 NE2d 1354 (1985); Hertz Corp. v Dahill Moving and Storage Co., Inc., 79 AD2d 589, 434 NYS2d 386 (1st Dept 1980), aff'd, 54 NY2d 619, 442 NYS2d 502, 425 NE2d 890 (1981) (VTL § 388); Bailer v Perez-Veridiano, 266 AD2d 249, 698 NYS2d 288 (2d Dept 1999); see also CPLR 1402; Felice v St. Agnes Hospital, 65 AD2d 388, 411 NYS2d 901 (2d Dept 1978). The fact that parties jointly negotiate a settlement of a negligence action does not, in itself, impair their rights to pursue claims for indemnification among themselves, Denton Leasing Corp. v Breezy Point Surf Club, Inc., 133 AD2d 95, 518 NYS2d 634 (2d Dept 1987). Accordingly, if the sole predicate for judgment against the owner of premises is vicarious liability under the Labor Law, the owner may seek indemnification from contractors and subcontractors, even though they have settled with plaintiff, see Smith v Jesus People, 113 AD2d 980, 493 NYS2d 658 (3d Dept 1985); Shufelt v Niagara Mohawk Power Corp., 109 AD2d 66, 490 NYS2d 633 (3d Dept

1985). Similarly if a wrongdoing employee has been released, GOL § 15-108 is no defense for the employer, *Riviello v Waldron*, *supra*, and the employer may seek indemnification from the employee. If the employer has been released, the wrongdoing employee is entitled only to a reduction of the judgment by the amount paid by the employer, *Mead v Bloom*, 94 AD2d 423, 464 NYS2d 904 (4th Dept 1983), *aff'd*, 62 NY2d 788, 477 NYS2d 326, 465 NE2d 1262 (1984). In *Williams v New York City Health and Hospitals Corp.*, 262 AD2d 231, 694 NYS2d 355 (1st Dept 1999), as part of settlement between plaintiff and defendant, plaintiff agreed that he would not assert any claims against other co-defendants premised upon their vicarious liability for defendant's conduct. Therefore, the co-defendants were precluded from prosecuting a third party action against the settling defendant for indemnification, *id.* In the event that the employer and employee are co-defendants together with a stranger to the employment relationship, the release of the employer deprives the co-defendant stranger of the right to seek contribution from the employer-employee "unit," and thus the release of the employer serves to reduce the plaintiff's recovery against the stranger by the formula found in GOL § 15-108(a), *Mead v Bloom*, *supra*. On the other hand, it appears that the release of the co-defendant employee does not diminish the right of the co-defendant stranger to seek contribution from the co-defendant employer, see *Riviello v Waldron*, *supra*.

Indemnity applies only where the party seeking to shift responsibility has been held liable solely on account of the negligence of another, see *D'Ambrosio v New York*, 55 NY2d 454, 450 NYS2d 149, 435 NE2d 366 (1982). Contribution is the only available remedy where a party is held liable at least partially because of its own negligence, *Glaser v M. Fortunoff of Westbury Corp.*, 71 NY2d 643, 529 NYS2d 59, 524 NE2d 413 (1988) and it is not available where the underlying personal injury action has been settled, GOL § 15-108; *Aetna Life & Cas. Co. v Blue Bird Coach Co.*, 140 AD2d 476, 528 NYS2d 588 (2d Dept 1988). Where a successive tortfeasor has aggravated the original injury, the original tortfeasor is responsible for the entire injury at least in part because of its own negligence. Thus, the original tortfeasor's remedy against the successive tortfeasor is contribution, which remedy is unavailable under GOL § 15-108 when the initial tortfeasor settles with plaintiff, *Glaser v M. Fortunoff of Westbury Corp.*, *supra*.

A plaintiff is not precluded from bringing an action against a state employee even though plaintiff had previously settled with the state itself and the state was statutorily obligated to indemnify its employee, *Ott v Barash*, 109 AD2d 254, 491 NYS2d 661 (2d Dept 1985).

Strict products liability is not analogous to vicarious liability since liability is imposed upon a manufacturer of a defective product because of wrongdoing, *Rosado v Proctor & Schwartz, Inc.*, 66 NY2d 21, 494 NYS2d 851, 484 NE2d 1354 (1985). Therefore, the manufacturer is not entitled to be indemnified by its purchaser which failed to install safety devices required by the sales agreement to be installed by the purchaser,

resulting in injury to purchaser's employee. If the manufacturer settles with the employee, the manufacturer is foreclosed by GOL § 15-108 from obtaining contribution from its purchaser as well, *Rosado v Proctor & Schwartz, Inc.*, supra.

**PJI 2:275B. Liability Over—Apportionment of Fault—
Effect of Release—During Trial**

For reasons that do not concern you AB is (not, no longer) a defendant in this case. Do not speculate why or draw any conclusion from the fact that AB is no longer a defendant.

However, evidence (may be presented, may have been presented) that AB was responsible in some degree for (plaintiff's injury, causing this accident [or other appropriate characterization of the event]). At the end of the trial I will tell you how you may consider any evidence of AB's conduct.

Comment

Based on General Obligations Law § 15-108. The statute and its effect are discussed at length in the Comment to PJI 2:275A. The pattern charge is meant for use during trial immediately upon the settlement of plaintiff's claim against one of several joint or concurrent tortfeasor-defendants.

The jury must not be informed that there has been a settlement, CPLR 4533-b; *Lettiere v Martin Elevator Co., Inc.*, 62 AD2d 810, 406 NYS2d 510 (2d Dept 1978), *aff'd*, 48 NY2d 662, 421 NYS2d 879, 397 NE2d 390 (1979). If the released defendant testifies and the fact of settlement is elicited for impeachment purposes, the jury must be charged that the fact of settlement may be considered only on the witness's credibility, and not on the issue of liability, see Comment, PJI 1:25C. Counsel for the released defendant may not participate in the trial after the release, *Meleo v Rochester Gas and Elec. Corp.*, 72 AD2d 83, 423 NYS2d 343 (4th Dept 1979); see *Mielcarek v Knights*, 50 AD2d 122, 375 NYS2d 922 (4th Dept 1975) (citing PJI). Statements made by plaintiff in procuring a settlement may be utilized at trial as prior inconsistent statements to impeach plaintiff's credibility, *Hayes v Henault*, 131 AD2d 930, 516 NYS2d 798 (3d Dept 1987). The fact of the settlement itself should not be disclosed and the statements may not be used to attempt to mitigate damages, see *Hayes v Henault*, supra.

GOL § 15-108 does not apply if the release was not given in good faith, GOL § 15-108(b); see Comment, PJI 2:275A. If an issue of good faith is presented, the proper procedure appears to be for the trial judge to conduct an immediate evidentiary hearing in the absence of the jury, and to decide this issue before the trial resumes.

**PJI 2:275C. Liability Over—Apportionment of Fault—
Effect of Release—Charge After Trial**

As I told you (before, during) the trial, AB is (not, no longer) a defendant in this case. Nevertheless, you must still consider whether AB was at fault as well as whether the defendant CD was at fault. If you find both AB and the defendant CD were at fault (in causing the accident, plaintiff's injury [or other appropriate characterization of the event]) you must decide the percentage of the total fault each bears.

In making that decision, you will consider the duty owed to plaintiff by AB and by CD, and to what extent, if at all, each one failed to meet that duty. Once you have considered all the facts and circumstances, you will decide what percentage of fault each bears for causing (the accident, *[or other appropriate characterization of the event]* plaintiff's injury).

In your verdict you will state the percentage of fault of AB and of CD. The total of these percentages must add up to 100 percent.

Comment

Based on General Obligations Law § 15-108 which is discussed at length in Comment to PJI 2:275A.

If one of several tortfeasors has been released and the jury finds the released tortfeasor was not at fault, GOL § 15-108 applies and the remaining tortfeasors are entitled to have the judgment reduced by the amount paid by the released tortfeasor, *Bartlett by Bartlett v General Elec. Co.*, 90 AD2d 183, 457 NYS2d 628 (3d Dept 1982); see *Mead v Bloom*, 94 AD2d 423, 464 NYS2d 904 (4th Dept 1983), *aff'd*, 62 NY2d 788, 477 NYS2d 326, 465 NE2d 1262 (1984).

In an action with multiple defendants where two or more of the defendants have settled with the plaintiff prior to submission of the case to the jury, the amount of the GOL § 15-108(a) offset to the jury award is determined by the aggregate method, in which the verdict is reduced either by the total of the dollar amounts to be paid by the settling defendants or the total dollar amounts of the corresponding shares of the verdict, allocated in accordance with their apportioned liability, whichever is greater, *Matter of New York City Asbestos Litigation*

[*Didner v Keene Corp.*], 82 NY2d 342, 604 NYS2d 884, 624 NE2d 979; *Pollicina v Misericordia Hosp. Medical Center*, 82 NY2d 332, 604 NYS2d 879, 624 NE2d 974 (1993); see Comment, PJI 2:275A.

While the plaintiff has the burden of proof in the first instance of establishing liability on the part of a non-settling defendant, once that liability is established, it is the non-settling defendant's burden to establish the equitable shares attributable to the settling defendants for purposes of reducing the amount of the non-settling defendant's responsibility for damages, *Zalinka v Owens-Corning Fiberglass Corp.*, 221 AD2d 830, 633 NYS2d 884 (3d Dept 1995); *Bigelow v Acands, Inc.*, 196 AD2d 436, 601 NYS2d 478 (1st Dept 1993); see *Matter of New York City Asbestos Litigation (Robaey)*, 186 AD3d 401, 129 NYS3d 48 (1st Dept 2020); *Nemeth v Brenntag North America*, 183 AD3d 211, 123 NYS3d 12 (1st Dept 2020); *Gerdik v Van Ess*, 5 AD3d 726, 774 NYS2d 174 (2d Dept 2004). Thus, where the only issue on a retrial was apportionment, it was appropriate to require the non-settling defendant to proceed first in presenting evidence to the jury, *Bigelow v Acands, Inc.*, *supra*. If at the trial the remaining tortfeasors do not raise the question of the released tortfeasor's responsibility, they are still entitled to have the amount of the verdict reduced by the amount paid by the released tortfeasor, *Whalen v Kawasaki Motors Corp.*, 92 NY2d 288, 680 NYS2d 435, 703 NE2d 246 (1998); *Bonnot v Fishman*, 57 NY2d 870, 456 NYS2d 47, 442 NE2d 445 (1982). They are, however, foreclosed from reducing the verdict by the settling party's equitable share of the fault, *Whalen v Kawasaki Motors Corp.*, 92 NY2d 288, 680 NYS2d 435, 703 NE2d 246 (1998).

If one defendant subsequently satisfies the judgment, even if the amount paid is fixed by compromise, i.e., is less than the amount of the judgment, GOL § 15-108 does not prevent that defendant from obtaining contribution, based on the amount paid, *Rock v Reed-Prentice Division of Package Machinery Co.*, 39 NY2d 34, 382 NYS2d 720, 346 NE2d 520 (1976); see *Velazquez v Water Taxi, Inc.*, 49 NY2d 762, 426 NYS2d 467, 403 NE2d 172 (1980) (re: effect of payment of arbitration award by joint tortfeasor).

A special verdict is well suited to elicit the jury's apportionment of fault, and an adaptation of the special verdict form found in the Comment to PJI 2:275 may be used.

J. DAMAGES

1. GENERAL

PJI 2:277. Damages—General

My charge to you on the law of damages must not be taken as a suggestion that you should find for the plaintiff. It is for you to decide on the evidence presented and the rules of law I have given you whether the plaintiff is entitled to recover from the defendant. If you decide that the plaintiff is not entitled to recover from the defendant, you need not consider damages. Only if you decide that the plaintiff is entitled to recover will you consider the measure of damages.

If you find that the plaintiff is entitled to recover from the defendant, you must render a verdict in a sum of money that will justly and fairly compensate the plaintiff for all losses resulting from the injuries and disabilities (he, she) sustained.

Comment

Caveat: The charge is transitional and introductory. It is not intended for use by itself; rather it should be followed by the statement of the specific measure of damage rules applicable to the particular case, for example see *Matter of Rothko's Estate*, 43 NY2d 305, 401 NYS2d 449, 372 NE2d 291 (1977); *Menzel v List*, 24 NY2d 91, 298 NYS2d 979, 246 NE2d 742 (1969); *Steitz v Gifford*, 280 NY 15, 19 NE2d 661 (1939); *New York State Thruway Authority v John Civetta Const. Corp.*, 62 AD2d 530, 405 NYS2d 778 (3d Dept 1978); *Linden v National City Bank of New York*, 12 AD2d 69, 208 NYS2d 182 (1st Dept 1960); *Hogan v Franken*, 221 App Div 164, 223 NYS 1 (3d Dept 1927); *Restatement, Second, Torts*, § 917.

As to choice of law principles that may affect the damages that a party may recover in a given case, see generally *Edwards v Erie Coach Lines Co.*, 17 NY3d 306, 929 NYS2d 41, 952 NE2d 1033 (2011); *Neumeier v Kuehner*, 31 NY2d 121, 335 NYS2d 64, 286 NE2d 454 (1972).

Proximate cause of particular items of damage may sometimes be in issue. When it is, the charge must be modified accordingly, see PJI 2:70; see also Comment to PJI 2:284. If several different measure of damages rules may be applicable, a charge specifically analyzing the op-

tions available to the jury is required, *Darrah v Kite*, 32 AD2d 208, 301 NYS2d 286 (3d Dept 1969). In cases involving joint tortfeasors the verdict should be for the full amount of damages against all liable defendants, although damages against one defendant may be different from damages awarded against the others if plaintiff fails to serve a medical report or amended bill of particulars on one defendant but does serve it on the others, *Dawson v Nici*, 22 NY2d 697, 291 NYS2d 808, 238 NE2d 917 (1968). Likewise, where plaintiff obtains a default judgment with damages determined at an uncontested inquest, the plaintiff is not collaterally estopped from obtaining a greater amount in damages as against a non-defaulting defendant, *Baxter v Fulton Ice & Cube Co.*, 106 AD2d 82, 484 NYS2d 835 (2d Dept 1985). However, where plaintiff does fully litigate the issue of damages against one tortfeasor, the amount of damages awarded constitutes a ceiling on the amount of damages for the same injury that may be assessed against another joint or vicariously liable tortfeasor, see *Page v La Buzzetta*, 96 AD2d 694, 466 NYS2d 769 (3d Dept 1983); *Goines v Pennsylvania R. Co.*, 6 AD2d 531, 179 NYS2d 960 (1st Dept 1958).

Causation is relevant both to liability and to damages, *Oakes v Patel*, 20 NY3d 633, 965 NYS2d 752, 988 NE2d 488 (2013). For example, in a medical malpractice case, liability cannot be established unless it is shown that the defendant's malpractice was a substantial factor in causing the plaintiff's injury, *id.* But even where liability is established, the plaintiff may recover only for those injuries and related damages proximately caused by the malpractice, *id.* More specifically, where the plaintiff had a pre-existing condition, the plaintiff is not entitled to recover for injuries that the pre-existing condition would have caused even in the absence of malpractice, *id.*

Under General Obligations law § 15-108, a release or a covenant not to sue made by one tortfeasor does not discharge any other tortfeasors from liability. However, it does reduce the claim against the other tortfeasors by the amount in the settling party's stipulation, or the amount of the tortfeasor's equitable share, whichever is greater, see *Williams by Williams v Niske by Niske*, 81 NY2d 437, 599 NYS2d 519, 615 NE2d 1003 (1993). GOL § 15-108 only applies where parties are liable in tort for the same injury, *Ackerman v Price Waterhouse*, 252 AD2d 179, 683 NYS2d 179 (1st Dept 1998).

The purpose of an award of damages is to restore the aggrieved party to the position that he or she held prior to injury, see *McDougald v Garber*, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 (1989). This is accomplished by awarding a sum of money that compensates the party for the actual loss sustained as well as those items that will be sustained in the future. Aside from their general experience, there is no legal criterion to guide the jurors in translating into money values such intangibles as pain, suffering and shock, see Comment to PJI 2:280. This is left to the good judgment of the jury; thus it is error to give the court's evaluation of the maximum recoverable, *Lieberman v Washington Square Hotel Corp.*, 40 AD2d 647, 336 NYS2d 518 (1st Dept 1972). Further, there is no requirement that the fact finder sort out varying

degrees of cognition and determine at what level a particular deprivation can be fully appreciated, *McDougald v Garber*, *supra*; *Sanchez v New York*, 93 AD3d 501, 949 NYS2d 368.

So long as the figure arrived at has a reasonable basis of computation and is not merely speculative, possible or imaginary, the fact finder has the right to resort to reasonable conjectures and probable estimates and to make the best approximation possible through the exercise of good judgment and common sense in arriving at an award of damages, *Matter of Rothko's Estate*, 43 NY2d 305, 401 NYS2d 449, 372 NE2d 291 (1977); *Curiale v Peat, Marwick, Mitchell & Co.*, 214 AD2d 16, 630 NYS2d 996 (1st Dept 1995); see *Quijano v American Transit Ins. Co.*, 155 AD3d 981, 65 NYS3d 221 (2d Dept 2017). This is particularly so where the conduct of wrongdoers has rendered it difficult to ascertain the damages suffered with the precision otherwise possible, *id.*

The court retains supervisory power to be exercised where the damages are excessive or inadequate, CPLR 4404; *Figliomeni v Board of Ed. of City School Dist. of Syracuse*, 38 NY2d 178, 379 NYS2d 45, 341 NE2d 557 (1975). The court may also affirm on damages and remand for a new trial on liability where appropriate, *Trimarco v Klein*, 56 NY2d 98, 451 NYS2d 52, 436 NE2d 502 (1982), and vice versa. However, in order to protect the right to a jury trial, a court that finds a verdict to be inadequate or excessive may not enter judgment for an increased or decreased amount. Proper procedure is for the court to grant a new trial on the issue of damages unless, in the case of an inadequate verdict, defendant stipulates to an increased amount or, in the case of an excessive verdict, plaintiff stipulates to a reduced amount, *Ashton v Bobruitsky*, 214 AD2d 630, 625 NYS2d 585 (2d Dept 1995); *Anderson v Stephen M. Donis, D.P.M., P.C.*, 150 AD2d 414, 541 NYS2d 25 (2d Dept 1989); see *Kane v Linsky*, 156 AD2d 333, 548 NYS2d 286 (2d Dept 1989); see also *Walker v New York City Transit Authority*, 130 AD2d 442, 515 NYS2d 777 (1st Dept 1987) (excessiveness of monetary award not a basis for granting a new trial on issue of liability). The courts generally have been reluctant to interfere with the verdict unless it is not within reasonable bounds, *Pratt v Sevenski*, 120 AD2d 953, 502 NYS2d 863 (4th Dept 1986); *Neal v Rainbow House Fruits*, 87 AD2d 511, 447 NYS2d 487 (1st Dept 1982); *Turner v Miller*, 61 AD2d 856, 401 NYS2d 914 (3d Dept 1978); *Riddle v Memorial Hospital*, 43 AD2d 750, 349 NYS2d 855 (3d Dept 1973); *Beckhusen v E. P. Lawson Co.*, 15 AD2d 455, 221 NYS2d 753 (1st Dept 1961); *Reich v Evans*, 7 AD2d 765, 180 NYS2d 159 (3d Dept 1958); *Wolfe v General Mills, Inc.*, 35 Misc2d 996, 231 NYS2d 918 (Sup 1962).

In reviewing a claim of excessiveness or inadequacy of the monetary award of a judgment in an action in which an itemized verdict as to damages is required by CPLR 4111, CPLR 5501(c) provides that "the Appellate Division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation," *Christopher v Great Atlantic & Pacific Tea Co., Inc.*, 76 NY2d 1003, 564 NYS2d 715, 565 NE2d 1266 (1990); see *Flansburg v Merritt*

Meridian Const. Corp. Inc., 191 AD2d 756, 594 NYS2d 421 (3d Dept 1993); Gunder v Murthy, 185 AD2d 915, 587 NYS2d 666 (2d Dept 1992); Reed v Harter Chair Corp., 185 AD2d 547, 586 NYS2d 401 (3d Dept 1992); see also *Hotaling v CSX Transp.*, 5 AD3d 964, 773 NYS2d 755 (3d Dept 2004) (in FELA actions, state courts apply federal standard of review of whether damages awarded are so excessive as to shock judicial conscience). While not binding upon an appellate court, the amount of damages awarded in personal injury actions involving similar injuries may serve to aid the court in the exercise of its review, *Quijano v American Transit Ins. Co.*, 155 AD3d 981, 65 NYS3d 221 (2d Dept 2017); see *Kahl v MHZ Operating Corp.*, 270 AD2d 623, 703 NYS2d 842 (3d Dept 2000); *Senko v Fonda*, 53 AD2d 638, 384 NYS2d 849 (2d Dept 1976).

CPLR 5501(c) applies to the trial courts, *Ashton v Bobruitsky*, 214 AD2d 630, 625 NYS2d 585 (2d Dept 1995); *Prunty v YMCA of Lockport, Inc.*, 206 AD2d 911, 616 NYS2d 117 (4th Dept 1994); *Cochetti v Gralow*, 192 AD2d 974, 597 NYS2d 234 (3d Dept 1993); *Ramos v New York*, 169 AD2d 687, 565 NYS2d 68 (1st Dept 1991).

In deciding the question of material deviation, the Appellate Division must set forth its reasons, including the factors it considered in determining whether the award deviates materially from the reasonable compensation standard, see CPLR 5522(b). Thus, the requirement that reasons and factors be stated applies even where the Appellate Division affirms the judgment below, see generally *Petryszyn v Di Fulvio*, 185 AD2d 405, 585 NYS2d 808 (3d Dept 1992). By parity of reasoning, the trial courts must also comply with the obligation to state their reasons. A review of other appellate determinations involving similar facts can aid in assessing whether an award deviates from what has otherwise been deemed reasonable compensation, *Preston v Young*, 239 AD2d 729, 657 NYS2d 499 (3d Dept 1997); see *Matter of 91st Street Crane Collapse Litigation*, 154 AD3d 139, 62 NYS3d 11 (1st Dept 2017) (appellate court is “required” to review similar appealed verdicts); *Launders v Steinberg*, 39 AD3d 57, 828 NYS2d 36 (1st Dept 2007); *Donlon v New York*, 284 AD2d 13, 727 NYS2d 94 (1st Dept 2001). Factors to be considered in reviewing the adequacy of a damage award include the life-threatening nature of the injuries, the length of hospitalization, surgeries required, complications experienced, medication needed to stabilize the patient and relieve pain, postconfinement convalescence, rehabilitative efforts and the success of treatment, *Edwards v Stamford Healthcare Soc. Inc.*, 267 AD2d 825, 699 NYS2d 835 (3d Dept 1999).

The American Law Reports contain a series of annotations relative to the matter of excessive or inadequate damages for particular injuries: 6 ALR4th 1127 (sensory or speech organs and systems); 16 ALR4th 238 (trunk or torso, or internal injuries); 15 ALR4th 519 (respiratory system); 15 ALR4th 294 (back, neck, or spine); 14 ALR4th 539 (circulatory, digestive, and glandular systems); 14 ALR4th 328 (head or brain, or for mental or nervous disorders); 13 ALR4th 212 (legs and feet); 12 ALR4th 96 (arms and hands); 12 ALR3d 475 (supplemented 16 ALR4th

1127, 15 ALR4th 519, 14 ALR4th 539) (organic systems and processes of body); 11 ALR3d 370 (supplemented 16 ALR4th 1127, 15 ALR4th 294, 14 ALR4th 328) (head or neck); 11 ALR3d 9 (supplemented 13 ALR4th 212, 12 ALR4th 96) (arms, legs, feet, and hands).

The court has the discretion to grant a motion to increase the amount of damages requested in the ad damnum clause, even where the motion is made after verdict, *Loomis v Civetta Corinno Const. Corp.*, 54 NY2d 18, 444 NYS2d 571, 429 NE2d 90 (1981); *Grcic v New York*, 139 AD2d 621, 527 NYS2d 263 (2d Dept 1988); see CPLR 3025. The motion should generally be granted in the absence of a showing of prejudice, e.g., being hindered in the preparation of the defense or being prevented from taking some measure in support of the defense, *Loomis v Civetta Corinno Const. Corp.*, supra. The First Department has held that in the absence of a formal motion to amend the ad damnum clause, damages must be limited to the amount sought in the complaint, *Reid v Weir-Metro Ambulance Service, Inc.*, 191 AD2d 309, 595 NYS2d 40 (1st Dept 1993); 17 E. 80th Realty Corp. v 68th Associates, 173 AD2d 245, 569 NYS2d 647 (1st Dept 1991). This caselaw should be considered in conjunction with the present version of CPLR 3017(c). CPLR 3017(c), which was amended in 2003, prohibits the pleading of a specific damage amount in all actions for personal injury and wrongful death. Before the amendment was enacted, the prohibition applied only to medical and dental malpractice actions and actions against municipal corporations.

In a comparative negligence case, the determination of excessiveness is to be made by reference to the gross amount of the verdict, not the net amount after reduction for comparative negligence, see *Alvez v American Export Isbrandtsen Lines*, 79 AD2d 590, 434 NYS2d 384 (1st Dept 1980).

Attorney's Fees and Sanctions

Generally, attorney's fees are not recoverable as an item of damage, unless authorized by agreement of the parties, court rule, or a statutory or contractual provision for allowance of such fees, *Chapel v Mitchell*, 84 NY2d 345, 618 NYS2d 626, 642 NE2d 1082 (1994) (citing *Alyeska Pipeline Service Co. v Wilderness Society*, 421 US 240, 95 SCt 1612 (1975)); *Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 549 NYS2d 365, 548 NE2d 903 (1989); see *Baker v Health Management Systems, Inc.*, 98 NY2d 80, 745 NYS2d 741, 772 NE2d 1099 (2002) (BCL §§ 722–724 do not independently provide for recovery of attorneys fees incurred by corporate officer in obtaining indemnification for attorneys fees). Attorney's fees may not be awarded under the guise of an additional allowance pursuant to CPLR 8303(a)(2), *Tucker v Toia*, 64 AD2d 826, 407 NYS2d 600 (4th Dept 1978).

However, express statutory provision has been made for the award of attorney's fees for resisting frivolous claims or for overcoming frivolous defenses. CPLR 8303-a provides that, in personal injury, property damage, wrongful death actions, or actions brought by an individual

who committed a crime against the victim of the crime, if the court finds, "at any time during the proceedings or upon judgment," that a claim by plaintiff or a counterclaim, cross claim or defense is frivolous, the court must award the successful party costs and reasonable attorney's fees not exceeding \$10,000, see *Mitchell v Herald Co.*, 137 AD2d 213, 529 NYS2d 602 (4th Dept 1988).

The statutory award of fees and costs may be made against the party who maintained the frivolous claim or defense or against the attorney for that party or both, CPLR 8303-a(b). Under the statute, a claim or defense is "frivolous" if commenced, used or continued "in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another" or "in bad faith without reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law," CPLR 8303-a(c)(I), (ii); see *Szabo v Church of Holy Trinity*, 201 AD2d 393, 607 NYS2d 935 (1st Dept 1994), *Penn Iron & Metal Co., Inc. v Gross*, 192 AD2d 1059, 596 NYS2d 243 (4th Dept 1993). The moving party must show that opposing counsel "knew or should have known that the action lacked merit," *McGill v Parker*, 179 AD2d 98, 582 NYS2d 91 (1st Dept 1992). Bad faith is a crucial element and the court may refuse to find bad faith where the claim or defense was "promptly discontinued" when the party or attorney learned that it lacked a reasonable basis, CPLR 8303-a(ii). Before making any award of costs and attorney's fees, the court should place findings in the record and adhere to due process considerations, see *Gabrelian v Gabrelian*, 108 AD2d 445, 489 NYS2d 914 (2d Dept 1985) (abrogated on other grounds by, *A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 511 NYS2d 216, 503 NE2d 681 (1986)). An insufficient or incomplete record may preclude an appellate court finding of bad faith, see *Penn Iron & Metal Co., Inc. v Gross*, 192 AD2d 1059, 596 NYS2d 243 (4th Dept 1993).

There is Appellate Division disagreement whether CPLR 8303-a applies to "all tort actions," as the Third Department held in *Patane v Griffin*, 164 AD2d 192, 562 NYS2d 1005 (3d Dept 1990), or only to a "designated class" of tort actions as the Second Department has held in *Banat v Passalacqua*, 142 AD2d 706, 531 NYS2d 106 (2d Dept 1988).

Subsequent to the passage of CPLR 8303-a, the Office of Court Administration promulgated Part 130, which allows for awards of costs and imposition of financial sanctions for frivolous conduct in any civil action or proceeding. The court may award costs or impose sanctions or both, but must do so in a written decision setting forth the conduct on which the award of costs or the imposition of sanctions is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate, 22 NYCRR § 130-1.2. The amount of sanctions imposed may not exceed \$10,000 for any single occurrence of frivolous conduct. There is no maximum for an award of costs. Part 130 does not apply to requests for costs or attorneys fees subject to the provisions of CPLR 8303-a. For a more comprehensive discussion of the interplay of CPLR 8303-a and Part 130-1, see Siegel, *New York Practice* § 414A (4th Edition).

Court of Claims Act § 27 generally precludes the award of counsel or attorney's fees in actions against the State "except as provided in . . . sections 3126 and 8303-a of the" CPLR. Thus, such an award may be made in the Court of Claims in a matter involving discovery, *Kulers v State*, 141 Misc2d 1079, 535 NYS2d 931 (Ct Cl 1988); but see dictum in *Taylor v State*, 160 Misc2d 120, 608 NYS2d 371 (Ct Cl 1994). In cases not brought in the Court of Claims, attorney's fees may be awarded against the State pursuant to CPLR 8601, the Equal Access to Justice Act, *Hernandez v Hammons*, 98 NY2d 735, 750 NYS2d 813, 780 NE2d 498 (2002). "State" is defined as the state or any of its agencies or any of its officials acting in his or her official capacity, CPLR 8602(g). The New York City Department of Social Services is neither the State nor a state agency within the meaning of the statute, *Hernandez v Hammons*, *supra*, see *Wittlinger v Wing*, 99 NY2d 425, 757 NYS2d 234, 786 NE2d 1270 (2003).

Federal Annotation: A Federal District Court sitting in a diversity case reviewing compensation awards for excessiveness or inadequacy should apply the review standards set out in CPLR 5501(c) when New York supplies the substantive law, *Gasperini v Center for Humanities, Inc.*, 518 US 415, 116 SCT 2211 (1996). The Federal Court of Appeals should then review the District Court's determination under an abuse of discretion standard, *id.* If it does not appear that the Federal District Court applied the proper standard in such cases, the case should be remanded to the District Court so that the trial judge may test the jury's verdict against CPLR 5501(c)'s "deviates materially" standard, *id.*

Structured Judgments in Personal Injury Actions

A structured judgment is one that provides for an immediate judgment for a portion of the damages fixed by the jury but "structures" the balance to be paid out in periodic installments over a period of time, see Siegel, Practice Commentary, McKinney's Cons. Law of NY, Book 7B, CPLR 50-A. Structured payment arrangements have appeared with increasing frequency as part of the negotiated settlement of personal injury actions.

Structured judgments are governed by the provisions of CPLR Article 50-A, which applies to medical, dental and podiatric malpractice actions, and CPLR Article 50-B, which applies to all personal injury, injury to property, and wrongful death actions other than those governed by Article 50-A, see *Hamilton v New York*, 203 AD2d 242, 610 NYS2d 278 (2d Dept 1994). With respect to actions for medical, dental and podiatric malpractice instituted prior to July 26, 2003, the provisions of CPLR Articles 50-A and 50-B are largely identical, with relatively minor differences that will be discussed. To avoid duplication, this discussion will initially address CPLR Articles 50-A and 50-B together, as they apply to actions commenced before July 26, 2003. Where the provisions of the two Articles are identical, citation will be to the provisions of both. Where the provisions of the two Articles differ, such differences will be noted.

The 2003 amendment to Article 50-A differs substantially from Article 50-B and is applicable to medical, dental and podiatric malpractice actions instituted on or after July 26, 2003. The changes in Article 50-A will be discussed at the end of this comment.

While the law relating to the preparation and entry of judgments is generally outside the scope of this work, the provisions of Articles 50-A and 50-B must be carefully noted by the trial courts. In order for the court to enter an appropriate judgment under Articles 50-A and 50-B, the court must require the jury to provide certain information in the special verdict, see CPLR 4111(e); see *Toledo v Iglesia Ni Cristo*, 18 NY3d 363, 939 NYS2d 282, 962 NE2d 773 (2012); *Brown v State*, 184 AD2d 126, 592 NYS2d 533 (4th Dept 1992). The jury must be instructed to award the full amount of future damages without reduction to present value, *Desiderio v Ochs*, 100 NY2d 159, 761 NYS2d 576, 791 NE2d 941 (2003); CPLR 4111(d). The statutes “unequivocally place the onus on the court to structure the judgment,” and defendant may not waive its application by failing to submit evidence of an appropriate discount rate, *Hill v Muchow*, 178 AD2d 954, 579 NYS2d 254 (4th Dept 1991); see also *Reed v Harter Chair Corp.*, 185 AD2d 547, 586 NYS2d 401 (3d Dept 1992). For text discussion of the special verdict requirements and for pattern verdict forms, see PJI 2:151A(1) and 2:151A(2) (medical, dental and podiatric malpractice) and 2:301 (all other tort litigation).

The provisions governing the structuring of judgments relate only to the method and timing of payments for damages; the substantive law governing the assessment of the amount of damages is not affected, *Pay v State*, 87 NY2d 1011, 643 NYS2d 467, 666 NE2d 172 (1996); see *Desiderio v Ochs*, 100 NY2d 159, 761 NYS2d 576, 791 NE2d 941 (2003). To determine the amount of damages, the court must apply all relevant rules of law to the jury verdict, including set-off, credits, reductions for comparative fault, additurs, and remittiturs, CPLR 5031(a); 5041(a). Thus, with respect to certain types of special damages (e.g., medical care, loss of earnings), the court must reduce the jury verdict on account of any appropriate collateral source indemnification, see CPLR 4545; *Ryan v New York*, 79 NY2d 792, 579 NYS2d 634, 587 NE2d 272 (1991); *Shue v Red Creek Cent. School Dist.*, 266 AD2d 899, 697 NYS2d 437 (4th Dept 1999). Likewise, if the court reduces any element of damages as excessive, it must make such reduction prior to undertaking the calculations necessary to enter judgment under CPLR Articles 50-A or 50-B.

The court must enter immediate judgment, in the form of a lump sum, for (a) all past damages; (b) future damages not exceeding \$250,000; and (c) any attorneys’ fees, costs, disbursements and liens, CPLR 5031(b); 5041(b); see generally *Desiderio v Ochs*, 100 NY2d 159, 761 NYS2d 576, 791 NE2d 941 (2003); *Bryant v New York City Health and Hospitals Corp.*, 93 NY2d 592, 695 NYS2d 39, 716 NE2d 1084 (1999); *Rohring v Niagara Falls*, 84 NY2d 60, 614 NYS2d 714, 638 NE2d 62 (1994). “Past damages,” as used in CPLR Articles 50-A and

50-B, means “amounts intended to compensate for damages which have been incurred prior to the verdict,” see CPLR 4111. “Future damages” means “amounts intended to compensate for damages to be incurred in the future,” *id.*

The CPLR does not provide for any set-off against a \$250,000 lump-sum payment to which a plaintiff is entitled based upon payments received from settling defendants, *Lieberman v Maimonides Medical Center*, 278 AD2d 203, 717 NYS2d 254 (2d Dept 2000). Furthermore, each plaintiff recovering damages in a single case is entitled to a lump-sum payment in accordance with Article 50-A and 50-B, *id.* Therefore, it is error to limit the recovering plaintiffs to a single lump-sum payment to be apportioned between them, *id.* Where plaintiff's children could have brought their own actions entitling them to relief under the statute, but did not do so, they cannot be apportioned \$250,000 lump sum payments against the total future damages award, *Adamy v Ziriakus*, 92 NY2d 396, 681 NYS2d 463, 704 NE2d 216 (1998) (children were merely distributees and not named plaintiffs).

As to future damages, if they exceed \$250,000, a lump sum judgment for the excess over \$250,000 may not be entered. Instead, judgment is entered “for the amount of the present value of an annuity contract that will provide for the payment” of such future damages “in periodic installments,” *Bryant v New York City Health and Hospitals Corp.*, 93 NY2d 592, 695 NYS2d 39, 716 NE2d 1084 (1999); CPLR 5031(e); 5041(e); see *Desiderio v Ochs*, 100 NY2d 159, 761 NYS2d 576, 791 NE2d 941 (2003); *Doe v State*, 189 AD2d 199, 595 NYS2d 592 (4th Dept 1993); *Reed v Harter Chair Corp.*, 185 AD2d 547, 586 NYS2d 401 (3d Dept 1992). The annuity contract shall provide for the payment of the annual payments of such remaining future damages over the period of time determined pursuant to the provisions in CPLR Articles 50-A and 50-B, *Desiderio v Ochs*, *supra*; *Bryant v New York City Health and Hospitals Corp.*, 93 NY2d 592, 695 NYS2d 39, 716 NE2d 1084 (1999). The present value of the annuity contract is computed in the following manner: 1) the award for future damages, if greater than \$250,000, is reduced by \$250,000; 2) the present value of the remaining amount of future damages is computed; 3) the attorney's fee is computed based on the present value; 4) the attorney's fee is then deducted from the present value; see CPLR 5031(e); 5041(e); *Rohring v Niagara Falls*, 84 NY2d 60, 614 NYS2d 714, 638 NE2d 62 (1994).

The present value of the annuity contract shall be determined in accordance with generally accepted actuarial practices by applying the discount rate in effect at the time of the award to the full amount of the remaining future damages, *Desiderio v Ochs*, 100 NY2d 159, 761 NYS2d 576, 791 NE2d 941 (2003); *Bryant v New York City Health and Hospitals Corp.*, 93 NY2d 592, 695 NYS2d 39, 716 NE2d 1084 (1999); *Young v Tops Markets, Inc.*, 283 AD2d 923, 725 NYS2d 489 (4th Dept 2001); *Karagiannis v New York State Thruway Authority*, 209 AD2d 993, 619 NYS2d 906 (4th Dept 1994); see *Tassone v Mid-Valley Oil Co., Inc.*, 5 AD3d 931, 773 NYS2d 744 (3d Dept 2004) (long-term treasury

bonds). The annual payments, which are the basis of the annuity contract, should be based on the future value of the remaining future damages award, *Bryant v New York City Health and Hospitals Corp.*, supra; *Schultz v Harrison Radiator Div. General Motors Corp.*, 90 NY2d 311, 660 NYS2d 685, 683 NE2d 307 (1997).

The annual payment for the first year shall be calculated by dividing the amount of future damages awarded by the jury, after the deduction of the \$250,000 lump sum payment and the attorneys' fee, by the number of years over which such payments shall be made, *Desiderio v Ochs*, 100 NY2d 159, 761 NYS2d 576, 791 NE2d 941 (2003); *Bryant v New York City Health and Hospitals Corp.*, 93 NY2d 592, 695 NYS2d 39, 716 NE2d 1084 (1999). In *Young v Tops Markets, Inc.*, 283 AD2d 923, 725 NYS2d 489 (4th Dept 2001), the court properly calculated monthly payments during the first year of the annuity contract using the "annuity due" formula rather than the "traditional annuity" formula. The annuity due formula is based on the premise that the first year payment is due and owing as of the beginning of the year, *id.* The payment due in each succeeding year shall be computed by adding four percent to the previous year's payment, *id.*; see *Desiderio v Ochs*, supra. There is no indication in the legislative history that Article 50-A was designed to require that the structure of the judgment exactly match the manner in which the costs accrue, *Desiderio v Ochs*, supra.

The total award for future damages may consist of several elements of damage, e.g., future medical care costs, future pain and suffering. The length of time over which periodic installments will be paid may vary from element to element. The jury is required to itemize the amount awarded for each element of future damage and to determine the period of years over which such amounts are intended to provide compensation, CPLR 4111(d), (f). The period of time over which installment payments are to be made for each element of future damage is, except for future pain and suffering, the period of years fixed by the jury for that element, CPLR 5031(a); 5041(a), see CPLR 4111(d), (f). With respect to future pain and suffering, the statutes provide that "the period of time over which such periodic payments shall be made and the period of time used to calculate the present value for damages attributable to pain and suffering shall be ten years or the period of time determined by the trier of fact, whichever is less," CPLR 5031(e); 5041(e).

Because the period of years for which payment is to be made may differ for each element of future damages, it becomes necessary to calculate which damages are within the \$250,000 lump sum judgment and which are subject to structure. To calculate the extent to which an element of future damages is covered by the \$250,000 lump sum judgment, the court must apply the proportion that each element bears to the total award for future damages, CPLR 5031(b); 5041(b). For example, if the total of all future damages is \$1,000,000, of which \$500,000 is attributable to future pain and suffering, then one-half of

the \$250,000 lump sum judgment (\$125,000) is attributable to future pain and suffering, and the balance of the award for future pain and suffering (\$375,000) is subject to structure.

The defendant is relieved of the obligation of making payments towards the plaintiff's future health care and other non-economic expenses in the event of the plaintiff's death, *Bryant v New York City Health and Hospitals Corp.*, 93 NY2d 592, 695 NYS2d 39, 716 NE2d 1084 (1999); see *Desiderio v Ochs*, 100 NY2d 159, 761 NYS2d 576, 791 NE2d 941 (2003). In certain circumstances, such as a plaintiff's death, plaintiff will not recover portions of future damages, such as installments for future health care, and future pain and suffering, *Bryant v New York City Health and Hospitals Corp.*, supra; see CPLR 5035(a); 5045(a). The policies underlying CPLR article 50-B, which mandates that the judgment sum in excess of \$250,000 to be paid in installments which terminate upon plaintiff's death, do not require that a verdict awarding \$150,000 for future pain and suffering be set aside solely because the injured plaintiff died the day after the verdict was rendered, *Stinton v Robin's Wood, Inc.*, 45 AD3d 203, 842 NYS2d 477 (2d Dept 2007).

Calculation of attorney contingency fees for actions under Article 50-A must adhere to the compensation schedule outlined in Judiciary Law § 474-a. The courts will only depart from this mandatory fee schedule upon a showing of inadequacy and extraordinary circumstances, *Yalango by Goldberg v Popp*, 84 NY2d 601, 620 NYS2d 762, 644 NE2d 1318 (1994). For a case allowing an attorney's fee in excess of the statutory rate, see *Contorino v Florida Ob/Gyn Ass'n, P.C.*, 283 AD2d 67, 726 NYS2d 121 (2d Dept 2001). Calculation of attorney contingency fees for actions under Article 50-B must adhere to the requirements of DR 2-106 and court rules in each of the four departments, see 22 NYCRR § 603.7(e) (First Department rule containing schedule of reasonable contingent fees in claims and actions for personal injury and wrongful death); 22 NYCRR § 691.20(e) (Second Department rule containing schedule of reasonable contingent fees in claims and actions for personal injury and wrongful death); 22 NYCRR § 806.13 (Third Department rule containing schedule of reasonable contingent fees in claims and actions for personal injury and wrongful death); 22 NYCRR § 1022.31 (Fourth Department rule containing schedule of reasonable contingent fees in claims and actions for personal injury and wrongful death).

However, given the universal use of contingent fee arrangements in tort cases, and the potential for dispute in calculating the attorney's percentage of the structured part of a structured judgment, the CPLR Articles provide for the calculations to be made in applying a contingent fee arrangement to a structured judgment. Payment of litigation expenses and attorneys' fees is by lump sum, CPLR 5031(b); 5041(b). Attorneys' fees on past damages and the first \$250,000.00 of future damages are deducted from sums presently payable to the plaintiff, *Bryant v New York City Health and Hospitals Corp.*, 93 NY2d 592, 695 NYS2d 39, 716 NE2d 1084 (1999); CPLR 5031(c); 5041(c). Calculation of the

portion of the attorney's fee related to the structured part of the judgment for future damages exceeding \$250,000 is not based on the gross amount of damages. Instead, it is based on "the present value of the annuity contract purchased to provide payment [of the structured part of the judgment]" CPLR 5031(c); 5041(c); see *Bryant v New York City Health and Hospitals Corp.*, supra; *Rohring v Niagara Falls*, 84 NY2d 60, 614 NYS2d 714, 638 NE2d 62 (1994). The annuity contract purchased pursuant to CPLR 5041(e) must include a 4% annual increase in each year of the annuity, *Desiderio v Ochs*, 100 NY2d 159, 761 NYS2d 576, 791 NE2d 941 (2003); *Bryant v New York City Health and Hospitals Corp.*, supra; *Karagiannis v New York State Thruway Authority*, 209 AD2d 993, 619 NYS2d 906 (4th Dept 1994). Therefore, CPLR 5041(e) requires that in computing attorneys fees, the 4% annual increase be included in the calculation and that this total be reduced to present value, *Bryant v New York City Health and Hospitals Corp.*, supra; *Karagiannis v New York State Thruway Authority*, supra.

To calculate the appropriate amount of the periodic payments to the plaintiff and the fee to the attorney "... the court could have subtracted the present value of the attorney's fees from the present value of the award, or [it] could have subtracted the gross value of these fees from the gross award of future damages; either method is correct ...," *Rohring v Niagara Falls*, 192 AD2d 228, 601 NYS2d 740 (4th Dept 1993), aff'd, 84 NY2d 60, 614 NYS2d 714, 638 NE2d 62 (1994). The Court of Appeals in *Rohring* chose the former method, although mathematically each method produces the same result. For ease of calculation it is suggested that, initially, gross values be used. For example: assume an award for future damages (after deduction of the \$250,000 lump sum) of \$1,500,000; \$600,000 for lost earnings for 20 years; \$450,000 for pain and suffering for 30 years; \$450,000 for medical expenses for 30 years. Reducing these gross awards by an attorney's fee of one-third results in the following: \$400,000 for lost earnings; \$300,000 for pain and suffering; \$300,000 for medical expenses. The initial annual installments to which plaintiff is entitled can be computed by dividing those reduced gross figures by the appropriate number of years: 20 for lost earnings; 10 for pain and suffering (per statute); 30 for medical expenses. The plaintiff, therefore, is entitled to the following initial annual payments: \$20,000 for lost earnings, \$30,000 for pain and suffering, \$10,000 for medical expenses.

To compute the attorney's fee, it is necessary, using an appropriate discount rate, to determine the present value of a stream of payments to the plaintiff for the appropriate number of years, each annual payment to be increased by 4% compounded annually, *Karagiannis v New York State Thruway Authority*, 209 AD2d 993, 619 NYS2d 906 (4th Dept 1994). In *Bryant v New York City Health and Hospitals Corp.*, 93 NY2d 592, 695 NYS2d 39, 716 NE2d 1084 (1999) (citing PJI), the Court of Appeals expressly held that the 4% statutory additur is to be included in the damage award prior to determining attorneys' fees. The calculation of the fee is not made on the actual periodic payments the plaintiff will receive but on the present value of periodic payments computed by

first dividing the jury award (prior to the reduction of the award by the attorney's fee) by the number of years for which the award is made. Thus, in this example, for the purpose of computing the attorney's fee, the first annual payment to which the plaintiff would be entitled for lost earnings would be \$30,000; for pain and suffering \$45,000; for medical expenses \$15,000. Assume that the calculation of present value indicates that the total present value of those future payments, increased by 4% compounded annually, is \$750,000. The attorney, therefore, is to receive a fee of one third of that amount or \$250,000. The present value of the annuity contract shall be determined in accordance with generally accepted actuarial practices by applying the discount rate in effect at the time of the award to the full amount of the remaining future damages, *Bryant v New York City Health and Hospitals Corp.*, supra; *Young v Tops Markets, Inc.*, 283 AD2d 923, 725 NYS2d 489 (4th Dept 2001); *Karagiannis v New York State Thruway Authority*, supra. The annual payments, which are the basis of the annuity contract, should be based on the gross future damage amount rather than present value, *Bryant v New York City Health and Hospitals Corp.*, supra; *Schultz v Harrison Radiator Div. General Motors Corp.*, 90 NY2d 311, 660 NYS2d 685, 683 NE2d 307 (1997); *Fisk v New York*, 256 AD2d 167, 682 NYS2d 164 (1st Dept 1998). The annual 4% increases in the periodic future damage payments provided by CPLR 5041(e) should be included in calculating the present value of such payments for purposes of determining the amount of attorneys fees relating thereto and the value of the annuity contract to be purchased, *Fisk v New York*, supra.

To the extent that future damages exceed \$250,000, judgment is not for a lump sum, but "for the amount of the present value of an annuity contract that will provide for the payment of the remaining amounts of future damages in periodic installments," CPLR 5031(e); 5041(e); see *Desiderio v Ochs*, 100 NY2d 159, 761 NYS2d 576, 791 NE2d 941 (2003); *Bryant v New York City Health and Hospitals Corp.*, 93 NY2d 592, 695 NYS2d 39, 716 NE2d 1084 (1999). The annuity contract must provide for periodic payments of the remaining future damages over the required period of time. The annual payment for the first year should be calculated as illustrated above. Despite the fact that the trier of fact is required to account for inflation in making its award for future damages, the court must still increase each annual installment payable after the first year by 4% over the previous year's payment, *Desiderio v Ochs*, supra; *Schultz v Harrison Radiator Div. General Motors Corp.*, 90 NY2d 311, 660 NYS2d 685, 683 NE2d 307 (1997). Unless otherwise agreed, the annual sum is to be paid in equal monthly installments, CPLR 5031(e); 5041(e).

In *Desiderio v Ochs*, 100 NY2d 159, 761 NYS2d 576, 791 NE2d 941 (2003), plaintiff sustained catastrophic injuries and had a life expectancy of 55 years. This caused a potential dramatic discrepancy between the jury award and the potential recovery under the application of Article 50-A if the plaintiff survived most of those 55 years. The Court noted that with lower awards and shorter durations, the application of Article 50-A does not produce such a disparity.

Lien holders and subrogees, including lienors whose liens arise from having made workers' compensation payments, may elect to have the portion of future damages allocable to reimbursement paid in a lump sum, CPLR 5031(d); 5041(d). In entering judgment, the court must make any adjustments required on account of attorney's fees, litigation expenses, and liens, *id.*

The court must direct defendant and defendant's insurer "to offer and to guarantee the purchase and payment of such an annuity contract," CPLR 5031(e); 5041(e). A defendant may, with plaintiff's consent, elect to have a judgment entered in a lump sum for all damages "attributable to said party as such are determinable without regard to the provisions" of CPLR Articles 50-A and 50-B, CPLR 5031(f); 5041(f). Where there are multiple defendants, only some of whom elect to have a judgment entered against them in a lump sum for all damages, it would appear that the structuring provisions of Articles 50-A and 50-B should continue to apply to the non-electing defendants.

Both Articles 50-A and 50-B make provision for the furnishing of security for the payment of future periodic installments, CPLR 5032, 5033; CPLR 5042, 5043. The requirement of security is met by supplying the annuity policy within 30 days after the date the judgment is entered, see CPLR 5033(a), CPLR 5043(a); *Rohring v Niagara Falls*, 212 AD2d 320, 630 NYS2d 827 (4th Dept 1995). The law requires only that the judgment direct defendants and their insurance carriers to purchase an annuity contract and to guarantee its payment, CPLR 5041(e); *Rohring v Niagara Falls*, *supra*. No separate instrument or further procedure is required to implement the guarantee, *Rohring v Niagara Falls*, *supra*. For example, the statute provides no specific time frame for the tender of the initial lump sum payment due under a structured judgment, *Summerville v New York*, 97 NY2d 427, 740 NYS2d 683, 767 NE2d 140 (2002). Thus, whether the initial lump sum payment is made "in a timely fashion" will depend on the circumstances presented in the particular case, *id.* In the event that security is not posted, a judgment may be entered in the form of a lump sum, CPLR 5033(b), CPLR 5043(b). Both articles provide that, if a judgment debtor fails to make timely payment, the judgment creditor may petition the court for an order requiring that all or part of the outstanding payments be made in a lump sum, CPLR 5034; 5044; see *Summerville v New York*, *supra* (addressing untimeliness under CPLR 5044 in case against municipality involving various automatic stay provisions in CPLR 5519). Courts are authorized to order defendant to make an accelerated lump sum payment of annuity benefits for future damages for the period between the verdict and the ultimate entry of judgment after postjudgment proceedings have terminated where there is a significant delay between those dates, *Scannapieco v New York*, 298 AD2d 81, 749 NYS2d 36 (2d Dept 2002); *Young v Tops Markets, Inc.*, 283 AD2d 923, 725 NYS2d 489 (4th Dept 2001); *Adamy v Ziriakus*, 254 AD2d 747, 678 NYS2d 557 (4th Dept 1998); *Bermeo v Atakent*, 276 AD2d 361, 715 NYS2d 5 (1st Dept 2000); see *Williams v Bright*, 230 AD2d 548, 658 NYS2d 910 (1st Dept 1997). Defendant's obligation to make annuity payments begins from

the date of the verdict even where enforcement of judgment was stayed during the pendency of an appeal, *Brown v New York*, 297 AD2d 771, 749 NYS2d 34 (2d Dept 2002); *Scannapieco v New York*, supra. However, the provisions of CPLR 5044 for acceleration where defendant fails to make timely payment are not available where judgment directing periodic payments was stayed pending appeal, *Summerville v New York*, supra.

In the event that the judgment creditor dies before all periodic payments have been made, absent an agreement to the contrary between the parties made at the time when security was posted, liability for any installments for future medical, dental, or other health care costs or for non-economic loss (i.e., pain and suffering) terminates, CPLR 5035(a); 5045(a); *Reed v Harter Chair Corp.*, 185 AD2d 547, 586 NYS2d 401 (3d Dept 1992). However, that portion of any periodic payment that is allocable to loss of future earnings is not to be reduced or terminated because of the judgment creditor's death; such portion is to be paid "to persons to whom the judgment creditor owed a duty of support immediately prior to his death to the extent that such duty of support exists under applicable law at the time of the death of the judgment creditor," CPLR 5035(b); 5045(b); as to duties of support, see *Dom Rel L*, §§ 32, 33; *Family Court Act*, §§ 412, 413, 415, 513, 515. Payments to a person owed a duty of support by the judgment creditor are to continue for the balance of the period specified by the jury or until the duty of support lapses, whichever occurs first, CPLR 5035(b), CPLR 5045(b). In the event that the judgment creditor did not owe anyone a duty of support at the time of his or her death, or in the event that all duties of support lapse before all remaining payments are made, the remaining payments become the property of the judgment creditor's estate, CPLR 5035(b); 5045(b). To help settle the estate, any remaining portions of the periodic payments allocable to loss of future earnings may, on petition, be converted into a lump sum by calculating the present value of such payments, *id*.

Neither Article 50-A nor Article 50-B limit the right of parties to settle any action as they deem appropriate in their discretion. Thus, the parties may agree to provide for a judgment that is entirely by lump sum or may provide for their own structured settlement, CPLR 5037; 5047. In this regard, it should be noted that CPLR 1206 permits the court to approve the use of structured settlements in actions prosecuted on behalf of infants, incompetents or persons under a disability, see *Gold ex rel. Gold v United Health Services Hospitals, Inc.*, 95 NY2d 683, 723 NYS2d 117, 746 NE2d 172 (2001) (trial court has discretion under CPLR 1206 to invest or disburse proceeds of infant's recovery to serve infant's best interests).

Periodic installment payments for future damages may be assigned only as to amounts: (a) to secure payment of alimony, maintenance or child support; (b) to pay for the cost of products, services or accommodations provided or to be provided by the assignee for medical, dental or other health care; and (c) for attorney's fees and other expenses of litigation incurred in securing the judgment, CPLR 5038; 5048.

Article 50-A allows a judgment creditor, or a successor in interest, to petition the court to convert the periodic payments to a lump sum where "unanticipated and substantial medical, dental or other needs have arisen" and create a hardship, CPLR 5036. However, Article 50-B permits the court to order a conversion to a lump sum only where "unanticipated and substantial medical, dental or other health needs have arisen," CPLR 5046, see *Rohring v Niagara Falls*, 84 NY2d 60, 614 NYS2d 714, 638 NE2d 62 (1994). Moreover, under Article 50-B, the annuity contract must contain a provision, unless specifically waived by the parties, which authorizes such lump sum payments, CPLR 5046(b). Under both Articles 50-A and 50-B, the court, before granting hardship relief, must also consider whether a lump sum payment would impose an unreasonable financial hardship on the judgment debtor, whether a lump sum payment will accommodate the future medical and other needs of the judgment creditor [health needs only under Article 50-B], and whether a lump sum payment would "further the interests of justice," CPLR 5035(a); 5046(a). For a discussion of defendant's view of the application of CPLR Article 50-A, which was rejected, see *Desiderio v Ochs*, 100 NY2d 159, 761 NYS2d 576, 791 NE2d 941 (2003), discussed below.

Where the court, under Article 50-A, grants relief on the basis of hardship, the lump sum is to be paid by the medical malpractice insurance association (created by Article 55 of the Insurance Law) and not by the insurer that provided the original annuity contract, CPLR 5036(b). The lump sum to be paid by the association is calculated on the basis of the present value of the annuity contract, "which shall be based on its cost at such time, for remaining periodic payments, or portions thereof, that are converted into a lump sum payment." CPLR 5036(b). Further, the insurer that provided the original annuity contract is required to make future payments thereunder to the association. However, if the lump sum ordered by the court is for a portion of the remaining periodic payments, there must be an apportionment of the future payments under the annuity contract between the association and the judgment creditor, *id.*

Where the court grants hardship relief under the provisions of Article 50-B, present value is calculated "based on the interest rate and mortality assumptions at the time such a lump sum payment is made as determined by the insurer who issued the annuity contract, in accordance with regulations of the superintendent of insurance," CPLR 5046(b).

In *Desiderio v Ochs*, 100 NY2d 159, 761 NYS2d 576, 791 NE2d 941 (2003), the Court addressed the issues faced by a defendant when the resulting structured judgment under CPLR Article 50-A might exceed the jury's future damages award. In *Desiderio*, because of the catastrophic nature of plaintiff's injuries, coupled with a projected life expectancy of 55 years, there was a potential dramatic discrepancy between the jury award and any ultimate recovery assuming plaintiff's survival for most of his life expectancy. The Court concluded that al-

though plaintiff might ultimately be paid more than the jury award, that alone was not enough to disregard the specified statutory procedure, *id.*

For Medical, Dental or Podiatric Malpractice Actions Commenced On or After July 26, 2003

The 2003 amendments to CPLR Article 50-A and section 4111(d), which apply to actions commenced on or after July 26, 2003, make the following changes:

1. It removes from the scope of the statute actions for wrongful death allegedly caused by medical, dental or podiatric malpractice as well as all derivative claims.

2. It reverses the order in which certain set-offs are to be applied. Previously, any set-offs or reductions required by CPLR Articles 14-A and 16 or GOL § 15-108 were to be applied prior to the application of Article 50-A. Such set-offs and reductions are now to be applied after application of the provisions of new Article 50-A.

3. Damages for future pain and suffering and future economic loss are to be treated differently. With respect to damages for pain and suffering the jury is required to set forth the total amount awarded for future pain and suffering and the time period for which that award is made. 35% of that award or \$500,000, whichever is greater, is to be paid as a lump sum. The balance is to be paid over a period of eight years or the period set by the jury, whichever is less. The first year's payment is to be computed by dividing the balance by eight, or a lower number if set by the jury, and the payment due in each succeeding year shall be computed by adding 4% to the previous year's payment. All payments for future pain and suffering are to terminate on the death of the plaintiff. The attorney's fee for this item of damage is to be based on the present value of all structured payments for pain and suffering.

4. With respect to economic awards, the jury is to set forth an annual amount of the future award for each item of damages in current dollars, the period of years for which the award is made, the inflation or growth rate, if any, for each award, and whether the loss or item of damages is permanent. If the jury finds that there will be a change in the future with respect to a particular award, that is, an increase, for example, for surgery or hospitalization, or a decrease with respect to, for example, the number of physiotherapy visits, that change is to be submitted to the jury as a separate item of damages commencing at the time of the change.

The present value of each item of future economic damages is to be computed separately and the plaintiff is to recover 35% of the present value of each economic damages element as a lump sum. The remaining

65% is paid over the period specified by the jury using the growth rate or inflation factor for each item specified by the jury. This specified growth rate or inflation rate is presumably to replace the 4% previously included in Article 50-A. All payments for medical and other expenses terminate at death. Payments for future economic damages continue to the term set by the jury. All awards for permanent expenses continue, if necessary, beyond the term set by the jury, until the death of the plaintiff. Thus, the annuity policy obtained pursuant to the judgment must provide for such continued payments.

Rather than leaving the issue of an appropriate discount rate with the trial court, the amendment provides for a set discount rate. Thus, where the payment term is less than 20 years, the discount rate is the rate of interest payable on a ten year treasury bond as of the date of the verdict. If the term of loss set by the jury is more than 20 years, the discount rate for the first 20 years is the ten year treasury bond rate as of the date of the verdict, with the rate for each year after 20 years at the ten year treasury bond rate plus two percentage points. The court is then to compute the average rate for the entire term and use that average.

The following is an illustration of the process for calculating and preparing a judgment pursuant the amended structured judgment statute relating to medical malpractice actions instituted after July 26, 2003. Assume the following jury award: \$1,000,000 for past pain and suffering, \$200,000 for past lost earnings, \$2,000,000 for future pain and suffering for 30 years, future loss of earnings of \$50,000 for the current year for a 20-year period with a growth rate (based on economic testimony) of 4%, and \$30,000 for the current year for medical expenses for a 30-year period with a growth rate of 7%. Assume further that the interest rate of the ten-year Treasury Bond was 4.2% on the date of the verdict.

\$1,000,000 for past pain and suffering and \$200,000 for past loss of earnings are to be paid in a lump sum. 35% of the \$2,000,000 awarded for future pain and suffering, \$700,000, is to be paid in a lump sum. The remaining \$1,300,000 is to be divided by eight. The first annual payment is thus \$162,500 and will be increased by 4% for each of the years for a total of eight years of payments. Using the discount rate of 4.2%, that stream of payments has a present value of approximately \$1,290,000.

The 20-year stream of payments for future lost earnings is also subject to the 4.2% discount rate. Thus, its present value is approximately \$981,000. 35% of that figure, \$343,350, is to be paid in a lump sum. The \$50,000 initial annual payment for lost earnings must then be reduced by 35% to \$32,500, which would be the first yearly payment for lost earnings to be paid for 20 years, increasing by 4% each year. The present value of that stream of payments is \$637,650.

The award for future medical care, because it extends for 30 years, is subject to a different discount rate. That rate is the average of 4.2% for 20 years and 6.2% (two points above the ten year rate) for the final ten years. The present value of the payment for future medical care is approximately \$1,262,953, of which 35% or \$442,034 is to be paid in a lump sum. Thus the \$30,000 initial annual payment for medical care is reduced by 35% to \$19,500, an amount that will increase by 7% each year and continue for 30 years. The present value of that stream of payments is approximately \$820,919 (35% of \$1,262,953).

The following lump sums are to be paid: \$1,000,000 (past pain and suffering); \$200,000 (past lost earnings); \$700,000 (future pain and suffering); \$343,361 (future loss of earnings); \$442,034 (future medical care). In addition, the following future payments have been determined: \$162,500, increasing at 4% for eight years (present value approximately \$1,290,060) for pain and suffering; \$32,500, increasing at 4% for 20 years (present value approximately \$637,670) for loss of earnings; \$19,500, increasing at 7% for 30 years (present value approximately \$820,919) for future medical care. Thus, the amount of the judgment to be entered is \$5,434,044 representing the total of the lump sums and the present value of the future payments.

The next step is to make adjustments for litigation expenses and attorney's fees. Assume \$50,000 in litigation expenses. That requires a deduction of that amount from the lump sums and the present values for the proper calculation of the attorney's fee. Since that amount is approximately .92% of the total lump sums and present values, each lump sum and each initial future payment is to be reduced by that percentage, reducing the amount on which the attorney's fee is to be computed to \$5,384,004. Using the sliding scale of Judiciary Law § 464-a, the fee is determined to be \$688,404, or approximately 12.78% of \$5,384,004. Thus, each lump sum and each initial payment, already reduced for litigation expenses, is to be reduced by that percentage.

As a result of these adjustments and reductions, the lump sums to be paid are: \$864,124 for past pain and suffering, \$172,827 for past lost earnings, \$604,894 for future pain and suffering, \$296,694 for future loss of earnings, \$382,001 for future medical care, \$50,000 for litigation expenses, and \$688,404 for the attorney's fee. With respect to future payments, the defendant would be required to purchase an annuity that would pay the plaintiff \$140,419 for the first year, increasing by 4% each year, for eight years, for pain and suffering, \$28,345 for the first year, increasing by 4% each year for 20 years, for loss of earnings, and \$17,007 for the first year, increasing by 7%, for 30 years for medical care. All annuity payments would be deemed to commence as of the date of the verdict and all would terminate upon the death of the plaintiff, except for loss of earnings.

It should be noted that, despite the apparent complexity of the ap-

plication of the statute to a jury award, all of the calculations are merely arithmetic, except for the initial calculation of the present value of the awards for future damages, which requires the use of a computer.

For verdict sheets incorporating these amendments, see PJI 2:151A(1), 2:151A(2) and 2:301.

CPLR 5001, 5002 and 5003 set forth the interest requirements for three distinct periods: interest prior to verdict (CPLR 5001), interest from verdict to judgment (CPLR 5002) and interest from judgment to payment (CPLR 5003). CPLR 5002 states that interest shall be recovered “upon the total sum awarded . . . from the date the verdict was rendered.” In a bifurcated personal injury action, prejudgment interest under CPLR 5002 should be calculated from the date of the liability determination even though the actual damages are assessed and judgment entered later, *Love v State*, 78 NY2d 540, 577 NYS2d 359, 583 NE2d 1296 (1991). The same principle applies in bifurcated automobile accident cases requiring a finding that plaintiff sustained “serious injury” within the meaning of Insurance Law § 5104(a), *Van Nostrand v Froehlich*, 44 AD3d 54, 844 NYS2d 293 (2d Dept 2007). In such cases, interest under CPLR 5002 is computed from the date of the liability verdict even though the “serious injury” determination may be postponed, at least to the extent that “serious injury” is treated as an element of the damages inquiry, *id.* For a discussion of the “serious injury” requirement and the Appellate Divisions’ treatment of the requirement as an element of damages, see Introductory Statement preceding PJI 2:75.

Interest is properly charged against the present value of future damages from the date of the liability verdict under CPLR 5002, *Rohring v Niagara Falls*, 84 NY2d 60, 614 NYS2d 714, 638 NE2d 62 (1994); *Karagiannis v New York State Thruway Authority*, 209 AD2d 993, 619 NYS2d 906 (4th Dept 1994). Likewise, under CPLR 5003 post-judgment interest accrues on awards for future damages when such awards are paid in a structured judgment pursuant to CPLR Article 50-A, *Silvestri v Smallberg*, 88 NY2d 1004, 648 NYS2d 870, 671 NE2d 1267 (1996). However, where an award of future damages includes an amount “equivalent of interest,” prejudgment interest on future damages would constitute a windfall unless such prejudgment interest is discounted back to the date from which statutory interest would be added, i.e., the date liability is found, *Pay v State*, 87 NY2d 1011, 643 NYS2d 467, 666 NE2d 172 (1996); see *Milbrandt v A.P. Green Refractories Co.*, 79 NY2d 26, 580 NYS2d 147, 588 NE2d 45 (1992); *Shue v Red Creek Cent. School Dist.*, 266 AD2d 899, 697 NYS2d 437 (4th Dept 1999). As to preverdict interest on future damages in a wrongful death action, see *Toledo v Iglesia Ni Cristo*, 18 NY3d 363, 939 NYS2d 282, 962 NE2d 773 (2012); Comment to PJI 2:320(III)(G).

In *Desiderio v Ochs*, 100 NY2d 159, 761 NYS2d 576, 791 NE2d 941 (2003), the Court rejected defendant’s argument that CPLR Article 50-A violated due process and, as applied, created unconstitutional taking.

The constitutionality of CPLR Article 50-B was upheld in *Doe v State*, 189 AD2d 199, 595 NYS2d 592 (4th Dept 1993).

Article 29-D of the Public Health Law was enacted in 2011 and established a medical indemnity fund, administered by an agency within the executive branch of state government, to pay health care costs of qualified infant-plaintiffs who have birth-related neurological injuries. The purpose of article 29-D is to reduce the medical malpractice insurance premiums of health care providers by shifting the responsibility of paying the future medical expenses of infants with birth-related neurological injuries from health care providers to the fund, Public Health Law § 2999-g. Thus, where article 29-D is applicable, the fund will pay for a plaintiff's "qualified [future] health care costs," Public Health Law § 2999-j(1), to the extent those costs will not be paid by a collateral source other than Medicaid or Medicare, Public Health Law § 2999-j(3). The defendant health care provider is relieved of the obligation to pay an award after trial (or that portion of a settlement) covering future medical expenses, see Public Health Law § 2999-j(1), (6), (13). While article 29-D may have a significant effect on an award for a plaintiff's future medical expenses, it has no direct effect on awards for pain and suffering or past medical expenses or the amount of the attorneys' fee to which plaintiff's counsel is entitled, Public Health Law § 2999-j(14). Article 29-D applies to all actions pending on and after April 1, 2011.

In an action in which a jury or court has made an award for future medical expenses arising out of a birth-related neurological injury, any party may apply to the court for a provision in the judgment that reflects that, in lieu of the award for future medical expenses and upon a determination by the administrator of the fund that plaintiff is a "qualified plaintiff", plaintiff's future medical expenses will be paid out of the fund, Public Health Law § 2999-j(6)(b). Public Health Law § 2999-h(4) defines a "qualified plaintiff" as every plaintiff or claimant who (a) has been found by a jury or court to have sustained a "birth-related neurological injury" as a result of alleged medical malpractice, or (b) has settled a lawsuit or claim therefor. Public Health Law § 2999-h(1), in turn, defines a "birth-related neurological injury" as (a) an injury to the brain or spinal cord of a live-born infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation or by other medical services provided or not provided during a delivery admission (b) that rendered the infant with a permanent and substantial motor impairment or with a developmental disability as defined by Mental Hygiene Law § 1.03. The court must grant the application if the court determines that the party making the application made a prima facie showing that plaintiff is a "qualified plaintiff," with the ultimate determination of whether a plaintiff qualifies reserved for the administrator of the fund. In an action arising out of a plaintiff's birth-related neurological injury that is settled, which settlement includes for the payment of plaintiff's future medical expenses, the settlement must contain a provision stating that if the

administrator of the fund determines that plaintiff is a “qualified plaintiff” all payments for future medical expense will be made by the fund, Public Health Law § 2999-j(6)(a).

As noted above, the fund administrator determines if a plaintiff is qualified. Generally, where the fund administrator determines that a plaintiff is qualified under article 29-D, the defendant is not obligated to pay that portion of the judgment or settlement allocated to future medical expenses. Once a plaintiff is qualified, the fund will pay for “qualified health care costs,” Public Health Law § 2999-h(3), i.e. future medical, hospital, surgical, nursing, dental, rehabilitation, custodial, durable medical equipment, home modifications, assistive technology, vehicle modifications, prescription and non-prescription medications, and other health care costs actually incurred for services rendered to and supplies utilized by plaintiff. The administrator, in accordance with article 29-D and its implementing regulations, determines which future health costs are to be paid from the fund, Public Health Law § 2999-j(2), (8)(a). A qualified plaintiff is assured of receiving medical care or assistance that would, at a minimum, be authorized under the Medicaid program, *id.*

The fund closes to new applicants if its liabilities reach 80% of its assets, Public Health Law § 2999-i(6)(a). In that event all judgments must be satisfied and all settlements paid as if the fund legislation had not been enacted, Public Health Law § 2999-i(6)(b).

All awards for damages other than future health care costs are to be paid in accordance with article 50-A of the CPLR. The plaintiff’s attorney fee is paid by the defendant as if the fund were not involved, that is on the entire sum awarded by the jury or the full amount of the settlement, with the fee portion allocated to non-fund damages deducted from the non-fund portion of the award in a proportional manner, Public Health Law § 2999-j(14). Because the determinations as to whether an individual is a “qualified plaintiff” and, if so, which costs are “qualified health care costs” are assigned to the fund administrator, there does not appear to be any reason to modify either the court’s charge or the verdict sheet in a case in which Public Health Law article 29-D may be implicated.

“Wrongful birth” claims would not appear to be affected by Public Health Law article 29-D. Under certain circumstances, a wrongful birth claim permits the parent of a child who was born with a congenital abnormality or defect to recover damages for the costs of the medical care and treatment of the child, see Comment to PJI 2:150. As discussed above, Public Health Law article 29-D only applies to an infant plaintiff who suffered a birth-related neurological injury, i.e. an injury to the brain or spinal cord caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation or by other medical services provided or not provided during a delivery admission, see Public Health Law § 2999-h(1). Thus, a child with a congenital abnormality or defect—the type of condition an infant must exhibit to

give rise to a claim for wrongful birth—generally will not exhibit a “birth-related neurological injury” as that phrase is defined under Public Health Law article 29-D.

PJI 2:277A. Damages—Comment by Counsel During Closing Remarks

During [his/her] closing remarks, counsel for [plaintiff/defendant] suggested a specific dollar amount [he/she] believes to be appropriate compensation for specific elements of plaintiff's damages. An attorney is permitted to make suggestions as to the amount that should be awarded, but those suggestions are argument only and not evidence and should not be considered by you as evidence of plaintiff's damages. The determination of damages is solely for you, the jury, to decide.

Comment

Based on CPLR 4016(b), which provides that, in any action for personal injuries or wrongful death, the parties' attorneys may refer in their closing statements to “a specific dollar amount that the attorney believes to be appropriate compensation for any element of damage that is sought to be recovered in the action.” The statute further provides that if an attorney exercises the right to refer to a specific dollar amount of damages, the court must, upon request of any party, include in its closing charge an instruction that the attorney's remarks are permitted as argument, that the attorney's references to specific dollar amounts are not evidence and should not be considered as evidence and, finally, that the determination of damages is solely for the jury, *id.*

CPLR 4016(b) was enacted in 2003 in conjunction with an amendment to CPLR 3017(c) that extended the statute's existing prohibition against pleading a specific damage amount to all actions for personal injury and wrongful death, L. 2003, ch 694. Before the amendment was enacted, the prohibition applied only to medical and dental malpractice actions and actions against municipal corporations. Under the present version of CPLR 3017(c), a personal injury or wrongful death plaintiff may not specify the amount of damages sought in the pleading absent a request by defendant.

CPLR 4016(b) resolves a difference of opinion among the intermediate appellate courts as to the extent to which counsel is permitted to comment on the damages amount requested in the *ad damnum* and the extent to which CPLR 3017(c) prohibited such comment, see *Reome v Cortland Memorial Hosp.*, 152 AD2d 773, 543 NYS2d 552 (3d Dept 1989); *O'Connor v Graziosi*, 131 AD2d 553, 516 NYS2d 276 (2d Dept 1987); *Braun v Ahmed*, 127 AD2d 418, 515 NYS2d 473 (2d Dept 1987);

Bechard v Eisinger, 105 AD2d 939, 481 NYS2d 906 (3d Dept 1984); Kusisto v McLean, 52 AD2d 674, 382 NYS2d 146 (3d Dept 1976); Rice v Ninacs, 34 AD2d 388, 312 NYS2d 246 (4th Dept 1970); see also Tate by McMahon v Colabello, 58 NY2d 84, 459 NYS2d 422, 445 NE2d 1101 (1983). By stating that counsel may refer to a specific amount for "any element of damage that is sought to be recovered in the action," CPLR 4016(b) also resolved the open question of whether it is permissible for counsel to suggest an amount for pain and suffering as well as for plaintiff's economic loss. A case decided before CPLR 3017(c) was amended and CPLR 4016(b) was enacted held that where plaintiff violates CPLR 3017(c) by demanding specific damages in the complaint, the remedy is to strike the ad damnum clause, *Boothe by Boothe v Lawrence Hosp.*, 188 AD2d 435, 591 NYS2d 412 (1st Dept 1992).

2. PUNITIVE

PJI 2:278. Damages—Punitive

In addition to awarding damages to compensate the plaintiff AB for (his, her) injuries, you may, but you are not required to, award AB punitive damages if you find that the act(s) of the defendant CD that caused the injury complained of (was, were) *[use applicable phrase or term:]* (wanton and reckless, malicious). Punitive damages may be awarded for conduct that represents a high degree of immorality *[add where applicable:]* (and shows such wanton dishonesty as to imply a criminal indifference to civil obligations). The purpose of punitive damages is not to compensate the plaintiff but to punish the defendant for (wanton and reckless, malicious) acts and thereby to discourage the defendant and other (people, companies) from acting in a similar way in the future.

[Use whichever of the following sentences apply:]

An act is malicious when it is done deliberately with knowledge of the plaintiff's rights, and with the intent to interfere with those rights. An act is wanton and reckless when it demonstrates conscious indifference and utter disregard of its effect upon the health, safety and rights of others. If you find that CD's act(s) (was, were) not wanton and reckless or malicious, you need proceed no further in your deliberations on this issue. On the other hand, if you find that CD's act(s) (was, were) wanton and reckless or malicious, you may award AB punitive damages.

[If the jury determines that defendant's acts were wanton and reckless, or malicious, the court should proceed to charge the jury on the factors it should consider in determining the amount of punitive damages.]

In arriving at your decision as to the amount of punitive damages you should consider the nature and reprehensibility of what CD did. That would include the character of the wrongdoing,

[state the factors that are applicable, such as:] **whether CD's conduct demonstrated an indifference to, or a reckless disregard of, the health, safety or rights of others, whether the act(s) (was, were) done with an improper motive or vindictiveness, whether the act or acts constituted outrageous or oppressive intentional misconduct, how long the conduct went on, CD's awareness of what harm the conduct caused or was likely to cause, any concealment or covering up of the wrongdoing, how often CD had committed similar acts of this type in the past and the actual and potential harm created by CD's conduct** *[add where appropriate:]* **(including the harm to individuals or entities other than plaintiff AB. However, although you may consider the harm to individuals or entities other than plaintiff AB in determining the extent to which CD's conduct was reprehensible, you may not add a specific amount to your punitive damages award to punish CD for the harm CD caused to others.)**

The amount of punitive damages that you award must be both reasonable and proportionate to the actual and potential harm suffered by AB, and to the compensatory damages you awarded AB. The reprehensibility of CD's conduct is an important factor in deciding the amount of punitive damages that would be reasonable and proportionate in view of the harm suffered by AB and the compensatory damages you have awarded AB.

[State where appropriate:] **You have heard evidence that CD** *[specify claimed out-of-state conduct]* **in the state(s) of** *[identify state(s) in which claimed conduct occurred]*. **That conduct is not against the law in** *[specify state(s) in which claimed conduct occurred]*. **Therefore, if you decide to award punitive damages in this case and if you find that CD** *[specify claimed out-of-state conduct]* **in** *[identify state(s) in which claimed conduct occurred]*, **you may not add a specific amount to your punitive damages award to punish CD for the out-of-state conduct.**

You may also consider the defendant CD's

financial condition and the impact your punitive damages award will have on CD.

In reporting your verdict, you will state the amount awarded by you as punitive damages.

Comment

Caveat 1: The charge does not include a statement of the standard of proof that must be satisfied for an award of punitive damages because the Appellate Divisions are split on the issue. The Second Department requires that the “clear and convincing evidence” standard be charged, *Randi A.J. v Long Island Surgi-Center*, 46 AD3d 74, 842 NYS2d 558 (2d Dept 2007); *Orange and Rockland Utilities, Inc. v Muggs Pub, Inc.*, 292 AD2d 580, 739 NYS2d 610 (2d Dept 2002); see *Chiara v Dernago*, 128 AD3d 999, 11 NYS3d 96 (2d Dept 2015). Similarly, the First Department holds that plaintiff’s entitlement to punitive damages must be established by “clear, unequivocal and convincing evidence,” *Munoz v Puretz*, 301 AD2d 382, 753 NYS2d 463 (1st Dept 2003); *Sladick v Hudson General Corp.*, 226 AD2d 263, 641 NYS2d 270 (1st Dept 1996); *Camillo v Geer*, 185 AD2d 192, 587 NYS2d 306 (1st Dept 1992). In contrast, the Fourth Department holds that proof by “a preponderance of the evidence” is sufficient, *Matter of Seventh Judicial District Asbestos Litigation [Wambach v Armstrong World Industries, Inc.]*, 190 AD2d 1068, 593 NYS2d 685 (4th Dept 1993); see *Greenbaum v Svenska Handelsbanken, N.Y.*, 979 F Supp 973 (SDNY 1997) (discussing and analyzing New York law); see also *Simpson v Pittsburgh Corning Corp.*, 901 F2d 277 (2d Cir 1990) (due process does not require use of clear and convincing standard). Until the issue is definitively resolved by the Court of Appeals, trial judges should charge the standard of proof applicable in the Department in which the case is tried.

Caveat 2: While states continue to possess considerable discretion over the imposition of punitive damages, it is now well established that there are procedural and substantive constitutional limitations on these awards, *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 123 SCt 1513 (2003); *Cooper Industries, Inc. v Leatherman Tool Group, Inc.*, 532 US 424, 121 SCt 1678 (2001); *BMW of North America, Inc. v Gore*, 517 US 559, 116 SCt 1589 (1996). The numerous New York State cases preceding recent holdings of the United States Supreme Court on the issue of punitive damages must now be read in light of these Supreme Court holdings.

Caveat 3: Evidence of the defendant’s wealth and other evidence relevant to an award of punitive damages should not be admitted at trial unless and until the jury has brought in a special verdict that plaintiff is entitled to punitive damages against defendant, *Rupert v Sellers*, 48 AD2d 265, 368 NYS2d 904 (4th Dept 1975). The use of a special verdict is particularly appropriate, see the Special Verdict Form at the end of this Comment.

Caveat 4: When relevant, a jury must be instructed that it may not use evidence of out of state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred, *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 123 SCt 1513 (2003). Additionally, as a general rule, a state does not have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the state's jurisdiction, *id.*

Caveat 5: Where evidence of injury to individuals or entities other than the plaintiff is introduced to demonstrate the reprehensibility of the defendant's conduct, the jury must be told that it may not impose an additional penalty for such injury, *Philip Morris USA v Williams*, 549 US 346, 127 SCt 1057 (2007); see *Frankson v Brown & Williamson Tobacco Corp.*, 67 AD3d 213, 886 NYS2d 714 (2d Dept 2009) (limiting instruction required where plaintiff's counsel referred during trial and summation to the "thousands of people" who die from lung cancer).

Based on *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 123 SCt 1513 (2003); *Cooper Industries, Inc. v Leatherman Tool Group, Inc.*, 532 US 424, 121 SCt 1678 (2001); *BMW of North America, Inc. v Gore*, 517 US 559, 116 SCt 1589 (1996); *Marinaccio v Clarence*, 20 NY3d 506, 964 NYS2d 69, 986 NE2d 903 (2013) (citing PJI); *Ross v Louise Wise Services, Inc.*, 8 NY3d 478, 836 NYS2d 509, 868 NE2d 189 (2007); *Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 612 NYS2d 339, 634 NE2d 940 (1994); *Hartford Acc. and Indem. Co. v Hempstead*, 48 NY2d 218, 422 NYS2d 47, 397 NE2d 737 (1979); *Walker v Sheldon*, 10 NY2d 401, 223 NYS2d 488, 179 NE2d 497 (1961); *Gostkowski v Roman Catholic Church of Sacred Hearts of Jesus and Mary*, 262 NY 320, 186 NE 798 (1933); *Lamb v S. Cheney & Son*, 227 NY 418, 125 NE 817 (1920).

Due Process Considerations

In a series of cases the United States Supreme Court has held that the Due Process Clause of the Fourteenth Amendment imposes procedural and substantive constraints on awards of punitive damages, *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 123 SCt 1513 (2003); *Cooper Industries, Inc. v Leatherman Tool Group, Inc.*, 532 US 424, 121 SCt 1678 (2001); *BMW of North America, Inc. v Gore*, 517 US 559, 116 SCt 1589 (1996); *TXO Production Corp. v Alliance Resources Corp.*, 509 US 443, 113 SCt 2711 (1993); *Pacific Mut. Life Ins. Co. v Haslip*, 499 US 1, 111 SCt 1032 (1991). The Due Process Clause of the Fourteenth Amendment also prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor, *State Farm Mut. Auto. Ins. Co. v Campbell*, *supra*; *Cooper Industries, Inc. v Leatherman Tool Group, Inc.*, *supra*; *BMW of North America, Inc. v Gore*, *supra*. The above cases compel alteration of the traditional methods of charging juries on punitive damages. The Supreme Court has cautioned that "[v]ague instructions, or those that merely inform the jury to avoid 'passion or prejudice,' do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is

tangential or only inflammatory,” *State Farm Mut. Auto. Ins. Co. v Campbell*, *supra*. Additionally, a state must have “proper standards” to guide the jury’s discretionary authority both to avoid arbitrary punishment and to ensure that the defendant has fair notice of the severity of the penalty that the state may impose, *Philip Morris USA v Williams*, 549 US 346, 127 S Ct 1057 (2007). On the other hand, the Supreme Court has also expressed skepticism that “verbal formulations, superimposed on general jury instructions, are the best insurance against unpredictable outliers [i.e. unusually high punitive damages verdicts],” *Exxon Shipping Co. v Baker*, 471 US 554, 128 S Ct 2605. In the Supreme Court’s view, “[i]nstructions can go just so far in promoting systemic consistency when awards are not tied to specifically proven items of damages . . .,” *id.* For that reason, when considering the best method of minimizing arbitrariness in cases arising under federal maritime law, the Supreme Court adopted an approach that “peg[s] punitive to compensatory damages using a ratio or maximum multiple,” *id.* Such an approach “leave[s] the effects of inflation to the jury or judge who assesses the value of the actual loss,” *id.*

In *BMW of North America, Inc. v Gore*, 517 US 559, 116 S Ct 1589 (1996), the Supreme Court refused to sustain a \$2 million punitive damages award that accompanied a verdict of only \$4,000 in compensatory damages. BMW instructed courts reviewing punitive damages awards to consider 1) the degree of reprehensibility of defendant’s misconduct; 2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and 3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Cooper Industries, Inc. v Leatherman Tool Group, Inc., 532 US 424, 121 S Ct 1678 (2001), involved compensatory damages of \$50,000 and punitive damages of \$4,500,000. The Supreme Court went considerably further than the earlier BMW decision, declaring that excessive punitive damage awards are analogous to excessive fines under the Eighth Amendment’s prohibition against excessive fines. The majority found that while compensatory damages derive from a factual finding by the jury, punitive damages represent an expression of moral condemnation. Finally, the court reiterated the importance of the three guideposts established in BMW, and mandated appellate courts to conduct *de novo* review of a trial court’s application of them to the jury’s award.

In 2003, the Supreme Court revisited the constitutionality of punitive damages awards in *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 123 S Ct 1513 (2003), where compensatory damages of \$1,000,000 were accompanied by a punitive damages award of \$145,000,000. The Court concluded that under the three guideposts outlined in BMW, the punitive damages award was excessive and in violation of the Due Process Clause of the Fourteenth Amendment. *State Farm* addressed each of the three guideposts, observing that the degree of reprehensibility of the defendant’s conduct is the most important factor in evaluating the reasonableness of a punitive damages award.

Due process requires that a defendant be provided with an opportunity to conduct discovery and establish a defense with respect to a punitive damages claim because such a claim involves different elements and standards of proof and potentially subjects defendants to a far greater and different dimension of liability than would otherwise be the case, *Matter of New York City Asbestos Litigation*, 130 AD3d 489, 13 NYS3d 398 (1st Dept 2015); see *Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 756 NYS2d 26 (1st Dept 2003).

Guideposts

Courts should determine the reprehensibility of a defendant's conduct by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct was financially vulnerable; if the conduct involved repeated actions of a similar type or was an isolated incident; the harm was the result of intentional malice, trickery, or deceit, or mere accident, *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 123 SCt 1513 (2003). The "existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award and the absence of all of them renders any award suspect." A recidivist may be punished more severely than a first offender but, in the context of civil actions, courts must ensure that the conduct in question replicates the prior misconduct. As a general rule, a State has no "legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." Furthermore, when relevant, a jury must be instructed that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred. Nevertheless, "[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff." Therefore, it is improper for a State court to base an award of punitive damages on dissimilar and out-of-state conduct that was independent from the acts upon which liability was premised.

Similarly, the Due Process Clauses of the United States Constitution forbid the use of punitive damages awards to punish a defendant for injury that it inflicts on individuals or entities who are strangers to the litigation, *Philip Morris USA v Williams*, 549 US 346, 127 SCt 1057 (2007). While harm to individuals or entities other than parties may be considered to determine the reprehensibility of the defendant's conduct or that the conduct posed a substantial risk of harm to the general public, care must be taken to ensure that the jury does not impose an additional penalty for causing harm to those who are not before the court, *id.*

Regarding the second guidepost in *BMW*, the disparity between the actual or potential harm suffered by the plaintiff and the punitive dam-

ages award, the Court again declined to impose a bright-line ratio, *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 123 SCt 1513 (2003). Declaring the 145 to 1 ratio in *State Farm* unconstitutional, the Court observed that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process,” *Exxon Shipping Co. v Baker*, 471 US 554, 128 SCt 2605. In *Pacific Mut. Life Ins. Co. v Haslip*, 499 US 1, 111 SCt 1032 (1991), the Court upheld a punitive damages award of more than four times the amount of compensatory damages, noting that this ratio might be close to the line of constitutional impropriety, *Guariglia v Price Chopper Operating Co., Inc.*, 38 AD3d 1043, 830 NYS2d 871 (3d Dept 2007) (upholding punitive damage award less than three times amount of award for actual harm), see *Exxon Shipping Co. v Baker*, *supra*. Ratios greater than this may comport with due process where a particularly egregious act has resulted in only a small amount of economic damage, *State Farm Mut. Auto. Ins. Co. v Campbell*, *supra*. Conversely, “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee,” see *Exxon Shipping Co. v Baker*, *supra*. “In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.” Courts must also be careful to avoid allowing components of compensatory damages awards to be duplicated in a punitive damages award. Finally, the wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.

The third guidepost in *BMW*, the disparity between the punitive damages award and the civil penalties authorized or imposed in comparable cases, allows consideration of criminal penalties that could be imposed, *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 123 SCt 1513 (2003). The *State Farm* Court cautioned that, when used to determine the dollar amount of a punitive damages award, a criminal penalty has less utility. Rather, the criminal penalty has a bearing on the seriousness with which a State views the wrongful action. “Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof.” In considering civil or criminal penalties authorized or imposed in other cases, courts must ensure that the penalties relate to conduct that is substantially similar to the defendant’s. A listing of statutes that expressly provide for damages that are punitive in nature appears later in the Comment.

Evidence in Mitigation

Although evidence of retraction may be received in mitigation of punitive damages and to show the absence of malice in defamation cases, see *O’Connor v Field*, 266 App Div 121, 41 NYS2d 492 (1st Dept 1943); *Kehoe v New York Tribune*, 229 App Div 220, 241 NYS 676 (1st Dept 1930), and a defendant may offer evidence of limited financial resources in mitigation as well, see *Mathie v Fries*, 121 F3d 808 (2d Cir

1997); *Zarcone v Perry*, 572 F2d 52 (2d Cir 1978), the admissibility of other evidence to mitigate punitive damages remains open to question because of the wide variety of circumstances in which such damages are sought. Evidence of post-complaint remedial action offered in mitigation of punitive damages in a racial discrimination case was excluded by the trial court in *Swinton v Potomac Corp.*, 270 F3d 794 (9th Cir 2001). While the 9th Circuit sustained the exclusion, it held that a court “may, in its discretion, allow a defendant/employer to introduce evidence of remedial conduct undertaken in response to its discovery of discrimination as a means to mitigate punitive damages.” *Swinton* contains a thorough discussion of the cases on both sides of the issue. There are a number of other cases where the evidence was either received or discussed, see *Matter of Exxon Valdez*, 270 F3d 1215 (9th Cir 2001); *Matter of Exxon Valdez*, 1995 AMC 1930 (DALaska 1995); *Farmers Ins. Exchange v Shirley*, 958 P2d 1040 (Wyo 1998); *Life Ins. Co. of Georgia v Johnson*, 701 So 2d 524 (Ala 1997); see also *BMW of North America, Inc. v Gore*, 517 US 559, 116 SCt 1589 (1996); *Harkin: A Trial Judge’s Guide to Jury Instructions and Judicial Review of Punitive Damage Awards*, 60 Mont. L. Rev. 367.

Purpose and Applicable Actions

Compensatory and punitive damages, although usually awarded at the same time by the same decision maker, serve different purposes, *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 123 SCt 1513 (2003). Compensatory damages are intended to redress the concrete loss that plaintiff has suffered by reason of the defendant’s wrongful conduct, *id.* Punitive damages, by contrast, are awarded to punish the defendant, to deter future reprehensible conduct and to protect society against similar acts, *Ross v Louise Wise Services, Inc.*, 8 NY3d 478, 836 NYS2d 509, 868 NE2d 189 (2007); *Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 612 NYS2d 339, 634 NE2d 940 (1994); *Home Ins. Co. v American Home Products Corp.*, 75 NY2d 196, 551 NYS2d 481, 550 NE2d 930 (1990); *Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 386 NYS2d 831, 353 NE2d 793 (1976); *Hartford Acc. and Indem. Co. v Hempstead*, 48 NY2d 218, 422 NYS2d 47, 397 NE2d 737 (1979); *Walker v Sheldon*, 10 NY2d 401, 223 NYS2d 488, 179 NE2d 497 (1961); see *Exxon Shipping Co. v Baker*, 471 US 554, 128 SCt 2605 (citing PJI); *Chauca v Abraham*, 30 NY3d 325, 67 NYS3d 85, 89 NE3d 475 (2017). Punitive damages are awarded to punish and deter behavior involving moral turpitude, *Marinaccio v Clarence*, 20 NY3d 506, 964 NYS2d 69, 986 NE2d 903 (2013); see *Matter of 91st Street Crane Collapse Litigation*, 154 AD3d 139, 62 NYS3d 11 (1st Dept 2017) (citing PJI). For a detailed discussion of the history of punitive damages, see *Exxon Shipping Co. v Baker*, *supra*. Punitive damages claims are quintessentially and exclusively public in their ultimate orientation and purpose, even when prosecuted in the context of personal injury actions, *Fabiano v Philip Morris Inc.*, 54 AD3d 146, 862 NYS2d 487 (1st Dept 2008). Consequently, a claim by a private party to vindicate what is an essentially public interest in imposing a punitive sanction cannot be maintained where the public interest has previously been represented

by the State Attorney General in an action brought on behalf of all of the people of the State to address the identical misconduct, *id.*

The list of actions in which punitive damages have been recognized in this state is long: *Chauca v Abraham*, 30 NY3d 325, 67 NYS3d 85, 89 NE3d 475 (2017) (violations of New York City Human Rights Law); *Home Ins. Co. v American Home Products Corp.*, 75 NY2d 196, 551 NYS2d 481, 550 NE2d 930 (1990) (strict products liability based on failure to warn); *Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 410 NYS2d 282, 382 NE2d 1145 (1978) (right of privacy); *Nardelli v Stamberg*, 44 NY2d 500, 406 NYS2d 443, 377 NE2d 975 (1978) (malicious prosecution); *Walker v Sheldon*, 10 NY2d 401, 223 NYS2d 488, 179 NE2d 497 (1961) (gross fraud and deceit, aimed at the public generally, involving high moral culpability); *Toomey v Farley*, 2 NY2d 71, 156 NYS2d 840, 138 NE2d 221 (1956) (libel); *Gostkowski v Roman Catholic Church of Sacred Hearts of Jesus and Mary*, 262 NY 320, 186 NE 798 (1933) (desecration of a grave); *Pickle v Page*, 252 NY 474, 169 NE 650 (1930) (forcible abduction of a minor child); *Reid v Terwilliger*, 116 NY 530, 22 NE 1091 (1889) (sale of liquor to an intoxicated person); *West v Hogan*, 88 AD3d 1247, 930 NYS2d 708 (4th Dept 2011), *aff'd*, 19 NY3d 1073, 955 NYS2d 543, 979 NE2d 802 (2012) (adverse possession/trespass); *Matter of 91st Street Crane Collapse Litigation*, 154 AD3d 139, 62 NYS3d 11 (1st Dept 2017) (failure to properly maintain construction crane, leading to catastrophic collapse); *Melfi v Mount Sinai Hosp.*, 64 AD3d 26, 877 NYS2d 300 (1st Dept 2009) (loss of sepulcher through wilful conduct or conscious disregard of others' rights); *Bondi v Bambrick*, 308 AD2d 330, 764 NYS2d 674 (1st Dept 2003) (recklessly driving over double yellow line while having a blood alcohol count of .42 and striking plaintiff after having previously been convicted of driving while intoxicated); *Guariglia v Price Chopper Operating Co., Inc.*, 38 AD3d 1043, 830 NYS2d 871 (3d Dept 2007) (leaving unsecured vials of valium and codeine where accessible to two-year-old child); *Liberman v Riverside Memorial Chapel, Inc.*, 225 AD2d 283, 650 NYS2d 194 (1st Dept 1996) (funeral home initiated and instigated city medical examiner's autopsy on decedent contrary to principles of decedent's religion); *Hart v New York*, 186 AD2d 398, 588 NYS2d 1012 (1st Dept 1992) (false arrest and imprisonment); *Graham v Columbia-Presbyterian Medical Center*, 185 AD2d 753, 588 NYS2d 2 (1st Dept 1992) (medical malpractice); *Chlystun v Kent*, 185 AD2d 525, 586 NYS2d 410 (3d Dept 1992) (trespass); *V.J.V. Transport Corp. v Santiago*, 173 AD2d 537, 570 NYS2d 138 (2d Dept 1991) (fraudulent conversion of corporate assets); *Soucy v Greyhound Corp.*, 27 AD2d 112, 276 NYS2d 173 (3d Dept 1967) (common carrier's gross negligence in using defective equipment); *Knibbs v Wagner*, 14 AD2d 987, 222 NYS2d 469 (4th Dept 1961) (injury by intoxicated person); see also *Matthews v Garrett*, 303 AD2d 563, 756 NYS2d 469 (2d Dept 2003) (punitive damages may be available in assault action, but defendant's conduct did not rise to level warranting imposition of such damages); *Camillo v Geer*, 185 AD2d 192, 587 NYS2d 306 (1st Dept 1992) (error to admit evidence of post-accident recall of product as proof of wilful and wanton misconduct); 36 NYJur2d Damages § 161 *et seq.*; Prosser & Keeton, Torts (5th Ed.), § 2.

On the other hand, punitive damages have been held inapplicable to certain types of claims, at least in the absence of conduct aimed at the public generally, *Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 612 NYS2d 339, 634 NE2d 940 (1994) (ordinary breach of contract); *Rice v University of Rochester Medical Center*, 46 AD3d 1421, 849 NYS2d 134 (4th Dept 2007) (ordinary negligence); *McConville v Reinauer Transp. Companies, LP*, 40 AD3d 715, 835 NYS2d 711 (2d Dept 2007) (action brought under Longshore and Harbor Workers' Compensation Act, 33 USC § 905(b)); *Bainton v Baran*, 287 AD2d 317, 731 NYS2d 161 (1st Dept 2001) (breach of implied covenant of good faith). For a discussion of the effect of conduct aimed at the public on the right to recover punitive damages, see "Requirements for Award of Punitive Damages," *infra*.

Requirements for Award of Punitive Damages

Punitive damages may not be awarded unless there has been an award for compensatory damages (even nominal), *Hubbell v Trans World Life Ins. Co. of New York*, 50 NY2d 899, 430 NYS2d 589, 408 NE2d 918 (1980); *Bryce v Wilde*, 39 AD2d 291, 333 NYS2d 614 (3d Dept 1972), *aff'd*, 31 NY2d 882, 340 NYS2d 185, 292 NE2d 320 (1972); *Kaiser v Van Houten*, 12 AD3d 1012, 785 NYS2d 569 (3d Dept 2004); *Prote Contracting Co., Inc. v Board of Educ. of City of New York*, 276 AD2d 309, 714 NYS2d 36 (1st Dept 2000).

Neither the federal nor the state constitution bars assessment of punitive damages in civil proceedings, see *TXO Production Corp. v Alliance Resources Corp.*, 509 US 443, 113 SCt 2711 (1993); *Curtis Pub. Co. v Butts*, 388 US 130, 87 SCt 1975 (1967); *Soucy v Greyhound Corp.*, 27 AD2d 112, 276 NYS2d 173 (3d Dept 1967). The constitutional prohibitions against double jeopardy do not preclude the imposition of punitive damages in a civil action that arises out of the same incident that resulted in defendant's criminal conviction, *Hudson v U.S.*, 522 US 93, 118 SCt 488 (1997); *Wittman v Gilson*, 70 NY2d 970, 525 NYS2d 795, 520 NE2d 514 (1988); *New York v Taliaferrow*, 158 AD2d 445, 551 NYS2d 253 (2d Dept 1990). While punitive damages are like criminal sanctions in that both punish misconduct, punitive damages afford the injured person a monetary recovery and do not carry the same heavy societal stigma as a criminal conviction, *Wittman v Gilson*, 70 NY2d 970, 525 NYS2d 795, 520 NE2d 514 (1988). Great care must, however, be taken to avoid use of the civil process to assess criminal penalties, which can be imposed only after the heightened protections of a criminal trial have been observed, including the higher standards of proof required in criminal proceedings, *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 123 SCt 1513 (2003).

To warrant an award of punitive damages, there must be proof of recklessness, or a conscious disregard of the rights of others, *Hartford Acc. and Indem. Co. v Hempstead*, 48 NY2d 218, 422 NYS2d 47, 397 NE2d 737 (1979) (citing PJI); *Zurich Ins. Co. v Shearson Lehman Hutton, Inc.*, 193 AD2d 1, 601 NYS2d 276 (1st Dept 1993), *aff'd as mod*,

84 NY2d 309, 618 NYS2d 609, 642 NE2d 1065 (1994); *Gruber v Craig*, 208 AD2d 900, 618 NYS2d 84 (2d Dept 1994); *Sweeney v McCormick*, 159 AD2d 832, 552 NYS2d 707 (3d Dept 1990); *Lyke v Anderson*, 147 AD2d 18, 541 NYS2d 817 (2d Dept 1989); *Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 67 AD2d 658, 412 NYS2d 623 (1st Dept 1979), mod, 50 NY2d 183, 428 NYS2d 628, 406 NE2d 445 (1980); see *Chauca v Abraham*, 30 NY3d 325, 67 NYS3d 85, 89 NE3d 475 (2017); *Dupree v Giugliano*, 20 NY3d 921, 958 NYS2d 312, 982 NE2d 74 (2012); *Prozeralik v Capital Cities Communications, Inc.*, 82 NY2d 466, 605 NYS2d 218, 626 NE2d 34 (1993); *Thoreson v Penthouse Intern., Ltd.*, 80 NY2d 490, 591 NYS2d 978, 606 NE2d 1369 (1992); *Home Ins. Co. v American Home Products Corp.*, 75 NY2d 196, 551 NYS2d 481, 550 NE2d 930 (1990) (citing PJI); *McDougald v Garber*, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 (1989); *Rhoades v Niagara Mohawk Power Corp.*, 202 AD2d 762, 608 NYS2d 733 (3d Dept 1994); *Doe v Roe*, 190 AD2d 463, 599 NYS2d 350 (4th Dept 1993); *Graham v Columbia-Presbyterian Medical Center*, 185 AD2d 753, 588 NYS2d 2 (1st Dept 1992); see also *Maitrejean v Levon Properties Corp.*, 87 AD2d 605, 448 NYS2d 46 (2d Dept 1982), aff'd, 57 NY2d 902, 456 NYS2d 763, 442 NE2d 1274 (1982); *Miller v Cattabiani*, 119 AD2d 864, 500 NYS2d 430 (3d Dept 1986). Specifically, the conduct justifying an award of punitive damages must manifest spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton, *Marinaccio v Clarence*, 20 NY3d 506, 964 NYS2d 69, 986 NE2d 903 (2013); *Dupree v Giugliano*, supra; see *Chauca v Abraham*, 30 NY3d 325, 67 NYS3d 85, 89 NE3d 475 (2017) (gross misbehavior or conduct that willfully and wantonly causes harm to another). Moreover, punitive damages are permitted when the conduct was not simply intentional, but evinced a high degree of moral turpitude and demonstrated such wanton dishonesty as to imply a criminal indifference to civil obligations, *Ross v Louise Wise Services, Inc.*, 8 NY3d 478, 836 NYS2d 509, 868 NE2d 189 (2007); see *Schlusselfberg v New York Central Mutual Fire Insurance Company*, 206 AD3d 682, 169 NYS3d 657 (2d Dept 2022); *Gaines v Brydges*, 198 AD3d 1287, 154 NYS3d 340 (4th Dept 2021); *Moskowitz v Masliansky*, 198 AD3d 637, 155 NYS3d 414 (2d Dept 2021) (punitive damages available only where tortfeasor's actions constitute gross recklessness or intentional, wanton or malicious conduct aimed at public generally or conduct activated by evil or reprehensible motives); *Randi A.J. v Long Island Surgi-Center*, 46 AD3d 74, 842 NYS2d 558 (2d Dept 2007). In the context of professional malpractice cases, the standard for an award of punitive damages is that a defendant manifest evil or malicious conduct beyond any breach of professional duty, *Dupree v Giugliano*, supra; see *Gaines v Brydges*, supra.

The definition of "wanton" contained in the pattern charge is based upon *Gostkowski v Roman Catholic Church of Sacred Hearts of Jesus and Mary*, 262 NY 320, 186 NE 798 (1933); *United Transp. Co. v Hass*, 91 Misc 311, 155 NYS 110 (Sup 1915), aff'd, 171 App Div 971, 155 NYS 1145 (3d Dept 1915), aff'd, 222 NY 623, 118 NE 1080 (1918); *Gruber v*

Craig, 208 AD2d 900, 618 NYS2d 84 (2d Dept 1994); *Sweeney v McCormick*, 159 AD2d 832, 552 NYS2d 707 (3d Dept 1990) (citing PJI); *Marra v New York Cent. & H.R.R. Co.*, 139 App Div 707, 124 NYS 443 (2d Dept 1910); *Noonan v Luther*, 119 App Div 701, 104 NYS 684 (3d Dept 1907); *Polykranas v Krausz*, 73 App Div 583, 77 NYS 46 (2d Dept 1902); *Phalen v Rae*, 101 Misc 424, 168 NYS 139 (Sup 1917), *aff'd*, 184 App Div 922, 170 NYS 1106 (3d Dept 1918); see *Mayer v Temple Properties*, 307 NY 559, 122 NE2d 909 (1954); *Kaplan v Sparks*, 192 AD2d 1119, 596 NYS2d 279 (4th Dept 1993). The definition of "malicious" is based upon *Lamb v S. Cheney & Son*, 227 NY 418, 125 NE 817 (1920); *People v Curtis*, 87 AD2d 954, 451 NYS2d 247 (3d Dept 1982).

The courts have often discussed the extent to which the conduct supporting punitive damages claims must be aimed at the public. In *Walker v Sheldon*, 10 NY2d 401, 223 NYS2d 488, 179 NE2d 497 (1961), the Court of Appeals held that, although punitive damages are generally not available in cases alleging ordinary fraud and deceit, such damages may be recovered where a fraud that is aimed at the public generally is gross and involves high moral culpability. Based upon the *Walker* holding, courts have held that punitive damages are recoverable in a fraud action only where the fraud is aimed at the public generally, *Rivas v Amerimed USA, Inc.*, 34 AD3d 250, 824 NYS2d 41 (1st Dept 2006); *Wright v Selle*, 27 AD3d 1065, 811 NYS2d 525 (4th Dept 2006); *Steinhardt Group Inc. v Citicorp*, 272 AD2d 255, 708 NYS2d 91 (1st Dept 2000); *Kelly v Defoe Corp.*, 223 AD2d 529, 636 NYS2d 123 (2d Dept 1996). Similarly, in *Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 612 NYS2d 339, 634 NE2d 940 (1994), the Court of Appeals stated that "[p]unitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights." The Court went on to state that "[t]hus, a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally."

Relying on *Walker* and *Rocanova*, courts have required conduct aimed at the public in a variety of situations in which punitive damages were sought, see 905 5th Associates, Inc. v 907 Corp., 47 AD3d 401, 851 NYS2d 393 (1st Dept 2008) (action by cooperative apartment tenant alleging damages resulting from renovation work performed on neighbors' premises); *Goldsmith Motors Corp. v Chemical Bank*, 41 AD3d 648, 838 NYS2d 631 (2d Dept 2007) (libel claim arising from alleged wrongful dishonor of checks); *Rosenberg, Minc & Armstrong v Mallilo & Grossman*, 39 AD3d 335, 833 NYS2d 485 (1st Dept 2007) (unjust enrichment); *1 Mott Street, Inc. v Con Edison*, 33 AD3d 531, 823 NYS2d 375 (1st Dept 2006) (claim that provider of electricity ratified employee's wrongful act in terminating service for improper retaliatory reasons); *P.W.B. Enterprises, Inc. v Ark Management Corp.*, 227 AD2d 104, 641 NYS2d 645 (1st Dept 1996) (claim that defendants caused or permitted water damage to plaintiff's premises). However, a showing of conduct aimed at the public is not required in every case in which punitive dam-

ages are sought, *Pirrotti & Pirrotti, LLP v Estate of Warm*, 8 AD3d 545, 778 NYS2d 705 (2d Dept 2004). In *Giblin v Murphy*, 73 NY2d 769, 536 NYS2d 54, 532 NE2d 1282 (1988), the Court of Appeals held that, in tort cases such as those involving alleged breaches of fiduciary duty, "harm aimed at the public generally" is not required "so long as the very high threshold of moral culpability is satisfied," see *Swersky v Dreyer and Traub*, 219 AD2d 321, 643 NYS2d 33 (1st Dept 1996); *V.J.V. Transport Corp. v Santiago*, 173 AD2d 537, 570 NYS2d 138 (2d Dept 1991). Thus, "the rule that an award for punitive damages must be limited to conduct directed at the general public applies in breach of contract cases, not tort cases for breach of fiduciary duty." *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 45 AD3d 419, 846 NYS2d 116 (1st Dept 2007), rev'd on other grounds, 12 NY3d 132, 879 NYS2d 355, 907 NE2d 268 (2009); see *Don Buchwald & Associates, Inc. v Rich*, 281 AD2d 329, 723 NYS2d 8 (1st Dept 2001).

Defamation Cases

In *Gertz v Robert Welch, Inc.*, 418 US 323, 94 SCt 2997 (1974), the Court held that punitive damages are allowable in cases of media defamation of private persons only upon a showing of constitutional malice as that term is used in *New York Times Co. v Sullivan*, 376 US 254, 84 SCt 710 (1964). This limited application of the *New York Times* case to private persons is warranted only where the defamation relates to matters of public concern and, where it does not, punitive damages may be recovered without the need to show constitutional malice. *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.*, 472 US 749, 105 SCt 2939 (1985); see comment to PJI 3:30.

As a matter of New York law in defamation cases, punitive damages may be assessed only if the plaintiff establishes common law malice, consisting of hatred, ill will, spite or wanton, reckless, or willful disregard of the rights of another or the injurious effect of defendant's conduct upon another, *Prozeralik v Capital Cities Communications, Inc.*, 82 NY2d 466, 605 NYS2d 218, 626 NE2d 34 (1993); see *Freeman v Johnston*, 84 NY2d 52, 614 NYS2d 377, 637 NE2d 268 (1994). An objection based on the guarantee of free speech is adequately met by the court's control over excessive verdicts and its right to set aside a verdict based merely on prejudice, *Curtis Pub. Co. v Butts*, 388 US 130, 87 SCt 1975 (1967). *Roginsky v Richardson-Merrell, Inc.*, 378 F2d 832 (2d Cir 1967), suggests, however, that some limitation on punitive damages may be imposed when there are a large number of suits arising out of the same conduct of the defendant, see *Globus v Law Research Service, Inc.*, 418 F2d 1276 (2d Cir 1969). For a further discussion of an award of punitive damages in a defamation case, see Comment to PJI 3:30.

Insurance Cases

There is a plethora of cases dealing with claims for punitive damages against insurance companies. These cases involve the principle that punitive damages are not recoverable for an ordinary breach of

contract, because the purpose of punitive damages is not to remedy private wrongs but to vindicate public rights, *Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 612 NYS2d 339, 634 NE2d 940 (1994); *Schlusberg v New York Central Mutual Fire Insurance Company*, 206 AD3d 682, 169 NYS3d 657 (2d Dept 2022). Plaintiffs must prove that they were victims of conduct aimed at the public generally that involved either a high degree of moral culpability, *Home Ins. Co. v American Home Products Corp.*, 75 NY2d 196, 551 NYS2d 481, 550 NE2d 930 (1990), or evil or reprehensible motives, *Cunningham v Security Mut. Ins. Co.*, 260 AD2d 983, 689 NYS2d 290 (3d Dept 1999); *Lavanant v General Acc. Ins. Co. of America*, 212 AD2d 450, 622 NYS2d 726 (1st Dept 1995), or a fraudulent and deceitful scheme that implied criminal indifference to civil obligations, *Rocanova v Equitable Life Assur. Soc. of U.S.*, supra; *Ahmadi v Government Employees Ins. Co. (GEICO)*, 204 AD2d 374, 612 NYS2d 50 (2d Dept 1994); *Sweazey v Merchants Mut. Ins. Co.*, 169 AD2d 43, 571 NYS2d 131 (3d Dept 1991); but see *Greenspan v Commercial Ins. Co. of Newark, New Jersey*, 57 AD2d 387, 395 NYS2d 519 (3d Dept 1977) (allowing punitive damages against an insurance company absent public fraud with a showing of “gross, wanton or willful fraud or other morally culpable conduct”). In *New York University v Continental Ins. Co.*, 87 NY2d 308, 639 NYS2d 283, 662 NE2d 763 (1995), the Court of Appeals declared that punitive damages may be awarded for a claim arising from the breach of an insurance contract if the conduct of the defendant is actionable as an independent tort, the tortious conduct is egregious, is directed at the plaintiff and is part of a pattern directed at the public generally. Nonetheless, the United States Supreme Court has cautioned that courts must be careful in considering evidence of an insurance company’s conduct towards persons or entities other than the plaintiff, see *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 123 SCt 1513 (2003). An insurance company’s dissimilar acts, independent from the acts upon which liability for compensatory damages was premised, may not serve as the basis for punitive damages, *id.* For a detailed discussion of the evidence that may be considered in determining an award for punitive damages, see the discussion of the *State Farm* case above.

However, in a fraud action that does not involve a suit by an insured against an insurance company, if the evidence in the action establishes a sufficiently high degree of “gross, wanton or willful fraud or other morally culpable conduct,” punitive damages may be awarded even if the acts have not been “aimed at the public generally,” *Giblin v Murphy*, 73 NY2d 769, 536 NYS2d 54, 532 NE2d 1282 (1988); *Borkowski v Borkowski*, 39 NY2d 982, 387 NYS2d 233, 355 NE2d 287 (1976); *Key Bank of New York v Diamond*, 203 AD2d 896, 611 NYS2d 382 (4th Dept 1994); *V.J.V. Transport Corp. v Santiago*, 173 AD2d 537, 570 NYS2d 138 (2d Dept 1991); see *Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 67 AD2d 658, 412 NYS2d 623 (1st Dept 1979), *mod* on other grounds, 50 NY2d 183, 428 NYS2d 628, 406 NE2d 445 (1980).

Insurance Law § 2601(a) prohibits insurance companies from engaging in unfair claim settlement practices. Violations may be administra-

tively determined and punished by fine not to exceed \$500 for each offense, Ins. L. 2601, 109(c)(1). A litigant cannot assert a private cause of action for punitive damages under § 2601 because the statute does not impose a tort duty of care on an insurance company separate and apart from the insurance contract, *Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 612 NYS2d 339, 634 NE2d 940 (1994). Thus, violation of the statute does not constitute an independent tort upon which to base a claim for punitive damages for breach of an insurance contract, *New York University v Continental Ins. Co.*, 87 NY2d 308, 639 NYS2d 283, 662 NE2d 763 (1995). It would appear that under *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 123 SCt 1513 (2003), the penalties authorized by Insurance Law § 2601 may be considered in reviewing an award for punitive damages. The *State Farm* case has been discussed extensively at the beginning of this Comment.

An insured's common-law right to sue an insurer for punitive damages in actions based upon unfair claim practices for morally culpable conduct directed at the general public is not preempted by the enactment of § 2601, *Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 612 NYS2d 339, 634 NE2d 940 (1994). Nevertheless, the "standard for awarding punitive damages in first party insurance actions is 'a strict one' and this extraordinary remedy will be available 'only in a limited number of instances,'" *id.*, citing *Cohen v New York Property Ins. Underwriting Ass'n*, 65 AD2d 71, 410 NYS2d 597 (1st Dept 1978) and *Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 386 NYS2d 831, 353 NE2d 793 (1976). The private party seeking to recover punitive damages in a common law action against an insurance company must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally, *Rocanova v Equitable Life Assur. Soc. of U.S.*, *supra*; *Brown v Government Employees Insurance Company*, 156 AD3d 1087, 66 NYS3d 733 (3d Dept 2017). Courts must be careful in considering evidence of an insurance company's conduct towards persons or entities other than the plaintiff, see *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 123 SCt 1513 (2003). An insurance company's dissimilar acts, independent from the acts upon which liability for compensatory damages was premised, may not serve as the basis for punitive damages, *id.*

It is an important principle that for public policy reasons the burden to pay punitive damages may not be passed on to the wrongdoer's insurer, *Hartford Acc. and Indem. Co. v Hempstead*, 48 NY2d 218, 422 NYS2d 47, 397 NE2d 737 (1979); *Padavan v Clemente*, 43 AD2d 729, 350 NYS2d 694 (2d Dept 1973); see *Doe v Allstate Ins. Co.*, 187 AD2d 181, 596 NYS2d 603 (4th Dept 1993). An attorney will not be held liable for punitive damages for malpractice in failing to join the individual wrongdoer in an action against a municipality, against whom punitive damages are not recoverable, *Summerville v Lipsig*, 270 AD2d 213, 704 NYS2d 598 (1st Dept 2000).

Statutory Punitive Damages

Some statutes expressly provide for damages punitive in nature:

Civil Rights Law § 51 (invasion of privacy); Federal Fair Housing Amendments Act 42 USC § 3613(c) (discriminatory housing practice); General Obligations Law § 11-101 (illegal sale of intoxicating liquor); see *Chauca v Abraham*, 30 NY3d 325, 67 NYS3d 85, 89 NE3d 475 (2017) (reviewing punitive damages under New York City Administrative Code § 8-502[a] for violations of New York City Human Rights Law); *E-J Elec. Installation Co. v Miller & Raved, Inc.*, 51 AD2d 264, 380 NYS2d 702 (1st Dept 1976) (discussing Lien Law § 39-a [willful exaggeration of mechanic's lien]). Other statutes permit the recovery of a penalty in a stated amount, Civil Rights Law § 41 (\$100 to \$500 for violation of equal rights); Executive Law § 297(4)(c)(iv) (up to \$10,000 in cases of housing discrimination), or in double the amount otherwise payable, Workers' Compensation Law § 14-a(1) (employment of minor in violation of law), or up to treble such amount, Real Property Actions and Proceedings Law § 861(2) (cutting trees or timber); RPAPL § 853 (forcible or unlawful entry or detainer); Labor Law §§ 198, 663 (willful non-payment or underpayment of wages); Judiciary Law § 487 (misconduct by attorney); McKinney's Unconsolidated Laws §§ 8591(5) and (6), 8610(e) and (f) (rent overcharge); Administrative Code of the New York, 26-413(d)(1)(e) (eviction of tenant absent good cause). Those penalties, when relevant, should be considered in reviewing an award of punitive damages, pursuant to the third guidepost in *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 123 SCt 1513 (2003). The *State Farm* case is extensively discussed at the outset of the Comment.

Several federal circuits have held that in a treble damage case, the jury should not be advised of the mandatory trebling of damages because if it is so advised, it may adjust damage awards downwards or find no liability because of the potential windfall that would otherwise be involved, *Pollock & Riley, Inc. v Pearl Brewing Co.*, 498 F2d 1240 (5th Cir 1974); see *Noble v McClatchy Newspapers*, 533 F2d 1081 (9th Cir 1975), judgment vacated on other grounds, 433 US 904, 97 SCt 2966 (1977); *Semke v Enid Auto. Dealers Ass'n*, 456 F2d 1361 (10th Cir 1972); but see *Bordonaro Bros. Theatres v Paramount Pictures*, 203 F2d 676 (2d Cir 1953) (statements of defense counsel indicating possibility of treble damages held not to warrant reversal).

In examining whether punitive damages are permissible in a statutory cause of action, the court will look to the statute and not to whether the nature of the wrong would permit recovery under traditional concepts of punitive damages in tort law, *Thoreson v Penthouse Intern., Ltd.*, 80 NY2d 490, 591 NYS2d 978, 606 NE2d 1369 (1992). Punitive damages are not permissible in a discrimination action pursuant to the Human Rights Law, Executive Law § 297(9), unless authorized by specific statutory authority, *id.*

Evidence of the violation of safety regulations, without evidence of wilful or wanton negligence or recklessness, is insufficient to warrant the imposition of punitive damages against a defendant in a plaintiff's action to recover damages for negligence, *Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 756 NYS2d 26 (1st Dept 2003); see *DeLeo v Monroe*,

130 AD3d 1549, 14 NYS3d 261 (4th Dept 2015) (violation of safety and industry standards, standing alone, insufficient to support award of punitive damages).

Punitive Damages Against Governmental Entities

Punitive damages cannot be assessed against the State or its political subdivisions in the absence of express legislative authorization, *Sharapata v Islip*, 56 NY2d 332, 452 NYS2d 347, 437 NE2d 1104 (1982); see *Krohn v New York City Police Dept.*, 2 NY3d 329, 778 NYS2d 746, 811 NE2d 8 (2004); *Cornell v Monroe*, 187 AD3d 1566, 132 NYS3d 213 (4th Dept 2020); *Grasso v New York State Thruway Authority*, 159 AD3d 674, 71 NYS3d 604 (2d Dept 2018). Nor may punitive damages be imposed against a public benefit corporation that performs an essentially governmental function and is heavily supported by tax revenues, *Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 521 NYS2d 653, 516 NE2d 190 (1987); see *Karoon v New York City Transit Authority*, 241 AD2d 323, 659 NYS2d 27 (1st Dept 1997). Since there is no express legislative authorization in the New York City Human Rights Law, an award of punitive damages is not available in an action against New York City based on claimed gender-based employment discrimination, *Krohn v New York City Police Dept.*, *supra*. Similarly, an award of punitive damages is not available in a Public Health Law § 2801-d action against a municipality, *Cornell v Monroe*, *supra*. However, the immunity of a municipality from punitive damages does not extend to individual police officers, *Staudacher v Buffalo*, 155 AD2d 956, 547 NYS2d 770 (4th Dept 1989). Even though punitive damages may not be assessed against the State, recovery of compensatory damages in the Court of Claims does not preclude the injured party from seeking punitive damages in a separate action against a private party who is a joint tortfeasor, *Pietras v Gol Pak Corp.*, 131 AD2d 239, 520 NYS2d 683 (4th Dept 1987).

Corporate Liability for Punitive Damages

Punitive damages may be awarded against a corporation only if its officers or directors authorized, participated in, consented to, or after discovery, ratified the conduct giving rise to such damages, *Murray v Long Island R. Co.*, 35 AD2d 579, 313 NYS2d 610 (2d Dept 1970), *aff'd*, 28 NY2d 849, 322 NYS2d 248, 271 NE2d 227 (1971); 1 Mott Street, Inc. v Con Edison, 33 AD3d 531, 823 NYS2d 375 (1st Dept 2006); see *Guion v Associated Dry Goods Corp. (Lord & Taylor Division)*, 43 NY2d 876, 403 NYS2d 465, 374 NE2d 364 (1978); *Girardi v Community Hosp. of Brooklyn*, 137 AD2d 788, 525 NYS2d 335 (2d Dept 1988). For punitive damages to be assessed against the corporation based upon the conduct of one of its officers, the officer must be a “superior officer,” i.e., a person possessing “a high level of general managerial authority in relation to the nature and operation of the employer’s business,” *Loughry v Lincoln First Bank, N.A.*, 67 NY2d 369, 502 NYS2d 965, 494 NE2d 70 (1986); *Matter of 91st Street Crane Collapse Litigation*, 154 AD3d 139, 62 NYS3d 11 (1st Dept 2017); *Melfi v Mount Sinai Hosp.*, 64 AD3d 26, 877

NYS2d 300 (1st Dept 2009); see *1 Mott Street, Inc v Con Edison*, supra; *Benson v Syntex Laboratories, Inc.*, 249 AD2d 904, 672 NYS2d 191 (4th Dept 1998); *Camillo v Geer*, 185 AD2d 192, 587 NYS2d 306 (1st Dept 1992).

An employer, or other vicariously liable party, may be required to pay punitive damages for the intentional wrongdoing or gross misconduct of an employee if the employer has deliberately or through gross negligence permitted an unfit employee to continue work, *Loughry v Lincoln First Bank, N.A.*, 67 NY2d 369, 502 NYS2d 965, 494 NE2d 70 (1986); *Cleghorn v New York Cent. & H.R.R. Co.*, 56 NY 44 (1874); *James v Eber Bros. Wine & Liquor Corp.*, 153 AD2d 329, 550 NYS2d 972 (4th Dept 1990); *Neal v C.F.M. Enterprises, Inc.*, 133 AD2d 941, 520 NYS2d 656 (3d Dept 1987); see *Caldwell v New Jersey Steamboat Co.*, 47 NY 282 (1872); *Brown v LaFontaine-Rish Medical Associates*, 33 AD3d 470, 822 NYS2d 527 (1st Dept 2006), or if the act is done by an employee entrusted with general management of the business, *Rose v Imperial Engine Co.*, 127 App Div 885, 112 NYS 8 (4th Dept 1908), aff'd, 195 NY 515, 88 NE 1130 (1909); *Crane v Bennett*, 177 NY 106, 69 NE 274 (1904), or was in pursuance of a regular practice in the business, authorized by the employer, *Loughry v Lincoln First Bank, N.A.*, supra; *Harrell v Champlain Enterprises Inc.*, 222 AD2d 876, 634 NYS2d 880 (3d Dept 1995); *Sultan v Kings Highway Hosp. Center, Inc.*, 167 AD2d 534, 562 NYS2d 204 (2d Dept 1990); *Lyke v Anderson*, 147 AD2d 18, 541 NYS2d 817 (2d Dept 1989); *Rose v Imperial Engine Co.*, supra, or if the act was authorized, participated in, consented to or ratified by the employer, *Loughry v Lincoln First Bank, N.A.*, supra; *Harrell v Champlain Enterprises Inc.*, supra; *Melfi v Mount Sinai Hosp.*, 64 AD3d 26, 877 NYS2d 300 (1st Dept 2009); see *Soucy v Greyhound Corp.*, 27 AD2d 112, 276 NYS2d 173 (3d Dept 1967) (punitive damages against an employer not allowed where acts of employee were unratified and unauthorized), and generally on the question, see *Gill v Montgomery Ward & Co.*, 284 App Div 36, 129 NYS2d 288 (3d Dept 1954); Restatement, Second, Agency § 217C; Restatement, Second, Torts § 909; Annot: 93 ALR3d 826.

Automobile Accidents

Generally in automobile accident cases, reckless or wanton conduct sufficient to warrant punitive damages is not established merely by proving the defendant's intoxication, *Chiara v Dernago*, 128 AD3d 999, 11 NYS3d 96 (2d Dept 2015); *Trudeau v Cooke*, 2 AD3d 1133, 769 NYS2d 322 (3d Dept 2003); *Deon v Fortuna*, 283 AD2d 388, 724 NYS2d 450 (2d Dept 2001); *Taylor v Dyer*, 190 AD2d 902, 593 NYS2d 122 (3d Dept 1993). There must be evidence of reckless and wanton conduct, such as driving at an excessive speed on a heavily congested street and in complete disregard of the safety of others, *Rinaldo v Mashayekhi*, 185 AD2d 435, 585 NYS2d 615 (3d Dept 1992); *Sweeney v McCormick*, 159 AD2d 832, 552 NYS2d 707 (3d Dept 1990); see *Chiara v Dernago*, supra; *Letterman v Reddington*, 278 AD2d 868, 718 NYS2d 503 (4th Dept 2000) (plaintiff granted leave to amend complaint to add claim for

punitive damages where defendant was driving on New York State Thruway at excessive speed with blood alcohol concentration level almost three times legal limit), or striking plaintiff's vehicle in an attempt to flee the scene of the accident in violation of VTL § 600(1)(a), *Rahn v Carkner*, 241 AD2d 585, 659 NYS2d 143 (3d Dept 1997); see also *Trudeau v Cooke*, *supra* (evidence that driver was intoxicated and had exceeded posted village speed limit not sufficient to warrant punitive damages claim where accident occurred in early morning hours and plaintiff voluntarily rode with driver after seeing him imbibe alcoholic beverages). Intoxication cases must be decided on a "case by case" basis, *Chiara v Dernago*, *supra*; *Rinaldo v Mashayekhi*, *supra*. Where there is no allegation of speeding, drunk driving or any other conduct or circumstances that would support a finding of gross negligence or recklessness, punitive damages are not warranted, *Cushing v Seemann*, 247 AD2d 891, 668 NYS2d 791 (4th Dept 1998). On the other hand, a claim for punitive damages may not be summarily dismissed where the plaintiff has alleged not only that the defendant was intoxicated, but also that the defendant, among other things, was speeding, went through a stop sign and had pleaded guilty to driving while intoxicated as a felony in connection with the accident, *Parkhill v Cleary*, 305 AD2d 1088, 759 NYS2d 262 (4th Dept 2003). Violation of Vehicle & Traffic Law § 1182, which prohibits speed races on public highways, may support an award of punitive damages, *O'Connor v Kuzmicki*, 14 AD3d 498, 788 NYS2d 414 (2d Dept 2005). The non-negligent owner of a vehicle that was involved in an automobile accident, whose liability is purely vicarious, is not liable for punitive damages, *id*.

Where a defendant's liability in an automobile accident case is vicarious and based solely on his or her ownership of the vehicle, an award of punitive damages is not permissible, *Hale v Saltamacchia*, 28 AD3d 715, 814 NYS2d 218 (2d Dept 2006).

Medical Malpractice

In the context of professional malpractice cases, the standard for an award of punitive damages is that a defendant manifest evil or malicious conduct beyond any breach of professional duty, *Dupree v Giugliano*, 20 NY3d 921, 958 NYS2d 312, 982 NE2d 74 (2012). Punitive damages may be recovered in a medical malpractice action where defendant's conduct is so "intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence" to warrant such an award, *McDougald v Garber*, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 (1989); *Graham v Columbia-Presbyterian Medical Center*, 185 AD2d 753, 588 NYS2d 2 (1st Dept 1992); see *Peltier v Wakhloo*, 20 AD3d 870, 798 NYS2d 277 (4th Dept 2005); *Marsh v Arnot Ogden Medical Center*, 91 AD3d 1070, 937 NYS2d 383 (3d Dept 2012). Punitive damages may be appropriate in a medical malpractice action where the defendant abandoned the plaintiff when he or she was in need of emergency medical treatment, or willfully failed to disclose pertinent medical information to evade a malpractice claim, *id*; see *Abraham v Kosinski*, 251 AD2d 967, 674 NYS2d 557 (4th Dept 1998). Punitive damages may also

be appropriate where the defendant's conduct is wantonly dishonest or grossly indifferent to patient care, see *Schiffer v Speaker*, 36 AD3d 520, 828 NYS2d 363 (1st Dept 2007); see also *Williams v Halpern*, 25 AD3d 467, 808 NYS2d 68 (1st Dept 2006). Where defendant doctor's conduct is not wantonly dishonest, grossly indifferent to patient care or malicious and/or reckless, an award of punitive damages is not appropriate, *Charell v Gonzalez*, 251 AD2d 72, 673 NYS2d 685 (1st Dept 1998); see *Gaines v Brydges*, 198 AD3d 1287, 154 NYS3d 340 (4th Dept 2021); *Brown v LaFontaine-Rish Medical Associates*, 33 AD3d 470, 822 NYS2d 527 (1st Dept 2006). Further, a physician's choice of the more expensive of two different methods for performing the same procedure is not an evil or reprehensible motive sufficient to impose punitive damages, *Spinosa v Weinstein*, 168 AD2d 32, 571 NYS2d 747 (2d Dept 1991); see *McCarthy v Shah*, 162 AD3d 1727, 80 NYS3d 778 (4th Dept 2018) (plaintiff sufficiently pleaded claim for punitive damages against physician-defendant for performing procedure without plaintiff's consent).

Other Actions

In order to recover punitive damages for trespass on real property, plaintiff has the burden of proving that the trespasser acted with actual malice involving an intentional wrongdoing, or that such conduct amounted to a wanton, willful or reckless disregard of plaintiff's rights, *Miller v National Property Management Associates, Inc.*, 191 AD3d 1341, 142 NYS3d 256 (4th Dept 2021); *West v Hogan*, 88 AD3d 1247, 930 NYS2d 708 (4th Dept 2011), *aff'd*, 19 NY3d 1073, 955 NYS2d 543, 979 NE2d 802 (2012); *Doin v Champlain Bluffs Development Corp.*, 68 AD3d 1605, 894 NYS2d 169 (3d Dept 2009); see *Marinaccio v Clarence*, 20 NY3d 506, 964 NYS2d 69, 986 NE2d 903 (2013); *Burdick v Tonoga, Inc.*, 191 AD3d 1220, 143 NYS3d 123 (3d Dept 2021).

Punitive damages may be awarded under Public Health Law § 2801-d(6), which creates a private right of action for patients against residential care facilities, where the patient has been deprived of certain rights and the deprivation was willful or the defendant acted in reckless disregard of the patient's rights. For a discussion of causes of action brought under Public Health Law § 2801-d, see PJI 2:151. Comment, *Residential Care Facilities*.

Punitive damages can also be recovered in an equity action, although there may be a right to jury trial on the issue of such damages, *I. H. P. Corp. v 210 Central Park South Corp.*, 12 NY2d 329, 239 NYS2d 547, 189 NE2d 812 (1963). Where the issue involves breach of covenant of quiet enjoyment of a lease, punitive damages may be awarded, *Suffolk Sports Center, Inc. v Belli Const. Corp.*, 212 AD2d 241, 628 NYS2d 952 (2d Dept 1995).

Punitive damages may be recovered in survival actions, provided that such damages would have been recoverable by the decedent if he or she had survived, EPTL § 5-4.3 and 11-3.2.

Standard of Proof

The Court of Appeals has held that the evidentiary standard for proving entitlement to punitive damages is preponderance of the evidence, *Corrigan v Bobbs-Merrill Co.*, 228 NY 58, 126 NE 260 (1920); *Matter of Seventh Judicial Dist. Asbestos Litigation*, 190 AD2d 1068, 593 NYS2d 685 (4th Dept 1993); see generally *Greenbaum v Svenska Handelsbanken, N.Y.*, 979 F Supp 973 (SDNY 1997) (discussing conflicting case law on the burden of proof in establishing entitlement to punitive damages and concluding that preponderance of evidence standard should be used). The First and Second Departments have held, however, that the standard of proof is clear and convincing evidence, *Randi A.J. v Long Island Surgi-Center*, 46 AD3d 74, 842 NYS2d 558 (2d Dept 2007); *Orange and Rockland Utilities, Inc. v Muggs Pub, Inc.*, 292 AD2d 580, 739 NYS2d 610 (2d Dept 2002); *Camillo v Geer*, 185 AD2d 192, 587 NYS2d 306 (1st Dept 1992).

In receiving evidence, the court must take great care to avoid use of civil action to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, the higher standards of proof required in criminal proceedings, *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 123 SCt 1513 (2003).

Pleading Requirements

The claim for punitive damages is not a separate cause of action, *Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 612 NYS2d 339, 634 NE2d 940 (1994); *Tate v Metropolitan Life Ins. Co.*, 186 AD2d 859, 587 NYS2d 813 (3d Dept 1992); *Rose Lee Mfg., Inc. v Chemical Bank*, 186 AD2d 548, 588 NYS2d 408 (2d Dept 1992); *Goldstein v Winard*, 173 AD2d 201, 569 NYS2d 425 (1st Dept 1991); see also *Kaiser v Van Houten*, 12 AD3d 1012, 785 NYS2d 569 (3d Dept 2004) (punitive damages not available absent sustainable compensatory damages). If the complaint states facts authorizing the award of such damages, it is not necessary that they be specifically demanded, *Korber v Dime Sav. Bank of Brooklyn*, 134 App Div 149, 118 NYS 857 (2d Dept 1909); *Sanders v Rolnick*, 188 Misc 627, 67 NYS2d 652 (AppT 1947), *aff'd*, 272 App Div 803, 71 NYS2d 896 (1st Dept 1947); see *Knibbs v Wagner*, 14 AD2d 987, 222 NYS2d 469 (4th Dept 1961); *Kathleen Foley, Inc. v Gulf Oil Corp.*, 12 AD2d 644, 208 NYS2d 781 (2d Dept 1960), *aff'd*, 10 NY2d 859, 222 NYS2d 691, 178 NE2d 913 (1961). The defendant must have notice of a claim for punitive damages because due process requires that the defendant have an opportunity to conduct discovery and establish a defense with respect to that damages claim, *Matter of New York City Asbestos Litigation*, 130 AD3d 489, 13 NYS3d 398 (1st Dept 2015); see *Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 756 NYS2d 26 (1st Dept 2003).

Bifurcation

In *Rupert v Sellers*, 48 AD2d 265, 368 NYS2d 904 (4th Dept 1975),

the Fourth Department ruled that in cases where plaintiff is seeking punitive damages, a split trial procedure should be used. First, the court should take a special verdict as to whether defendant was guilty of conduct entitling plaintiff to punitive damages, i.e., wanton and reckless, or malicious, conduct. The court concluded that evidence of a defendant's wealth cannot be brought out upon trial unless and until the jury returns a special verdict that plaintiff is entitled to punitive damages against the defendant. The Rupert court also held that plaintiff is not entitled to disclosure of defendant's net worth until the jury returns a special verdict entitling plaintiff to punitive damages. Recognizing that the bifurcation procedure might delay the final disposition of a case, the Rupert court found the delay warranted to protect defendants from discovery of their net worth in cases where plaintiffs have only alleged, but have not established, entitlement to punitive damages. The bifurcation procedure also saves time because it bars discovery in cases where plaintiff cannot ultimately prove such entitlement, *id.* In addition, the limited disclosure to which a plaintiff is entitled concerning defendant's wealth in a punitive damage case should be conducted expeditiously, and in most cases the evidence should be available for presentation to the same jury that rendered the special verdict, *id.* The First and Third Departments have endorsed the split trial procedure set forth in Rupert, see *Suoizzi v Parente*, 202 AD2d 94, 616 NYS2d 355 (1st Dept 1994); *Suoizzi v Parente*, 161 AD2d 232, 554 NYS2d 617 (1st Dept 1990); *Varriale v Saratoga Harness Racing, Inc.*, 76 AD2d 991, 429 NYS2d 302 (3d Dept 1980). The federal courts recognize the procedures set forth in Rupert to be settled law in New York, see *Evans v Calise*, 1994 WL 185696 (SDNY 1994); *Agudas Chasidei Chabad of U.S. v Gourary*, 1989 WL 38341 (EDNY 1989); see also *Smith v Lightning Bolt Productions, Inc.*, 861 F2d 363 (2d Cir 1988) (bifurcation is "the preferred method").

Evidence of defendant's wealth or financial condition is generally not discoverable until after the trier of fact has determined the defendant's liability for punitive damages, *Rupert v Sellers*, 48 AD2d 265, 368 NYS2d 904 (4th Dept 1975) (discovery allowed only after special verdict of liability for punitive damages); see *Suoizzi v Parente*, 161 AD2d 232, 554 NYS2d 617 (1st Dept 1990) (financial disclosure to support punitive damage claim should not be had until there is special verdict determining entitlement to punitive damages); *James D. Vollertsen Associates, Inc. v John T. Nothnagle, Inc.*, 48 AD2d 1007, 369 NYS2d 267 (4th Dept 1975) (disclosure of defendant's financial condition permitted only if plaintiffs obtain a special verdict entitling them to punitive damages against defendants). Accordingly, the plaintiff must first obtain a special verdict that it is entitled to punitive damages before it may obtain such disclosure, *Suoizzi v Parente supra*; *Varriale v Saratoga Harness Racing, Inc.*, 76 AD2d 991, 429 NYS2d 302 (3d Dept 1980); *Rupert v Sellers supra*; *James D. Vollertsen Associates, Inc. v John T. Nothnagle, Inc. supra*. In some instances, however, the requested financial information does not involve net worth and does not relate to the amount of punitive damages to be awarded, but the right to recover punitive damages in the first instance, *Moran v International*

Playtex, Inc., 103 AD2d 375, 480 NYS2d 6 (2d Dept 1984). In such a situation, plaintiff must nevertheless demonstrate some factual basis for the punitive damage claims before discovery of defendant's financial records is permitted, *id.*

Contribution and Indemnification

Punitive damages are in the nature of a penalty and are therefore not subject to contribution principles, *Herrick v Second Cuthouse, Ltd.*, 100 AD2d 952, 475 NYS2d 91 (2d Dept 1984), *aff'd*, 64 NY2d 692, 485 NYS2d 518, 474 NE2d 1186 (1984); *Smith v Guli*, 106 AD2d 120, 484 NYS2d 740 (4th Dept 1985); see *Staudacher v Buffalo*, 155 AD2d 956, 547 NYS2d 770 (4th Dept 1989). Insurance indemnification for punitive damage awards is precluded by public policy where the conduct involved is intentional or amounts to gross negligence or conscious disregard for the rights of others, *Home Ins. Co. v American Home Products Corp.*, 75 NY2d 196, 551 NYS2d 481, 550 NE2d 930 (1990); see *Soto v State Farm Ins. Co.*, 83 NY2d 718, 613 NYS2d 352, 635 NE2d 1222 (1994). This public policy extends to prohibit insurance indemnification of punitive damages awarded by a foreign state. However, where a foreign punitive damage award may include both punitive and compensatory elements, indemnification of such damages by an insurer is not prohibited, *Zurich Ins. Co. v Shearson Lehman Hutton, Inc.*, 84 NY2d 309, 618 NYS2d 609, 642 NE2d 1065 (1994). In addition, punitive damages awarded against an insured in a civil suit are not a proper element of the compensatory damages recoverable in a suit against an insurer for a bad faith refusal to settle, *Soto v State Farm Ins. Co.*, 83 NY2d 718, 613 NYS2d 352, 635 NE2d 1222 (1994). The public policy prohibition against the liability coverage for punitive damages does not protect a liability insurer from being held in bad faith for exposing its insured to a potential award of punitive damages by refusing to settle a claim within coverage limits before trial if insured does not seek reimbursement for any sum that represents punitive damages, *Ansonia Associates Ltd. Partnership v Public Service Mut. Ins. Co.*, 257 AD2d 84, 692 NYS2d 5 (1st Dept 1999).

Conflict of Laws

Where conflicts of laws may be involved, the law governing punitive damages is that of the jurisdiction having the strongest interest in the issue, *Zurich Ins. Co. v Shearson Lehman Hutton, Inc.*, 84 NY2d 309, 618 NYS2d 609, 642 NE2d 1065 (1994) (controlling effect must be given to the law of the jurisdiction with the greatest concern for the specific issue raised in the litigation); *James v Powell*, 19 NY2d 249, 279 NYS2d 10, 225 NE2d 741 (1967) (jurisdiction with the greatest concern for the specific issue raised in the litigation); *Knieriemen v Bache Halsey Stuart Shields Inc.*, 74 AD2d 290, 427 NYS2d 10 (1st Dept 1980). The prevailing rule is that punitive damages are unavailable under general maritime law, *Frazer v New York*, 240 AD2d 307, 659 NYS2d 23 (1st Dept 1997).

Administrative Agencies

An administrative agency apparently may award punitive dam-

ages, provided that such power has been conferred by the Legislature, see *Cullen v Nassau County Civil Service Commission*, 53 NY2d 492, 442 NYS2d 470, 425 NE2d 858 (1981); *Van Cleef Realty, Inc. v New York State Div. of Human Rights*, 216 AD2d 306, 627 NYS2d 744 (2d Dept 1995) (upholding punitive damage award by the Division of Human Rights for discrimination in housing rental pursuant to specific authority); see also *Thoreson v Penthouse Intern., Ltd.*, 80 NY2d 490, 591 NYS2d 978, 606 NE2d 1369 (1992) (punitive damages are not permissible in discrimination action pursuant to Human Rights Law unless specifically allowed by statute).

Interest

A party is not entitled to interest on a punitive damages award for the period preceding the court's verdict or decision, *Stassou v Casini & Huang Const., Inc.*, 14 AD3d 695, 789 NYS2d 225 (2d Dept 2005); *Delulio v 320-57 Corp.*, 99 AD2d 253, 472 NYS2d 379 (1st Dept 1984).

Verdict Sheet

The jury should be instructed to return a separate verdict as to each defendant on each cause of action with respect to punitive damages, *Staudacher v Buffalo*, 155 AD2d 956, 547 NYS2d 770 (4th Dept 1989) (fundamental error to fail to separate punitive damage claims for each defendant and each cause of action in the charge and verdict sheet); *Raplee v Corning*, 6 AD2d 230, 176 NYS2d 162 (4th Dept 1958); see *New York Times Co. v Sullivan*, 376 US 254, 84 SCt 710 (1964); *Gutowska v Childs Co.*, 5 AD2d 245, 171 NYS2d 248 (1st Dept 1958); *Walsh v Hyde & Behman Amusement Co.*, 113 App Div 42, 98 NYS 960 (2d Dept 1906), since punitive damages may be awarded in varying amounts against different defendants, *Raplee v Corning*, *supra*; see *Matter of New York City Asbestos Litigation*, 130 AD3d 489, 13 NYS3d 398 (1st Dept 2015), and because there is no joint and several liability or contribution with respect to punitive damages, *Felice v Delporte*, 136 AD2d 913, 524 NYS2d 919 (4th Dept 1988). Thus, the use of a special verdict in a punitive damages case is particularly appropriate, see PJI 1:26. As noted above, the jury must be told to fix compensatory damages and punitive damages separately. Where plaintiff seeks to introduce evidence regarding defendant's wealth, a trifurcated trial may be necessary. A special verdict form for use in conjunction with the pattern charge follows. When the special verdict form is prepared for use, signature lines should be included after each question, see Comment, PJI 1:95. The completed special verdict form should be marked as a court exhibit.

Special Verdict Form PJI 2:278 SV-I

[Note: These questions should follow the questions concerning compensatory damages. Where there is more than one defendant against whom a claim of punitive damages may be sustained by the evidence, a separate series of questions should be asked as to each defendant.]

Is plaintiff entitled to punitive damages against defendant AB?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

[Insert signature lines]

[Note: If the jury has answered the above question “yes,” the trial should proceed with evidence relevant to the amount of punitive damages. For a discussion of evidence that may be considered by the jury in awarding punitive damages, see State Farm Mut. Auto. Ins. Co. v Campbell, 538 US 408, 123 SCt 1513 (2003). After this phase of the trial, the following question should be submitted to the jury]

Special Verdict Form PJI 2:278 SV-II

State the amount of punitive damages you award against defendant AB on the cause of action for: ____

At least five jurors must agree on the answer to this question.

Amount
\$_____

[Note: The jury should be instructed to return a separate verdict as to each cause of action and for each defendant.]

[Insert signature lines]

3. PERSONAL INJURY**a. INJURY AND PAIN AND SUFFERING****PJI 2:280. Damages—Personal Injury—Injury and Pain and Suffering**

If you decide that defendant is liable, plaintiff is entitled to recover a sum of money which will justly and fairly compensate (him, her) for any injury, disability and conscious pain and suffering to date caused by defendant. [If there is an issue relative to the level of plaintiff's awareness, the following should be charged.] Conscious pain and suffering means pain and suffering of which there was some level of awareness by plaintiff (decedent).

Comment

The first sentence is based on *Tate* by *McMahon v Colabello*, 58 NY2d 84, 459 NYS2d 422, 445 NE2d 1101 (1983) (citing PJI); *Kane v New York, N.H. & H.R. Co.*, 132 NY 160, 30 NE 256 (1892); *Ransom v New York & E.R. Co.*, 15 NY 415 (1857); *Robison v Lockridge*, 230 App Div 389, 244 NYS 663 (4th Dept 1930); 7 Warren, Negligence 62, Damages, § 7.07. The second sentence is based on *McDougald v Garber*, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 (1989); *Ramos v Shah*, 293 AD2d 459, 740 NYS2d 376 (2d Dept 2002).

Where there are multiple defendants and the plaintiff fails to serve a medical report or amended bill of particulars on one defendant, it is proper to instruct the jury to bring in verdicts in different amounts against different defendants, *Dawson v Nici*, 22 NY2d 697, 291 NYS2d 808, 238 NE2d 917 (1968). While causal relationship must exist, it can be established without medical testimony when the results of the negligent act are within the experience and observation of a layperson, *Shaw v Tague*, 257 NY 193, 177 NE 417 (1931); *Thompson v Carney*, 52 AD2d 977, 383 NYS2d 111 (3d Dept 1976); *Mitchell v Coca-Cola Bottling Co.*, 11 AD2d 579, 200 NYS2d 478 (3d Dept 1960); see *Brown v Albany*, 271 AD2d 819, 706 NYS2d 261 (3d Dept 2000) (although plaintiff was competent to testify as to past and present physical condition, alleged soft tissue damage was beyond observation of lay jury, and competent expert medical testimony was required to causally connect these injuries to accident). Moreover, the accident need not be the exclusive cause, but only a competent producing cause, *Bobbe v Camato*, 26 AD2d 627, 272 NYS2d 475 (2d Dept 1966). An accident which produces injury by precipitating development of a latent condition or by aggravating a pre-existing condition is a cause of that injury, *Tobin v Steisel*, 64 NY2d

254, 485 NYS2d 730, 475 NE2d 101 (1985); see *Edmond v International Business Machines Corp.*, 91 NY2d 949, 671 NYS2d 437, 694 NE2d 438 (1998) (reinstating plaintiff's complaint against keyboard manufacturers whose products allegedly aggravated plaintiff's preexisting repetitive stress injury and caused new injury). Where there is any evidence of permanence or of future pain and suffering, PJI 2:281 must also be charged. Where there is evidence of emotional reaction to physical injury, PJI 2:284 must be charged. In cases involving medical, dental or podiatric malpractice, CPLR 4111(d) contains special requirements for itemizing the amount of damages attributable to pre-verdict pain and suffering, see PJI 2:151A(1) and 2:151A(2). As to the sufficiency of evidence of future pain and suffering, see Annot: 18 ALR3d 170. As to inadequacy or excessiveness of specific verdicts, see 36 NYJur2d, Damages §§ 131–153; 7 Warren, Negligence 153 ff, Damages § 7.15; 2 Clark, New York Law of Damages 1087, §§ 621–683.

As to the validity of a verdict which awards medical expenses but not pain and suffering, see Annot: 55 ALR4th 186. No New York case has been found on the question whether shortening of life expectancy constitutes an element of damages, but see *Downie v U.S. Lines Co.*, 359 F2d 344 (3d Cir 1966); *Rhone v Fisher*, 224 Md 223, 167 A2d 773 (1961); Notes: 15 Syracuse L Rev 14; 41 Temple LQ 142; Comment: 73 Dickinson L Rev 639.

The term “pain and suffering” has been utilized to encompass all items of general, non-economic damages, see CPLR 4111(d), (e), (f); *McDougald v Garber*, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 (1989); *Lamot v Gondek*, 163 AD2d 678, 558 NYS2d 284 (3d Dept 1990); Comments to PJI 2:151, 2:301; see also *Bartoli v Asto Const. Corp.*, 22 AD3d 437, 802 NYS2d 463 (2d Dept 2005) (disfigurement is aspect of pain and suffering not separate element of damages). An award for pain and suffering should include compensation to an injured person for the physical and emotional consequences of the injury. It is improper to permit the jury to award damages for shock and fright as a category of damages separate from past pain and suffering, *Eaton v Comprehensive Care America, Inc.*, 233 AD2d 875, 649 NYS2d 293 (4th Dept 1996). In determining the amount to be awarded plaintiff for non-economic damages, the jury may properly consider the effect of the injuries on plaintiff's capacity to lead a normal life, *McDougald v Garber*, *supra*. However, while the loss of the enjoyment of life may be considered in fixing the amount awarded plaintiff for pain and suffering, the loss of enjoyment of life does not, by itself, constitute a separate and distinct item of damages, *McDougald v Garber*, *supra*; see *Kavanaugh v Nussbaum*, 129 AD2d 559, 514 NYS2d 55 (2d Dept 1987), *aff'd as mod* on other grounds, 71 NY2d 535, 528 NYS2d 8, 523 NE2d 284 (1988); *Golden v Manhasset Condominium*, 2 AD3d 345, 770 NYS2d 55 (1st Dept 2003); *Ledogar v Giordano*, 122 AD2d 834, 505 NYS2d 899 (2d Dept 1986) (both treating loss of enjoyment of life as permissible component of pain and suffering award). In *Nussbaum v Gibstein*, 73 NY2d 912, 539 NYS2d 289, 536 NE2d 618 (1989), decided simultaneously with *McDougald v Garber*, *supra*, the Court stated that “loss of

enjoyment of life is not a separate element of damages deserving a distinct award but is, instead, only a factor to be considered by the jury in assessing damages for conscious pain and suffering.” Likewise, “mental suffering” is not an item of damage distinct from “pain and suffering,” *Lamot v Gondek*, supra.

Loss of enjoyment of life, as well as other factors in determining the amount of damages for conscious pain and suffering, may be considered only if plaintiff has “some cognitive awareness” of the loss, *McDougald v Garber*, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 (1989); see *Ramos v Shah*, 293 AD2d 459, 740 NYS2d 376 (2d Dept 2002). An award for the loss of enjoyment of life would serve no compensatory purpose where plaintiff has no awareness of the loss. The jury is not required to sort out varying degrees of cognition and to determine the level at which a particular deprivation may be fully appreciated. It is sufficient if the jury is instructed that there must be “some level of awareness” in order for plaintiff to recover, *McDougald v Garber*, supra; *Ramos v Shah*, supra.

Based upon *McDougald v Garber*, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 (1989), and *Nussbaum v Gibstein*, 73 NY2d 912, 539 NYS2d 289, 536 NE2d 618 (1989), the following supplemental charge should be given, after the main charge, in any action where plaintiff has presented evidence on the issue of loss of enjoyment of life as an element of pain and suffering:

PJI 2:280.1

In determining the amount, if any, to be awarded plaintiff for pain and suffering, you may take into consideration the effect that plaintiff's (decedent's) injuries have had on plaintiff's ability to enjoy life (have had on decedent's ability to enjoy life up to the time of death). Loss of enjoyment of life involves the loss of the ability to perform daily tasks, to participate in the activities which were a part of the person's life before the injury, and to experience the pleasures of life. However, a person suffers the loss of enjoyment of life only if the person is aware, at some level, of the loss that (he, she) has suffered.

If you find that plaintiff (decedent), as a result of (his, her) injuries, suffered some loss of the ability to enjoy life and that plaintiff (decedent) was aware, at some level, of a loss, you may take that loss into consideration in determining the amount to be awarded to plaintiff for pain and suffering.

In *Broadnax v Gonzalez*, 2 NY3d 148, 777 NYS2d 416, 809 NE2d 645 (2004), the Court of Appeals overruled *Tebbutt v Virostek*, 65 NY2d 931, 493 NYS2d 1010, 483 NE2d 1142 (1985), and other cases holding that, in the absence of independent physical injury, an expectant mother may not recover damages for emotional distress resulting from a miscarriage or stillbirth caused by medical malpractice. The *Broadnax* decision recognizes that medical malpractice resulting in miscarriage or stillbirth can constitute a breach of duty to the expectant mother and that damages for emotional distress arising from such malpractice should be recoverable even where there has been no physical injury. The *Broadnax* holding does not address the continuing vitality of cases holding, based on *Tebbutt v Virostek*, *supra*, that damages for pain and suffering normally incidental to childbirth are not recoverable in an action for negligently caused stillbirth or miscarriage, see *Wittrock v Maimonides Medical Center-Maimonides Hosp.*, 119 AD2d 748, 501 NYS2d 684 (2d Dept 1986); see also *Fahey v Canino*, 304 AD2d 1069, 758 NYS2d 708 (3d Dept 2003), *rev'd*, 2 NY3d 148, 777 NYS2d 416, 809 NE2d 645 (2004). The *Broadnax* holding is a narrow one and does not extend to situations where a fetus injured in utero was carried to term and born alive, *Sheppard-Mobley ex rel. Mobley v King*, 4 NY3d 627, 797 NYS2d 403, 830 NE2d 301 (2005); *Ward v Safajou*, 145 AD3d 836, 43 NYS3d 447 (2d Dept 2016); see *Brashaw v Cohen*, 154 AD3d 1327, 62 NYS3d 251 (4th Dept 2017) (*same*); *Levin v New York City Health and Hospitals Corp.*, 119 AD3d 480, 990 NYS2d 490 (1st Dept 2014).

The physical and emotional injuries suffered by a pregnant woman from a miscarriage because of the defendant's negligence in failing to advise her that she still could be pregnant due to an incomplete abortion are recoverable, *Ferrara v Bernstein*, 81 NY2d 895, 597 NYS2d 636, 613 NE2d 542 (1993). Moreover, the damages resulting from the physical and emotional injuries suffered by a pregnant woman as the result of an abortion occasioned by a physician's negligent failure to detect the pregnancy prior to prescribing a drug potentially harmful to the fetus are recoverable, *Lynch v Bay Ridge Obstetrical and Gynecological Associates, P.C.*, 72 NY2d 632, 536 NYS2d 11, 532 NE2d 1239 (1988), as is the emotional distress sustained by a prospective mother generally opposed to abortion who was induced to have an abortion by negligent medical advice, *Martinez v Long Island Jewish Hillside Medical Center*, 70 NY2d 697, 518 NYS2d 955, 512 NE2d 538 (1987). However, no damages are recoverable for negligence resulting in an incapacity to have children in the future, *Devine v Brooklyn Heights R. Co.*, 198 NY 630, 92 NE 1083 (1910), *rev'g* for reasons in AD dissenting opinion, 131 App Div 142, 115 NYS 263 (2d Dept 1909).

Damages may be recoverable for emotional injuries suffered by a couple whose embryo was mistakenly placed in another woman, *Perry-Rogers v Obasaju*, 282 AD2d 231, 723 NYS2d 28 (1st Dept 2001). In *Perry-Rogers v Obasaju*, the couple suffered emotional harm caused by their having been deprived of the opportunity of experiencing pregnancy, prenatal bonding and the birth of their child, and by their separation from the child for more than four months after his birth, *id.* The couple,

through medical affidavits attesting to objective manifestations of their trauma, evidenced the genuineness of their claim, and survived the defendants' motion for summary judgment dismissing the complaint, *id.* However, there is no recovery for psychological harm suffered by a plaintiff as a result of alleged negligence in performing a surgical procedure to enhance her husband's fertility, *Cohen v Cabrini Medical Center*, 94 NY2d 639, 709 NYS2d 151, 730 NE2d 949 (2000); see *Landon by Landon v New York Hosp.*, 101 AD2d 489, 476 NYS2d 303 (1st Dept 1984), *aff'd* for reasons in AD opinion, 65 NY2d 639, 491 NYS2d 607, 481 NE2d 239 (1985).

It has been held that negligent delay in delivery which causes the mother emotional distress related to a previous physical condition may be compensable, *Prado v Catholic Medical Center of Brooklyn and Queens, Inc.*, 145 AD2d 614, 536 NYS2d 474 (2d Dept 1988) (mother feared real possibility of rupture of prior rectocystocele repair). But *Prado* has been limited to its "exceptional" factual circumstances, *Guialdo v Allen*, 171 AD2d 535, 567 NYS2d 255 (1st Dept 1991).

There is no cause of action for "wrongful life" where a child claims that the doctor's negligence consisted of failing to advise the child's mother that the fetus was impaired which prevented the mother from electing to have an abortion, *Becker v Schwartz*, 46 NY2d 401, 413 NYS2d 895, 386 NE2d 807 (1978); *Howard v Lecher*, 42 NY2d 109, 397 NYS2d 363, 366 NE2d 64 (1977); *Stewart v Long Island College Hospital*, 35 AD2d 531, 313 NYS2d 502 (2d Dept 1970), *aff'd*, 30 NY2d 695, 332 NYS2d 640, 283 NE2d 616 (1972); see PJI 2:150, 2:284, 2:318. However, in an action sometimes referred to as "wrongful birth," the parents may recover the cost of care and treatment of a disabled child born because of a negligent failure to test for or advise the parents of the potential for the birth of such a child, *Becker v Schwartz*, *supra*; see *B.F. v Reproductive Medicine Associates of New York, LLP*, 30 NY3d 608, 69 NYS3d 543, 92 NE3d 766 (2017); *Foote v Albany Medical Center Hosp.*, 16 NY3d 211, 919 NYS2d 472, 944 NE2d 1111 (2011); *Mayzel v Moretti*, 105 AD3d 816, 962 NYS2d 656 (2d Dept 2013). This recovery is limited to the extraordinary expenses incurred or to be incurred prior to the child's 21st birthday, *Bani-Esraili v Lerman*, 69 NY2d 807, 513 NYS2d 382, 505 NE2d 947 (1987). The existence of government programs that provide resources to a disabled child will not, as a matter of law, eliminate the parents' financial obligation for their child's extraordinary medical and educational expenses during the child's minority, *Foote v Albany Medical Center Hosp.*, *supra*. Therefore, the existence of such programs is not necessarily fatal to the parents' claim, *id.* The parents, however, must demonstrate that they have incurred or will incur some extraordinary expenses in caring for the child; conclusory or speculative assertions that such expenses have been or will be incurred are insufficient, see *Mayzel v Moretti*, *supra* (parents failed to raise triable issue of fact regarding whether they sustained damages as a result of child's "wrongful birth"; child's care was provided by a residential care facility and paid for by Medicaid, and parents offered no evidence that resources provided by government were insufficient or that they actually intended to care for child in future).

Recovery for pain and suffering of an inmate of a mental institution is allowed, notwithstanding the inability of the injured party to describe the pain and suffering experienced, *Scolavino v State*, 187 Misc 253, 62 NYS2d 17 (Ct Cl 1946), mod on other grounds, 271 App Div 618, 67 NYS2d 202 (3d Dept 1946), aff'd, 297 NY 460, 74 NE2d 174 (1947); *Siegel v New York*, 43 AD2d 271, 351 NYS2d 394 (1st Dept 1974); *Schreck v State*, 35 Misc2d 929, 231 NYS2d 563 (Ct Cl 1962); *Dowly v State*, 190 Misc 16, 68 NYS2d 573 (Ct Cl 1947), unless there is evidence that the injured party was incapable of experiencing pain and suffering at all, see *Ledogar v Giordano*, 122 AD2d 834, 505 NYS2d 899 (2d Dept 1986) (autistic child); *Tinnerholm v Parke, Davis & Co.*, 411 F2d 48 (2d Cir 1969) (sustaining an award for past and future pain and suffering of three-month-old); see also *Capelouto v Kaiser Foundation Hospitals*, 7 Cal 3d 889, 103 Cal Rptr 856, 500 P2d 880 (1972) (infant under one year old).

Where the interval between injury and death is relatively brief, the amount, if any, awarded for the decedent's conscious pain and suffering depends upon such factors as degree of consciousness, severity of pain, apprehension of impending death, and duration of suffering, *Jones v Simeone*, 112 AD2d 772, 492 NYS2d 270 (4th Dept 1985); see also *Cassar v Central Hudson Gas & Elec. Corp.*, 134 AD2d 672, 521 NYS2d 337 (3d Dept 1987). Plaintiff has the threshold burden of proving consciousness for at least some period of time following an accident to justify an award of damages for pain and suffering, *Cummins v Onondaga*, 84 NY2d 322, 618 NYS2d 615, 642 NE2d 1071 (1994); *Cleary v LJR Associates*, 198 AD2d 394, 604 NYS2d 140 (2d Dept 1993). The burden can be satisfied by direct or circumstantial evidence, *id*; see *Cushing v Seemann*, 247 AD2d 891, 668 NYS2d 791 (4th Dept 1998) (affirmation of pathologist who performed autopsy was sufficient to establish triable issue of fact with respect to whether decedent had conscious pain and suffering after his vehicle was struck by truck). Testimony by the deceased infant's parents that, in the moments before he died, the baby was "changing colors," "trying to breathe," "his forehead was becoming swollen," "his eyes were different" and "he was full of blood" was legally sufficient to create a question for the jury, *Lopez v Gomez*, 305 AD2d 292, 761 NYS2d 601 (1st Dept 2003). In those circumstances, the requirement that there must have been some level of cognitive awareness did not preclude recovery for the pain and suffering experienced by the 15-day-old decedent, *id*.

No precise rule can be formulated to measure pain or to compensate for it in money damages, *Robison v Lockridge*, 230 App Div 389, 244 NYS 663 (4th Dept 1930); see *McDougald v Garber*, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 (1989). Where a plaintiff requires further surgery, the jury should be instructed to consider the pain and suffering entailed in the surgery, *Caro v Skyline Terrace Coop., Inc.*, 132 AD2d 512, 517 NYS2d 531 (2d Dept 1987). It is peculiarly fitting therefore that the amount of such damages should be determined by the jury, *Frey v Gerhard Lang Brewery*, 256 App Div 1054, 10 NYS2d 874 (4th Dept 1939); *Wolfe v General Mills, Inc.*, 35 Misc2d 996, 231 NYS2d 918

(Sup 1962); and it is improper for the trial judge to give the jury the court's evaluation of the maximum sum recoverable, *Lieberman v Washington Square Hotel Corp.*, 40 AD2d 647, 336 NYS2d 518 (1st Dept 1972); or to state to the jury that a given sum would not be too much or too little, *Wersebe v Broadway & S.A.R. Co.*, 1 Misc 472, 21 NYS 637 (Super Ct 1893).

CPLR 4016(b), which was enacted in 2003, L 2003, ch 694, effective November 27, 2003 and amended in 2004, L 2004, ch 372, expressly permits counsel for both plaintiff and defendant to make reference in their closing statements to "a specific dollar amount that the attorney believes to be appropriate compensation for any element of damage that is sought to be recovered in the action." The statute further provides that if an attorney exercises the right to refer to a specific dollar amount of damages, the court must, upon request of any party, include in its closing charge instructions that the attorney's remarks are permitted as argument, that the attorney's references to specific dollar amounts are not evidence and should not be considered as evidence and, finally, that the determination of damages is solely for the jury, *id*; see PJI 2:277A.

It is improper to suggest to the jury that they may follow a particular mathematical guide or unit-of-time basis in fixing damages for pain and suffering, *Grasha v Amherst*, 191 AD3d 1286, 141 NYS3d 587 (4th Dept 2021); *Halftown v Triple D Leasing Corp.*, 89 AD2d 794, 453 NYS2d 514 (4th Dept 1982); *De Cicco v Methodist Hospital of Brooklyn*, 74 AD2d 593, 424 NYS2d 524 (2d Dept 1980); *Paley v Brust*, 21 AD2d 758, 250 NYS2d 356 (1st Dept 1964); *Jacobs v Peress*, 24 AD2d 746, 263 NYS2d 675 (1st Dept 1965); see *Laughing v Utica Steam Engine and Boiler Works*, 16 AD2d 294, 228 NYS2d 44 (4th Dept 1962); A "unit of time" argument, while improper, is not grounds for setting aside the verdict where it is plain that the jury disregarded the argument, *Lee v Bank of New York*, 144 AD2d 543, 534 NYS2d 409 (2d Dept 1988); see *Grasha v Amherst*, *supra* (counsel's remark indirectly suggesting use of time-unit formula deemed harmless under circumstances). It has been held that it is not improper to make a "unit of time" argument if no specific monetary value for each unit is suggested, *Feldman v Bethel*, 106 AD2d 695, 484 NYS2d 147 (3d Dept 1984). Whether the Court of Appeals will adopt this rule is unclear, see *Tate by McMahon v Colabello*, 58 NY2d 84, 459 NYS2d 422, 445 NE2d 1101 (1983); see also Annot: 3 ALR4th 940.

Any allusion by plaintiff's attorney to the defendant's ability to pay damages is improper, *Adams v Acker*, 57 AD2d 741, 394 NYS2d 8 (1st Dept 1977); *Nicholas v Island Industrial Park of Patchogue, Inc.*, 46 AD2d 804, 361 NYS2d 39 (2d Dept 1974); *Laughing v Utica Steam Engine and Boiler Works*, 16 AD2d 294, 228 NYS2d 44 (4th Dept 1962), and if made is grounds for mistrial, Annot: 32 ALR2d 9. Likewise, defense counsel may not suggest that defendant lacks the funds to respond to a large judgment and may not make allusions to plaintiff's financial status, *Vassura v Taylor*, 117 AD2d 798, 499 NYS2d 120 (2d Dept 1986). Moreover, it is improper for counsel in summation or the

court in its charge to relate the amount to be fixed to what the jurors would like to receive as compensation if they were in plaintiff's place, *Liosi v Vaccaro*, 35 AD2d 790, 315 NYS2d 225 (1st Dept 1970); *Weintraub v Zabolinsky*, 19 AD2d 906, 244 NYS2d 905 (2d Dept 1963); see Annot: 96 ALR2d 760. It is likewise error for counsel repeatedly to refer to the jury as the "conscience of the community," *Halftown v Triple D Leasing Corp.*, 89 AD2d 794, 453 NYS2d 514 (4th Dept 1982).

Damages for personal injury and loss of earnings resulting therefrom are not taxable, 26 USC § 104(a)(2); see *Lanzano v New York*, 71 NY2d 208, 524 NYS2d 420, 519 NE2d 331 (1988); see also *C.I.R. v Schleier*, 515 US 323, 115 S Ct 2159 (1995); but see *BNSF Railway Company v Loos*, 139 S Ct 893 (2019) (recovery pursuant to the Federal Employers' Liability Act for lost wages due to an on-the-job injury is taxable income). The courts have recognized the possibility that a tax-conscious jury may, in "ignorance of relevant rules in this highly specialized field," proceed on "erroneous speculations and assumptions," to render an unfair and inaccurate verdict, *Lanzano v New York*, 71 NY2d 208, 524 NYS2d 420, 519 NE2d 331 (1988); *Johnson v Manhattan & Bronx Surface Transit Operating Authority*, 71 NY2d 198, 524 NYS2d 415, 519 NE2d 326 (1988); *Coleman v New York City Transit Authority*, 37 NY2d 137, 371 NYS2d 663, 332 NE2d 850 (1975); see *Norfolk & W. Ry. Co. v Liepelt*, 444 US 490, 100 S Ct 755 (1980). To counter this possibility, the Court of Appeals has declared that "it is better practice in all cases where jury awards are excluded from taxation under 26 USC § 104(a)(2) for the jury to be instructed in substance that such awards, if any, are not subject to income taxes, and that it should not add or subtract from the award on account of income taxes but should follow the ordinary, specific instructions for measuring damages which the courts usually give," *Lanzano v New York*, supra; *Cramer v Kuhns*, 213 AD2d 131, 630 NYS2d 128 (3d Dept 1995).

Based upon *Lanzano v New York*, 71 NY2d 208, 524 NYS2d 420, 519 NE2d 331 (1988) the court should instruct the jury:

PJI 2:280.2

If your verdict is in favor of plaintiff, plaintiff will not be required to pay income taxes on the award and you must not add to or subtract from the award any amount on account of income taxes.

The above charge should not be used as to causes of action subject to the provisions of EPTL 5-4.3; see PJI 2:151C. It should also not be used as to a cause of action pursuant to the Federal Employer's Liability Act for lost wages, *BNSF Railway Company v Loos*, 139 S Ct 893 (2019).

CPLR 4546, applicable to medical, dental, and podiatric malpractice actions, requires the court to reduce any award for lost earnings or

impairment of earning ability to account for the federal, state and local income taxes that the court finds with reasonable certainty “the plaintiff would have been obligated by law to pay.” EPTL 5-4.3, applicable to wrongful death actions grounded in medical or dental malpractice, requires the jury to “consider,” in connection with the assessment of the amount that would have been available for support of the distributees had the decedent lived, the income taxes that decedent would have been obligated by law to pay. The CPLR and EPTL provisions contain express directions as to what the jury must be instructed with respect to income tax considerations. Pattern charges for use in actions subject to CPLR 4546 and/or EPTL 5-4.3 appear in PJI 2:151C.

As to lawyers’ fees it is error to instruct the jury that lawyers’ fees are customarily paid from jury verdicts, *Brod v Central School Dist. No. 1 of Towns of Sand Lake and Poestenkill, Rensselaer County*, 53 AD2d 1002, 386 NYS2d 125 (3d Dept 1976). Attorneys’ fees are merely incidents of litigation, *Klein v Sharp*, 41 AD2d 926, 343 NYS2d 1014 (1st Dept 1973), and absent a contractual obligation or specific statutory authority, such fees do not constitute an element of damage and are not recoverable, *Buffalo v J. W. Clement Co.*, 28 NY2d 241, 321 NYS2d 345, 269 NE2d 895 (1971); *Piaget Watch Corp. v Audemars Piguet & Co.*, 35 AD2d 920, 316 NYS2d 104 (1st Dept 1970).

Pre-verdict interest is not recoverable in a personal injury case even though the action is for breach of warranty of fitness for use, *Gillespie v Great Atlantic & Pacific Tea Co.*, 26 AD2d 953, 276 NYS2d 372 (2d Dept 1966), *mod*, 21 NY2d 823, 288 NYS2d 907, 235 NE2d 911 (1968); *Hyatt v Pepsi-Cola Albany Bottling Co.*, 32 AD2d 574, 298 NYS2d 1005 (3d Dept 1969); *Raman v Carborundum Co.*, 31 AD2d 552, 295 NYS2d 534 (2d Dept 1968). However, where the trial is bifurcated, interest on the recovery is computed from the date that liability was determined, rather than from the date of the final judgment, *Love v State*, 78 NY2d 540, 577 NYS2d 359, 583 NE2d 1296 (1991); *Gunnarson v State*, 70 NY2d 923, 524 NYS2d 396, 519 NE2d 307 (1987); *Trimboli v Scarpaci Funeral Home, Inc.*, 37 AD2d 386, 326 NYS2d 227 (2d Dept 1971), *aff’d*, 30 NY2d 687, 332 NYS2d 637, 283 NE2d 614 (1972). Interest is measured from the date that liability was fixed regardless of which party is responsible for any delay in the assessment of plaintiff’s damages, *Love v State*, *supra*. Where the trial is bifurcated and the trial court structures the award pursuant to Articles 50-A and 50-B of the CPLR, interest is properly computed on the present value of future damages from the date of the liability verdict under CPLR 50-A and 50-B, *Rohring v Niagara Falls*, 84 NY2d 60, 614 NYS2d 714, 638 NE2d 62 (1994); *Karagiannis v New York State Thruway Authority*, 209 AD2d 993, 619 NYS2d 906 (4th Dept 1994). Likewise, under CPLR 5003 post-judgment interest accrues on awards for future damages when such awards are paid in a structured judgment pursuant to CPLR Article 50-A, *Silvestri v Smallberg*, 88 NY2d 1004, 648 NYS2d 870, 671 NE2d 1267 (1996).

An injured plaintiff’s inability to perform household services is a

quantitative economic loss separate and apart from pain and suffering, *Cramer v Kuhns*, 213 AD2d 131, 630 NYS2d 128 (3d Dept 1995); see *Compani v State*, 183 AD2d 966, 583 NYS2d 582 (3d Dept 1992). Damages for loss of household services should be awarded only for those services which are reasonably certain to be incurred and necessitated by plaintiff's injuries, *Schultz v Harrison Radiator Div. General Motors Corp.*, 90 NY2d 311, 660 NYS2d 685, 683 NE2d 307 (1997). In *Schultz*, the court held that since plaintiff did not incur any actual expenditures for household services between the accident and the date of verdict, having relied on the gratuitous assistance of relatives and friends, the jury improperly awarded plaintiff an award for household services for that period.

Annot: 14 ALR3d 541.

b. PERMANENCE—LIFE EXPECTANCY TABLES

**PJI 2:281. Damages—Personal Injury—Future—
Permanence—Life Expectancy Tables**

With respect to any of the plaintiff's injuries or disabilities, the plaintiff is entitled to recover for future pain, suffering and disability and the loss of (his, her) ability to enjoy life. In this regard you should take into consideration the period of time that the injuries or disabilities are expected to continue. If you find that the injuries or disabilities are permanent, you should take into consideration the period of time that the plaintiff can be expected to live. In accordance with statistical life expectancy tables, AB has a life expectancy of *[insert number]* years. Such a table, however, provides nothing more than a statistical average. It neither guarantees that AB will live an additional *[insert number]* years or means that (he, she) will not live for a longer period. The life expectancy figure I have given you is not binding upon you, but may be considered by you together with your own experience and the evidence you have heard concerning the condition of AB's health, (his, her) habits, employment and activities in deciding what AB's present life expectancy is.

Comment

Caveat: Special verdicts itemizing damages are often essential in actions in which PJI 2:281 is charged, see charge and Comment to PJI 2:301; see also Comment to PJI 1:26.

Life expectancy tables are set forth in Appendix A to this volume. The tables referring to differences based on race have been eliminated. Where the plaintiff dies before trial from causes unconnected with the accident, damages are limited to those occurring before his or her death, *Raman v Carborundum Co.*, 31 AD2d 552, 295 NYS2d 534 (2d Dept 1968), and the pattern charge should not be used.

Damages for future pain and suffering are available regardless of whether the plaintiff's injuries are permanent, and it is error to charge that such damages may be awarded only upon a finding of permanence, *Gallagher v Samples*, 6 AD3d 659, 776 NYS2d 585 (2d Dept 2004); *Rizzo v DeSimone*, 6 AD3d 600, 775 NYS2d 531 (2d Dept 2004). Where

it was uncontroverted that plaintiff was in pain at time of trial and that the pain would continue, a jury verdict which failed to make any award for future pain and suffering was against the weight of the evidence, *Fenocchi v Syracuse*, 216 AD2d 864, 629 NYS2d 580 (4th Dept 1995). The policies underlying CPLR article 50-B, which mandates that the judgment sum in excess of \$250,000 be paid in installments which terminate upon plaintiff's death, do not require that a verdict awarding \$150,000 for future pain and suffering be set aside solely because the injured plaintiff died the day after the verdict was rendered, *Stinton v Robin's Wood, Inc.*, 45 AD3d 203, 842 NYS2d 477 (2d Dept 2007).

Mortality tables are admissible in permanent injury cases to show the length of time plaintiff will suffer the injury and endure the pain, *Barone v Forgette*, 286 App Div 588, 146 NYS2d 63 (3d Dept 1955); see *Sauter v New York Cent. & H.R.R. Co.*, 66 NY 50 (1876); *Schell v Plumb*, 55 NY 592, 46 How Pr 11 (1874); see RPAPL § 403, and are to be considered together with evidence of the health, constitution, habits and mode of living of the person whose life expectancy is in question, *Rothman v St. Barnabas Hospital for Chronic Diseases*, 20 AD2d 531, 244 NYS2d 791 (1st Dept 1963); *Giambrone v Israel America Line, Inc.*, 26 Misc2d 593, 208 NYS2d 215 (Sup 1960). Evidence of the life span of plaintiff's parent is not, however, admissible, *Hinsdale v New York, N.H. & H.R. Co.*, 81 App Div 617, 81 NYS 356 (1st Dept 1903). Although a plaintiff may lack normal health, it is still proper for the jury to consider mortality tables along with all of the other evidence in the case bearing on life expectancy, 29A Am Jur 2d, Evidence § 1418. A verdict will not be disturbed, however, where proof of plaintiff's physical condition supports the jury's finding that plaintiff's life expectancy is less than the statistical average, *O'Rourke v Berner*, 249 AD2d 975, 672 NYS2d 216 (4th Dept 1998) (citing PJI). The jury may also conclude that the duration of a particular plaintiff's life will be longer than the tables indicate, *Sternfels v Metropolitan St. Ry. Co.*, 73 App Div 494, 77 NYS 309 (1st Dept 1902), *aff'd*, 174 NY 512, 66 NE 1117 (1903). Thus, it is proper to charge the jury that the life expectancy table should be used merely as a guide, *Blyskal v Kelleher*, 171 AD2d 718, 567 NYS2d 174 (2d Dept 1991) (citing PJI); see *Lolik v Big V Supermarkets, Inc.*, 266 AD2d 759, 698 NYS2d 762 (3d Dept 1999) (citing PJI).

It is also proper for the court to take judicial notice of mortality tables, *Giambrone v Israel America Line, Inc.*, 26 Misc2d 593, 208 NYS2d 215 (Sup 1960); see *People v Security Life Ins. & Annuity Co.*, 78 NY 114 (1879); 58 NYJur2d 149, Evidence and Witnesses § 532.

As to use of life expectancy tables in a wrongful death action, see PJI 2:320.

If the jury finds that plaintiff's injury is permanent, the amount awarded as damages for future pain and suffering must be separately itemized on the verdict sheet and the number of years for which the award is made must be stated, CPLR 4111(d)(e)(f), see PJI 2:301. If the award for future damages exceeds \$250,000 in an action for personal

injuries or wrongful death, CPLR Article 50A (malpractice actions) or Article 50B, requires that the amount in excess of \$250,000 be paid periodically. For the method to be used to compute the periodic payments see *Rohring v Niagara Falls*, 84 NY2d 60, 614 NYS2d 714, 638 NE2d 62 (1994) and comment to PJI 2:277.

c. AGGRAVATION OF PRE-EXISTING INJURY

PJI 2:282. Damages—Personal Injury—Aggravation of Pre-existing Injury

If you find that before this (accident, occurrence) the plaintiff had a [*specify the particular condition*] and further find that because of the (accident, occurrence) this condition was aggravated so as to cause (increased) suffering and disability, then the plaintiff is entitled to recover for any (increased) disability or pain resulting from such aggravation. (He, she) is not, however, entitled to recover for any physical ailment or disability which existed prior to the (accident, occurrence) or for any injuries from which (he, she) may now be suffering which were not caused or contributed to by the (accident, occurrence). The plaintiff can recover only for damage caused by aggravation of the pre-existing condition, not the condition itself. The plaintiff should be compensated only to the extent that you find (his, her) condition was made worse by the defendant's negligence.

Comment

Where the defendant's wrongful act does not cause the condition, injury or illness, but only aggravates and increases the severity of a condition existing at the time of the injury, the plaintiff may recover only for such increased or augmented suffering or damage as are caused by the defendant's act, *Ortiz v Mendolia*, 116 AD2d 707, 497 NYS2d 761 (2d Dept 1986) (Court approved a charge substantially the same as the pattern charge); see *McCahill v New York Transp. Co.*, 201 NY 221, 94 NE 616 (1911); *Kirschhoffer v Van Dyke*, 173 AD2d 7, 577 NYS2d 512 (3d Dept 1991). As to the sufficiency of proof of causation of the aggravation, see Annot: 2 ALR3d 290; 2 ALR3d 384; 2 ALR3d 401; 2 ALR3d 434; 2 ALR3d 446; 2 ALR3d 464; 2 ALR3d 487.

Stated differently, in determining damages, the jury must consider the plaintiff's pre-existing condition and limit the award accordingly; i.e., to the extent to which he or she has been further disabled as a result of the defendant's negligence, *Lopato v Kinney Rent-A-Car, Inc.*, 73 AD2d 565, 423 NYS2d 42 (1st Dept 1979); *Roy v Hartogs*, 85 Misc2d 891, 381 NYS2d 587 (AppT 1976); *Castaldo v Transportation Vehicles, Inc.*, 16 Misc2d 948, 180 NYS2d 368 (Sup 1958), mod, 10 AD2d 955, 201 NYS2d 601 (2d Dept 1960); *Beaudoin v State*, 24 Misc2d 962, 207 NYS2d 348 (Ct Cl 1960); see *Oakes v Patel*, 20 NY3d 633, 965 NYS2d

752, 988 NE2d 488 (2013); *Tobin v Steisel*, 64 NY2d 254, 485 NYS2d 730, 475 NE2d 101 (1985); *Stewart v Olean Medical Group, P.C.*, 17 AD3d 1094, 795 NYS2d 420 (4th Dept 2005) (jury should be instructed to award only those damages proximately caused by defendant's negligence and not by plaintiff's underlying illness itself); *Monahan v Weichert*, 93 AD2d 984, 461 NYS2d 633 (4th Dept 1983) (same). Thus, in a medical malpractice case, where a condition existing before the malpractice occurred may have contributed to plaintiff's harm, plaintiff is not entitled to recover those damages that the pre-existing condition would have caused in the absence of malpractice, *Oakes v Patel*, 20 NY3d 633, 965 NYS2d 752, 988 NE2d 488 (2013).

It is error to refuse to instruct the jury as to the principles governing plaintiff's claim that a pre-existing condition was aggravated, *Rosenberg v Rixon*, 111 AD2d 910, 490 NYS2d 807 (2d Dept 1985) (citing PJI); see *Miller v Sansone*, 127 AD2d 569, 511 NYS2d 369 (2d Dept 1987), (requiring distinction between pre-existing condition and latent condition). A failure to request the charge may result in a waiver, *Hancock v 330 Hull Realty Corp.*, 225 AD2d 365, 638 NYS2d 654 (1st Dept 1996). As to subsequent injuries, see PJI 2:305 and PJI 2:306.

The aggravation of pre-existing disease or infirmities must be pleaded before recovery therefor can be allowed, *Anderson v Dainack*, 39 AD3d 1065, 834 NYS2d 564 (3d Dept 2007); *Behan v Data Probe Intern., Inc.*, 213 AD2d 439, 623 NYS2d 886 (2d Dept 1995); *De Mento v Nehi Beverages, Inc.*, 55 AD2d 794, 389 NYS2d 909 (3d Dept 1976); *Von Sydow v Long Beach Bus Co.*, 249 App Div 838, 292 NYS 662 (2d Dept 1937); see Annot: 32 ALR2d 1447. The Fourth Department has held that a charge on aggravation of pre-existing injury may be given if plaintiff has not pleaded the theory but defendant has raised the issue, *Mazurek v Home Depot U.S.A., Inc.*, 303 AD2d 960, 757 NYS2d 425 (4th Dept 2003); *Martin v Volvo Cars of North America, Inc.*, 241 AD2d 941, 661 NYS2d 338 (4th Dept 1997). However, the Third Department has rejected the Fourth Department's approach, at least where there has been a wholesale failure by plaintiff to plead the theory, *Anderson v Dainak*, *supra*. A charge on aggravation of pre-existing injuries must be requested before the jury retires to consider its verdict, *Hancock v 330 Hull Realty Corp.*, 225 AD2d 365, 638 NYS2d 654 (1st Dept 1996).

d. INCREASED SUSCEPTIBILITY TO INJURY

PJI 2:283. Damages—Personal Injury—Increased Susceptibility To Injury

The fact that the plaintiff may have a physical or mental condition that makes (him, her) more susceptible to injury than a normal healthy person does not relieve the defendant of liability for all injuries sustained as a result of (his, her, its) negligence. The defendant is liable even though those injuries are greater than those that would have been sustained by a normal healthy person under the same circumstances.

Comment

A wrongdoer is chargeable for all the harm and suffering that his or her negligent act causes the plaintiff, even though the plaintiff's injuries are increased by a predisposition or weakness, *Owen v Rochester-Penfield Bus Co.*, 304 NY 457, 108 NE2d 606 (1952); *Dunham v Canisteo*, 303 NY 498, 104 NE2d 872 (1952); *Poplar v Bourjois, Inc.*, 298 NY 62, 80 NE2d 334 (1948); *McCahill v New York Transp. Co.*, 201 NY 221, 94 NE 616 (1911); *King v State*, 58 AD2d 934, 396 NYS2d 919 (3d Dept 1977); *Seitz v Department of Fire, City of Syracuse*, 55 AD2d 829, 390 NYS2d 308 (4th Dept 1976); *Fergus v Benedetto Trucking Co., Inc.*, 50 AD2d 754, 377 NYS2d 14 (1st Dept 1975); *MacIver v Lyon*, 43 AD2d 806, 350 NYS2d 477 (4th Dept 1973); *Gonzalez v New York City Omnibus Corp.*, 150 NYS2d 722 (Sup 1956), *aff'd*, 2 AD2d 963, 158 NYS2d 739 (1st Dept 1956); *Lang v Stadium Purchasing Corporation*, 216 App Div 558, 215 NYS 502 (1st Dept 1926); *Miehlke v Nassau Electric R. Co.*, 129 App Div 438, 114 NYS 90 (2d Dept 1908); *Sikorski v Melba*, 17 Misc2d 382, 183 NYS2d 731 (Sup 1959); 36 NYJur2d, Damages § 61.

When the claim is for "precipitation" rather than "aggravation," *Behan v Data Probe Intern., Inc.*, 213 AD2d 439, 623 NYS2d 886 (2d Dept 1995); *De Mento v Nehi Beverages, Inc.*, 55 AD2d 794, 389 NYS2d 909 (3d Dept 1976); *Weisent v New York*, 29 AD2d 776, 287 NYS2d 702 (2d Dept 1968); *Roth v Hudson Transit Lines, Inc.*, 72 Misc2d 999, 340 NYS2d 224 (Sup 1972), it is enough that the accident precipitated or triggered a latent condition, it need not have caused it, *Edmond v International Business Machines Corp.*, 91 NY2d 949, 671 NYS2d 437, 694 NE2d 438 (1998) (reinstating plaintiff's complaint against keyboard manufacturers whose products allegedly aggravated plaintiff's preexisting repetitive stress injury and caused new injury); *Tobin v Steisel*, 64 NY2d 254, 485 NYS2d 730, 475 NE2d 101 (1985); *McCahill v New York Transp. Co.*, 201 NY 221, 94 NE 616 (1911); *McCulloch v New York Central Mutual Insurance Company*, 175 AD3d 912, 107 NYS3d 545

(4th Dept 2019) (increased susceptibility charge warranted where there is evidence that accident allegedly triggered asymptomatic arthritis); *Petrella v Board of Trustees of Police Pension Fund*, 141 AD2d 361, 529 NYS2d 307 (1st Dept 1988); *Bartolone v Jeckovich*, 103 AD2d 632, 481 NYS2d 545 (4th Dept 1984); *Steinhauser v Hertz Corp.*, 421 F2d 1169 (2d Cir 1970). But the defendant may show that because of latent psychotic tendencies plaintiff's present condition would have developed even without the trauma, as bearing on the amount of damages, even though exact prediction of plaintiff's future apart from the accident might be difficult or impossible, *McCahill v New York Transp. Co.*, 201 NY 221, 94 NE 616 (1911); *Monahan v Weichert*, 82 AD2d 102, 442 NYS2d 295 (4th Dept 1981); *Bartolone v Jeckovich*, 103 AD2d 632, 481 NYS2d 545 (4th Dept 1984); *Steinhauser v Hertz Corp.*, supra. In such a case, the pattern charge should be amended to point out to the jury that in fixing damages it must take into consideration that the condition would have developed without the trauma, if it finds that to be the case.

The pre-existing physical condition of the plaintiff does not have to be known to the defendant in order for the plaintiff to recover, *Bernstein v Western Union Tel. Co.*, 174 Misc 74, 18 NYS2d 856 (Mun Ct 1940); Restatement of Torts 2d, Sec 461.

There must be a progressive, complete connection between the plaintiff's disease and the injuries inflicted by the defendant. The plaintiff is entitled to compensation for any damages which are the proximate result of the injuries, *Wagner v Mittendorf*, 232 NY 481, 134 NE 539 (1922), *Wood v New York Cent. & H.R.R. Co.*, 83 App Div 604, 82 NYS 160 (4th Dept 1903), aff'd, 179 NY 557, 71 NE 1142 (1904), *Dickerson v Essex*, 2 AD2d 516, 157 NYS2d 94 (3d Dept 1956), *Rasa v New York*, 95 NYS2d 291 (Sup 1950), mod on other grounds, 277 App Div 780, 97 NYS2d 520 (2d Dept 1950).

e. FRIGHT AND PHYSICAL CONSEQUENCES THEREOF

PJI 2:284. Damages—Personal Injury—Emotional Distress and Physical Consequences Thereof

If you find that the plaintiff is entitled to recover from the defendant, you must also include in your verdict damages for any mental suffering, emotional and psychological injury and any physical consequences resulting from the emotional distress caused by the wrongful act of the defendant.

Comment

Caveat: The pattern charge deals with damages for mental suffering, emotional and psychological injury and any physical consequences thereof; it is not a liability charge. Thus, the charge is not designed as a charge for a cause of action for negligent infliction of emotional distress (NIED), which is a claim for emotional harm stemming from a defendant's breach of a duty toward a plaintiff that caused the plaintiff to fear for his or her own safety, or unreasonably endangered the plaintiff's physical safety, see this Comment, *infra*. A charge under PJI 2:284, therefore, does not submit to the jury a claim for emotional distress premised on a plaintiff being placed negligently in another's zone of danger, *Motelson v Ford Motor Co.*, 101 AD3d 957, 957 NYS2d 341 (2d Dept 2012), *aff'd*, 24 NY3d 1025, 997 NYS2d 678, 22 NE3d 186 (2014) (citing PJI). Where the trial evidence presents questions of fact as to a cause of action for NIED, the court must craft a negligence charge to address the matter of liability, see *id.*

Bovsun v Sanperi, 61 NY2d 219, 473 NYS2d 357, 461 NE2d 843 (1984) and *Kennedy v McKesson Co.*, 58 NY2d 500, 462 NYS2d 421, 448 NE2d 1332 (1983), delineate the basic rules governing recovery for negligently caused emotional injury.

Ordinarily, when there is a duty owed by defendant to plaintiff, breach of that duty resulting directly in emotional harm is compensable even though no physical injury occurred, but only if defendant's breach of duty toward plaintiff caused plaintiff to fear for his or her own safety, *Graber v Bachman*, 27 AD3d 986, 812 NYS2d 659 (3d Dept 2006), or unreasonably endangered plaintiff's physical safety, *Kennedy v McKesson Co.*, 58 NY2d 500, 462 NYS2d 421, 448 NE2d 1332 (1983); see *Martinez v Long Island Jewish Hillside Medical Center*, 70 NY2d 697, 518 NYS2d 955, 512 NE2d 538 (1987); *Lando v State*, 39 NY2d 803, 385 NYS2d 759, 351 NE2d 426 (1976); *Johnson v State*, 37 NY2d 378, 372 NYS2d 638, 334 NE2d 590 (1975); *Battalla v State*, 10 NY2d 237, 219 NYS2d 34, 176 NE2d 729 (1961) (eliminating physical impact require-

ment); *Ferrara v Galluchio*, 5 NY2d 16, 176 NYS2d 996, 152 NE2d 249 (1958); *Stamm v PHH Vehicle Management Services, LLC*, 32 AD3d 784, 822 NYS2d 240 (1st Dept 2006) (no recovery where emotional injury resulted from child's growing up with disabled mother rather from child's observations during accident); *Doner v Ed Adams Contracting Inc.*, 208 AD2d 1072, 617 NYS2d 565 (3d Dept 1994) (where no physical injury inflicted, no recovery for mental anxiety occasioned by the fear of developing a disease unless there is evidence substantiating both actual exposure to the disease-causing agent and a likelihood of contracting the disease as a result); *Guialdo v Allen*, 171 AD2d 535, 567 NYS2d 255 (1st Dept 1991); *Prado v Catholic Medical Center of Brooklyn and Queens, Inc.*, 145 AD2d 614, 536 NYS2d 474 (2d Dept 1988); *Green v Leibowitz*, 118 AD2d 756, 500 NYS2d 146 (2d Dept 1986); but see *Bossio v Fiorillo*, 210 AD2d 836, 620 NYS2d 596 (3d Dept 1994). A claim for emotional harm stemming from a defendant's breach of a duty toward a plaintiff that caused the plaintiff to fear for his or her own safety, or unreasonably endangered the plaintiff's physical safety, is generally considered one for negligent infliction of emotional distress, *Graber v Bachman*, *supra*. A cause of action to recover damages for negligent infliction of emotional distress generally requires a plaintiff to show a breach of duty to him or her that unreasonably endangered his or her physical safety or caused him or her to fear for his or her own safety, *Silverman v Park Towers Tenants Corp.*, 206 AD3d 417, 169 NYS3d 61 (1st Dept 2022); *Borrerro v Haks Group, Inc.*, 165 AD3d 1216, 87 NYS3d 618 (2d Dept 2018); *Sacino v Warwick Valley Cent. School Dist.*, 138 AD3d 717, 29 NYS3d 57 (2d Dept 2016); see *Nainan v 715-723 Sixth Avenue Owners Corp.*, 177 AD3d 489, 113 NYS3d 50 (1st Dept 2019) (negligent infliction of emotional distress claim dismissed because plaintiff's allegations of defendant's conduct, while upsetting to plaintiff and not to be condoned, did not cause her to fear for her safety). However, damages for negligent infliction of emotional distress are not recoverable if no allegations of negligence appear in the pleadings, *Borrerro v Haks Group, Inc.*, *supra*. In *Salandy v Bryk*, 55 AD3d 147, 864 NYS2d 46 (2d Dept 2008), the court held that, where plaintiff alleged that she had been given a blood transfusion without her consent in violation of her beliefs as a Jehovah's Witness, plaintiff was entitled to seek recovery for emotional distress even without any indication that her physical safety had been endangered or that she had reason to fear for her physical safety, see *DiGeronimo v Fuchs*, 101 AD3d 933, 957 NYS2d 167 (2d Dept 2012).

Thus, plaintiff may not recover for emotional harm caused by "the violation of a duty to plaintiff which results in physical injury to a third person but only financial or emotional harm or both to the plaintiff," *Kennedy v McKesson Co.*, 58 NY2d 500, 462 NYS2d 421, 448 NE2d 1332 (1983); see *Becker v Schwartz*, 46 NY2d 401, 413 NYS2d 895, 386 NE2d 807 (1978); *Howard v Lecher*, 42 NY2d 109, 397 NYS2d 363, 366 NE2d 64 (1977); *Osborn v Andrus Pavilion of St. John's Riverside Hosp.*, 100 AD2d 840, 474 NYS2d 76 (2d Dept 1984); see also *Landon by Landon v New York Hosp.*, 101 AD2d 489, 476 NYS2d 303 (1st Dept 1984), *aff'd* for reasons in AD opinion, 65 NY2d 639, 491 NYS2d 607,

481 NE2d 239 (1985), (doctor owed no duty to parents to prevent emotional harm from either witnessing child's deterioration from meningitis or for fear that parents might have contracted meningitis where doctor failed to make timely diagnosis of child's meningitis). As a general proposition, in *Kennedy v McKesson Co.*, supra, the Court declared: "[T]here is no duty to protect from emotional injury a bystander to whom there is otherwise owed no duty, and even as to a participant to whom a duty is owed, such injury is compensable only when a direct, rather than a consequential, result of the breach."

In order to recover damages for pure emotional distress, the emotional disturbance must be serious and verifiable, *Bovsun v Sanperi*, 61 NY2d 219, 473 NYS2d 357, 461 NE2d 843 (1984), and plaintiffs must produce evidence which is sufficient to guarantee the genuineness of the claim, *Ornstein v New York City Health and Hospitals Corp.*, 10 NY3d 1, 852 NYS2d 1, 881 NE2d 1187 (2008); *Ajie Chen v Deliso*, 169 AD3d 761, 91 NYS3d 895 (2d Dept 2019) (negligent infliction of emotional distress claim dismissed for failure to plead facts that demonstrated some guarantee of genuineness, "an element of a cause of action for negligent infliction of emotional distress," citing *Orenstein v New York City Health and Hospitals Corp.*, supra); *Conway v Brooklyn Union Gas Co.*, 189 AD2d 851, 592 NYS2d 782 (2d Dept 1993); see *Johnson v State*, 37 NY2d 378, 372 NYS2d 638, 334 NE2d 590 (1975); *Iannotti v Amsterdam*, 225 AD2d 990, 639 NYS2d 537 (3d Dept 1996); see *Graber v Bachman*, 27 AD3d 986, 812 NYS2d 659 (3d Dept 2006) (plaintiff's affidavit and bill of particulars indicating that she suffered from emotional distress that was exacerbation of pre-existing post-traumatic stress disorder insufficient absent expert proof). The charge should not be given in the absence of any evidence that plaintiff's injury caused emotional or neurological sequelae, *Kelly v Tarnowski*, 213 AD2d 1054, 624 NYS2d 504 (4th Dept 1995). Plaintiff, who was asleep in a room approximately four feet from the site of the impact at the time defendant negligently drove his truck into her house, could not recover for her emotional distress, since she was not in the room where the accident occurred, she suffered no physical harm, she was not danger of any physical injury and she did not have a contemporaneous awareness of the truck as it headed for her home before the impact, *Graber v Bachman*, 27 AD3d 986, 812 NYS2d 659 (3d Dept 2006). Mere observation of the negligently caused physical damage to her home was insufficient to support a claim for emotional distress, see *Nicholson v A. Anastasio & Sons Trucking Co., Inc.*, 77 AD3d 1330, 909 NYS2d 244 (4th Dept 2010).

In order to maintain a cause of action for fear of developing cancer or some other physical disease following exposure to a toxic substance, a plaintiff must establish both that he was in fact exposed to the disease causing agent and that there is a rational basis for the plaintiff's fear of contracting the disease, *DiStefano v Nabisco, Inc.*, 2 AD3d 484, 767 NYS2d 891 (2d Dept 2003); *Prato v Vigliotta*, 253 AD2d 746, 677 NYS2d 386 (2d Dept 1998); *Dangler v Whitestown*, 241 AD2d 290, 672 NYS2d 188 (4th Dept 1998); *Wolff v A-One Oil, Inc.*, 216 AD2d 291, 627 NYS2d 788 (2d Dept 1995). A "rational basis" has been construed to

mean the clinically demonstrable presence of asbestos fibers in the plaintiff's body or some indication of asbestos-induced disease, such as physical manifestation of asbestos contamination, *DiStefano v Nabisco, Inc.*, *supra*; *Wolff v A-One Oil, Inc.*, *supra*; *Conway v Brooklyn Union Gas Co.*, 189 AD2d 851, 592 NYS2d 782 (2d Dept 1993); *Prato v Vigliotta*, *supra* (no clinical evidence of some physical manifestation of petroleum contamination). In an action brought under the Federal Employer's Liability Act (FELA), 45 USC §§ 51–60, a plaintiff who has work-related asbestosis may recover damages arising from a resulting fear of developing cancer, *Norfolk & Western Ry. Co. v Ayers*, 538 US 135, 123 S Ct 1210 (2003). However, the Supreme Court has held that such damages may be recovered only if the plaintiff proves that the fear of cancer was "genuine and serious," *CSX Transp., Inc. v Hensley*, 556 US 838, 129 S Ct 2139 (2009). There is no need to prove a physical manifestation of the emotional distress, *id.* For a charge on the issue to be used in FELA cases, see PJI 2:180.1. As a related matter, there is no independent cause of action for future medical monitoring where plaintiff's only injury is the financial burden associated with such monitoring, *Caronia v Philip Morris USA, Inc.*, 22 NY3d 439, 982 NYS2d 40, 5 NE3d 11 (2013). However, the expense of medically monitoring a plaintiff placed at risk for developing an illness or injury in the future may be recovered as consequential damages if plaintiff has sustained physical injury or damage to property, *id.*; *Ivory v International Business Machines Corp.*, 116 AD3d 121, 983 NYS2d 110 (3d Dept 2014).

The parents of a disabled child are not entitled to recover damages for emotional distress occasioned by the birth or premature death of the child, *Vaccaro v Squibb Corp.*, 52 NY2d 809, 436 NYS2d 871, 418 NE2d 386 (1980); *Becker v Schwartz*, 46 NY2d 401, 413 NYS2d 895, 386 NE2d 807 (1978); *Howard v Lecher*, 42 NY2d 109, 397 NYS2d 363, 366 NE2d 64 (1977); *Weed v Meyers*, 251 AD2d 1062, 674 NYS2d 242 (4th Dept 1998); see PJI 2:280. The parents may, however, recover damages measured by the cost of care and treatment of the child, *Becker v Schwartz*, *supra*; see *B.F. v Reproductive Medicine Associates of New York, LLP*, 30 NY3d 608, 69 NYS3d 543, 92 NE3d 766 (2017); *Foote v Albany Medical Center Hosp.*, 16 NY3d 211, 919 NYS2d 472, 944 NE2d 1111 (2011). Since parents have no legal obligation to support children who attain age 21, see Family Court Act § 513; Domestic Relations Law § 32; Social Services Law § 101, any recovery is limited to the extraordinary expenses incurred or to be incurred prior to the child's 21st birthday, *Bani-Esraili v Lerman*, 69 NY2d 807, 513 NYS2d 382, 505 NE2d 947 (1987). The existence of government programs that provide resources to a disabled child will not, as a matter of law, eliminate the parents' financial obligation for their child's extraordinary medical and educational expenses during the child's minority, *Foote v Albany Medical Center Hosp.*, *supra*; see *Mayzel v Moretti*, 105 AD3d 816, 962 NYS2d 656 (2d Dept 2013).

Endresz v Friedberg, 24 NY2d 478, 301 NYS2d 65, 248 NE2d 901 (1969) holds that "the mother may sue for any injury she sustained in her own person, including her suffering as a result of the stillbirth, and

the father for loss of her services and consortium,” see *Weintraub v Brown*, 98 AD2d 339, 470 NYS2d 634 (2d Dept 1983); *Friedman v Meyer*, 90 AD2d 511, 454 NYS2d 909 (2d Dept 1982); PJI 2:150, PJI 2:280, PJI 2:316, 2:318, 2:320. In *Broadnax v Gonzalez*, 2 NY3d 148, 777 NYS2d 416, 809 NE2d 645 (2004), the Court of Appeals overruled its prior decision in *Tebbutt v Virostek*, 65 NY2d 931, 493 NYS2d 1010, 483 NE2d 1142 (1985), and held that an expectant mother may recover damages for emotional distress resulting from a miscarriage or stillbirth that was caused by medical malpractice, even in the absence of independent physical injury. There is no recovery for psychological harm suffered by plaintiff as a result of alleged negligence in performing a surgical procedure to enhance her husband’s fertility, *Cohen v Cabrini Medical Center*, 94 NY2d 639, 709 NYS2d 151, 730 NE2d 949 (2000); see *Landon by Landon v New York Hosp.*, 65 NY2d 639, 491 NYS2d 607, 481 NE2d 239 (1985), *aff’d* for the reasons in the AD opinion 101 AD2d 489, 476 NYS2d 303.

Damages may be recoverable for emotional injuries suffered by a couple whose embryo was mistakenly placed in another woman, *Perry-Rogers v Obasaju*, 282 AD2d 231, 723 NYS2d 28 (1st Dept 2001). In *Perry-Rogers v Obasaju*, the couple suffered emotional harm caused by their having been deprived of the opportunity of experiencing pregnancy, prenatal bonding and the birth of their child, and by their separation from the child for more than four months after his birth, *id.* The couple, through medical affidavits attesting to objective manifestations of their trauma, evidenced the genuineness of their claim, and survived the defendants’ motion for summary judgment dismissing the complaint, *id.*

Although plaintiff may not generally recover for emotional harm caused by the defendant’s infliction of injuries upon another, *Kennedy v McKesson Co.*, 58 NY2d 500, 462 NYS2d 421, 448 NE2d 1332 (1983), if defendant’s negligent conduct “creating an unreasonable risk of bodily harm to a plaintiff . . . is a substantial factor in bringing about injuries to the plaintiff in consequence of shock or fright resulting from [plaintiff’s] contemporaneous observation of serious physical injury or death inflicted by the defendant’s conduct on a member of the plaintiff’s immediate family in [plaintiff’s] presence, the plaintiff may recover damages for such injuries,” *Bovsun v Sanperi*, 61 NY2d 219, 473 NYS2d 357, 461 NE2d 843 (1984), (“zone of danger” rule); see *Greene v Esplanade Venture Partnership*, 36 NY3d 513, 144 NYS3d 654, 168 NE3d 827 (2021); *Coleson v New York*, 24 NY3d 476, 999 NYS2d 810, 24 NE3d 1074 (2014); *Lafferty v Manhasset Medical Center Hospital*, 54 NY2d 277, 445 NYS2d 111, 429 NE2d 789 (1981); *Vaccaro v Squibb Corp.*, 52 NY2d 809, 436 NYS2d 871, 418 NE2d 386 (1980); *Cushing v Seemann*, 247 AD2d 891, 668 NYS2d 791 (4th Dept 1998) (triable issue of fact established concerning whether plaintiff has viable “zone of danger” claim for emotional injuries); *DiMarco v Supermarkets General Corp.*, 137 AD2d 651, 524 NYS2d 743 (2d Dept 1988); *Schram v Herkimer Memorial Hosp.*, 115 AD2d 882, 496 NYS2d 577 (3d Dept 1985); *Quijije v Lutheran Medical Center*, 92 AD2d 935, 460 NYS2d 600 (2d Dept 1983); Restatement, Torts Second, § 436. A plaintiff may be

placed in the zone of danger when he or she attempts to rescue a member of his or her immediate family, see *Wallace v Parks Corp.*, 212 AD2d 132, 629 NYS2d 570 (4th Dept 1995); *Hass v Manhattan and Bronx Surface Transit Operating Authority*, 204 AD2d 208, 612 NYS2d 134 (1st Dept 1994); *DiMarco v Supermarkets General Corp.*, 137 AD2d 651, 524 NYS2d 743 (2d Dept 1988); see also *Gonzalez v New York City Housing Authority*, 181 AD2d 440, 580 NYS2d 760 (1st Dept 1992) (plaintiff not in zone of danger; plaintiff tried to aid daughter but was restrained by another person before fainting). The *Bovsun* court explicitly left open the issue of the outer limits of the term “immediate family.” In *Greene v Esplanade Venture Partnership*, *supra*, the Court of Appeals held that a grandparent is in the “immediate family” of a grandchild, effectively overruling *Jun Chi Guan v Tuscan Dairy Farms*, 24 AD3d 725, 806 NYS2d 713 (2d Dept 2005), which held to the contrary. In *Greene*, the Court of Appeals continued to leave open the precise outer boundary of the immediate family, recognizing the relevancy of society’s changing perspective on familial relationships, *Greene v Esplanade Venture Partnership*, *supra*.

The Court of Appeals held that where plaintiff’s aunt was killed in her presence and plaintiff shared a long and strong emotional bond with the decedent, plaintiff may not bring suit as a bystander for the negligent infliction of emotional injuries, *Trombetta v Conkling*, 82 NY2d 549, 605 NYS2d 678, 626 NE2d 653 (1993). The Court held that the zone of danger rule did not extend to aunts, uncles, and other persons outside the immediate family sharing a strong emotional bond with the plaintiff, *id.* In *Santana v Salmeron*, 79 AD3d 1122, 913 NYS2d 584 (2d Dept 2010), the boyfriend of an injured woman was held to be outside the immediate family, and in *Thompson v Dhaiti*, 103 AD3d 711, 959 NYS2d 522 (2d Dept 2013), a step-parent was held to be outside of the immediate family for lack of a “blood relationship.”

For cases finding that plaintiff was not within the zone of danger, see *Coleson v New York*, 24 NY3d 476, 999 NYS2d 810, 24 NE3d 1074 (2014) (child, who was locked in broom closet during assault of his mother, and neither saw nor was immediately aware of assault at time it occurred, was not in zone of danger); *Feng v Metropolitan Transp. Authority*, 285 AD2d 447, 727 NYS2d 470 (2d Dept 2001) (parent, unaware of train’s approach, seated five feet from child struck by train car and pushed on to parent’s lap, was not within zone of danger); *Zea v Kolb*, 204 AD2d 1019, 613 NYS2d 88 (4th Dept 1994) (plaintiff was not in zone of danger simply because she could have been struck by a vehicle other than defendant’s or because she could have been struck by her daughter’s body which was thrown into the air upon impact); *Arroyo v New York City Health and Hospitals Corp.*, 163 AD2d 9, 558 NYS2d 8 (1st Dept 1990).

For cases finding no liability for emotional distress caused by physical injury to another, see *Johnson v Jamaica Hosp.*, 62 NY2d 523, 478 NYS2d 838, 467 NE2d 502 (1984) (no recovery for emotional distress caused to parent of child kidnapped from defendant’s hospital); *Kalina v*

General Hospital of City of Syracuse, 31 Misc2d 18, 220 NYS2d 733 (Sup 1961), *aff'd*, 18 AD2d 757, 235 NYS2d 808 (4th Dept 1962), *aff'd*, 13 NY2d 1023, 245 NYS2d 599, 195 NE2d 309 (1963) (Jewish parents of a son born in defendant hospital cannot recover when son not circumcised ritually); *Stamm v PHH Vehicle Management Services, LLC*, 32 AD3d 784, 822 NYS2d 240 (1st Dept 2006) (no recovery where emotional injury resulted from child's growing up with disabled mother rather than from child's observations during accident); *Oresky v Scharf*, 126 AD2d 614, 510 NYS2d 897 (2d Dept 1987) (no liability for emotional distress caused adult children by disappearance of senile parent from nursing home); *Smith v Long Island Jewish-Hillside Medical Center*, 118 AD2d 553, 499 NYS2d 167 (2d Dept 1986) (parents not entitled to recover for emotional distress caused by improper publication of article disclosing fatal illness of child); *Christopher v Kaftal*, 78 AD2d 945, 433 NYS2d 254 (3d Dept 1980) (husband not entitled to damage for emotional distress caused him by misdiagnosis of wife's condition, when the diagnosis is not communicated by doctor to husband).

However, in *Martinez v Long Island Jewish Hillside Medical Center*, 70 NY2d 697, 518 NYS2d 955, 512 NE2d 538 (1987), the Court permitted the recovery of damages for emotional distress sustained by a mother generally opposed to abortion as a consequence of an abortion she was induced to undergo as the result of negligent medical advice. While the duty that the Court in *Martinez* found was owed directly to the mother was a duty that seemingly was within the rule of *Kennedy v McKesson Co.*, 58 NY2d 500, 462 NYS2d 421, 448 NE2d 1332 (1983), *Martinez* limited *Kennedy* to situations where third persons are directly injured as a result of defendant's conduct. *Martinez* viewed the injury to the aborted fetus as only an indirect, albeit intended, result of the breach of duty owing the mother and, thus, held the emotional distress compensable. Likewise, where a physician negligently failed to detect plaintiff's pregnancy before prescribing a drug potentially harmful to the fetus and plaintiff, fearful that the fetus was harmed, underwent an abortion, plaintiff may recover for the physical and emotional injuries resulting from the abortion and the decision to have the abortion, *Lynch v Bay Ridge Obstetrical and Gynecological Associates, P.C.*, 72 NY2d 632, 536 NYS2d 11, 532 NE2d 1239 (1988). On the other hand, a woman who was erroneously advised that she was pregnant and who was treated for that condition for months is limited to recovery for pecuniary loss and may not, in the absence of any physical trauma, recover for emotional distress, *Lancellotti v Howard*, 155 AD2d 588, 547 NYS2d 654 (2d Dept 1989).

New York has historically recognized two categories of exceptions to the general rules; one dealing with mishandling of corpses, *Melfi v Mount Sinai Hosp.*, 64 AD3d 26, 877 NYS2d 300 (1st Dept 2009); see *Zhuangzi Li v New York Hosp. Medical Center of Queens*, 147 AD3d 1115, 48 NYS3d 225 (2d Dept 2017); *Schultes v Kane*, 50 AD3d 1277, 856 NYS2d 684 (3d Dept 2008), and the other with the conveying of misinformation regarding the death of a relative, *Johnson v State*, 37 NY2d 378, 372 NYS2d 638, 334 NE2d 590 (1975). A related basis for

recovery is the common-law right of sepulcher, which gives the next-of-kin the right to immediate possession of a decedent's body for preservation and burial, *Melfi v Mount Sinai Hosp.*, 64 AD3d 26, 877 NYS2d 300 (1st Dept 2009); *Zhuangzi Li v New York Hosp. Medical Center of Queens*, supra; see *Rugova v New York*, 132 AD3d 220, 16 NYS3d 233 (1st Dept 2015). Compensatory and punitive damages may be awarded against any person who unlawfully interferes with this right or improperly deals with the decedent's body, *Melfi v Mount Sinai Hosp.*, supra. In *Melfi v Mount Sinai Hosp.*, supra, the court discussed the background and history of the right of sepulcher and concluded that it "is less a quasi-property right and more the legal right of surviving next of kin to find 'solace and comfort' in the ritual of burial." Thus, a decedent's brother was permitted to seek compensatory damages for emotional injury from the hospital where the death occurred, where the hospital failed to identify or locate decedent's next of kin and sent the body to local college for use in embalming practice; the college thereafter sent the body for burial in a mass grave with 150 unclaimed bodies, *id.* Since an essential element of the cause of action is the next-of-kin's mental anguish, the claim does not accrue until the decedent's next-of-kin become aware of the interference with their right to possess the body for burial, *id.* For a charge and comment regarding a cause of action for breach of the common law right of sepulcher, see PJI 3:6.1.

It should be noted that a plaintiff who does not have a claim for loss of sepulcher and who has not alleged mishandling of a corpse or conveyance of misinformation about a death may not recover damages for emotional distress absent a showing that defendant breached a duty to plaintiff that unreasonably endangered him or her or caused him or her to fear for his or her safety, *Shepherd v Whitestar Development Corp.*, 113 AD3d 1078, 977 NYS2d 844 (4th Dept 2014).

Emotional distress suffered by one who was mistakenly informed that her mother had died is compensable, *Johnson v State*, 37 NY2d 378, 372 NYS2d 638, 334 NE2d 590 (1975), and in *Lando v State*, 39 NY2d 803, 385 NYS2d 759, 351 NE2d 426 (1976), the claimant was held entitled to damages for mental anguish suffered when, by reason of defendant's negligence, claimant was denied access to and control over the body of his dead daughter, see *Jorbel v Kopko*, 31 AD3d 611, 819 NYS2d 96 (2d Dept 2006) (recognizing cause of action belonging to decedent's next of kin for negligent infliction of emotional distress due to illegal autopsy); *Rivera v Wyckoff Heights Hosp.*, 184 AD2d 558, 584 NYS2d 648 (2d Dept 1992) (claim that hospital negligently misrepresented to parents that deceased child was alive held to state cause of action); *Holster v Ross*, 45 AD3d 640, 846 NYS2d 261 (2d Dept 2007) (unauthorized autopsy); *Cremonese v New York*, 23 AD2d 861, 259 NYS2d 235 (2d Dept 1965), rev'd on other grounds, 17 NY2d 22, 267 NYS2d 897, 215 NE2d 157 (1966) (same); *Weingast v State*, 44 Misc2d 824, 254 NYS2d 952 (Ct Cl 1964) (sister improperly buried); see also *Quiroz v Latulip*, 145 AD2d 978, 536 NYS2d 350 (4th Dept 1988) (right of decedent's relatives to possession of body not interfered with by refusal of county social services department to provide funds for

transporting body to Mexico for burial). However, the disinterment and reinterment of bodies that remained encased in their caskets does not constitute mishandling of a corpse, *Schultes v Kane*, 50 AD3d 1277, 856 NYS2d 684 (3d Dept 2008).

A violation of General Business Law § 395-b(2), which prohibits the installation of cameras in “any fitting room, restroom, toilet, bathroom, washroom, shower, or any room assigned to guests or patrons in a motel, hotel or inn,” may serve as a basis for a cause of action for the negligent infliction of emotional distress, *Salamone v Oak Park Marina, Inc.*, 259 AD2d 987, 688 NYS2d 362 (4th Dept 1999); *Dana v Oak Park Marina, Inc.*, 230 AD2d 204, 660 NYS2d 906 (4th Dept 1997). A plaintiff need not prove that he or she was in fact videotaped to recover because the duty is breached by the installation of the video camera, *Salamone v Oak Park Marina, Inc.*, *supra*.

To recover damages for the negligent infliction of emotional distress caused by the fear of contracting AIDS, plaintiff must establish a breach of a duty owed directly to him or her that either endangered the plaintiff's physical safety or caused the plaintiff to fear for his or her own physical safety, *Brown v New York City Health and Hospitals Corp.*, 225 AD2d 36, 648 NYS2d 880 (2d Dept 1996). Plaintiff must demonstrate that the defendant negligently breached that duty and that such breach was the proximate cause of the plaintiff's mental distress, *id*. In other words, plaintiff must establish that his or her fear of developing AIDS was a reasonable result of the defendant's wrongful conduct, *id*; see *Wolff v A-One Oil, Inc.*, 216 AD2d 291, 627 NYS2d 788 (2d Dept 1995) (fear of developing cancer must have a rational basis). In order to maintain a cause of action for damages due to the fear of contracting AIDS, a plaintiff who has not tested positive must offer proof of “actual exposure,” that is, proof of both a scientifically accepted method of transmission of the virus and that the source of the allegedly transmitted blood or fluid was in fact HIV positive, *Ornstein v New York City Health and Hospitals Corp.*, 10 NY3d 1, 852 NYS2d 1, 881 NE2d 1187 (2008); *Brown v New York City Health and Hospitals Corp.*, *supra*; see *Fosby v Albany Memorial Hosp.*, 252 AD2d 606, 675 NYS2d 231 (3d Dept 1998); *Bishop v Mount Sinai Medical Center*, 247 AD2d 329, 669 NYS2d 530 (1st Dept 1998); *Montalbano v Tri-Mac Enterprises of Port Jefferson, Inc.*, 236 AD2d 374, 652 NYS2d 780 (2d Dept 1997). Thus, in *Brown*, the court held that a pediatric nurse at defendant hospital who was stuck with a needle left in the crib of an HIV positive infant could maintain a cause of action for negligent infliction of emotional distress caused by her fear of contracting AIDS, *Brown v New York City Health and Hospitals Corp.*, *supra*.

In the absence of a likelihood of contracting AIDS, recovery for emotional distress will be denied as overly speculative and remote, *Bishop v Mount Sinai Medical Center*, 247 AD2d 329, 669 NYS2d 530 (1st Dept 1998); *Kaufman v Physical Measurements Inc.*, 207 AD2d 595, 615 NYS2d 508 (3d Dept 1994); *Hare v State*, 173 AD2d 523, 570 NYS2d 125 (2d Dept 1991). Thus, where plaintiff could not identify the

object that cut him with reasonable certainty and there was no evidence that whatever object cut him was contaminated, plaintiff could not maintain a cause of action based on his alleged fear of contracting AIDS, *Lombardo v New York University Medical Center*, 243 AD2d 688, 663 NYS2d 295 (2d Dept 1997). Similarly, a postal worker who had been pricked by a hypodermic needle protruding from an envelope was denied recovery for negligent infliction of emotional injury where he tested negative for AIDS on five separate occasions over an extended period of time and where neither the blood specimen nor the individual on whom the needle had been used had tested positive for HIV, *Kaufman v Physical Measurements Inc.*, *supra*; see *Schott v St. Charles Hosp.*, 250 AD2d 587, 672 NYS2d 393 (2d Dept 1998) (likelihood of HIV contamination too remote where plaintiff stuck with needle from recently laundered gown in radiology department and needle was not type ordinarily used for blood transfers); but see *Marchica v Long Island R. Co.*, 31 F3d 1197 (2d Cir 1994) (action under Federal Employer's Liability Act). However, a plaintiff who lacks the requisite proof of actual exposure to HIV may nevertheless pursue a claim to recover for negligent infliction of emotional distress where there exists an especial likelihood of genuine and serious mental distress, arising from special circumstances, which serves as a guarantee that the claim is not spurious, *Fosby v Albany Memorial Hosp.*, 252 AD2d 606, 675 NYS2d 231 (3d Dept 1998) (defendant hospital's unexplained refusal to provide plaintiff with information regarding needle with which she was pricked); *Schulman v Prudential Ins. Co. of America*, 226 AD2d 164, 640 NYS2d 112 (1st Dept 1996) (erroneous report of an HIV positive finding following blood analysis); see *Johnson v State*, 37 NY2d 378, 372 NYS2d 638, 334 NE2d 590 (1975) (erroneous report of mother's death).

With respect to damages for mental distress resulting from fear of contracting AIDS, there is no bright-line limit on the period for which such damages may be sought, *Ornstein v New York City Health and Hospitals Corp.*, 10 NY3d 1, 852 NYS2d 1, 881 NE2d 1187 (2008). Although a person is highly unlikely to become infected after testing negative for HIV for six months, a person may sustain cognizable damages from emotional distress even after the expiration of that period, *id.* For example, in *Ornstein*, the Court of Appeals recognized plaintiff's potential right to recover for emotional distress suffered beyond the six-month "window of anxiety" period where she claimed that she was unaware, and had not been told, that her risk would dramatically decrease once she tested negative for six months and she testified that her actual fear continued for about 18 months after exposure despite timely and consistent medical care. The *Ornstein* Court observed that a person exposed to HIV may suffer emotional injuries, such as post-traumatic stress disorder, that are distinct from fear of contracting HIV and that may continue even after that fear has dissipated. Nevertheless, the Court noted, a jury can conclude, based on the evidence, that a particular plaintiff's fear of contracting HIV ceased to be reasonable at some point and that, after that point, any residual anxiety was not sufficiently causally related to the underlying exposure to warrant recovery. Further, where plaintiff has unreasonably failed to take steps to alleviate

emotional distress, defendant can raise failure to mitigate damages, *id.* In recognizing a right to recover for injuries extending beyond the six-month period following exposure, the Ornstein Court implicitly rejected the holdings in *Sims v Comprehensive Community Development Corp.*, 40 AD3d 256, 835 NYS2d 163 (1st Dept 2007), and *Taormino v State*, 286 AD2d 490, 729 NYS2d 757 (2d Dept 2001), which adopted a rule precluding recovery for damages beyond the first six months after exposure. Additionally, the Ornstein Court explicitly left open whether the six-month limitation adopted in *Brown v New York City Health and Hospitals Corp.*, 225 AD2d 36, 648 NYS2d 880 (2d Dept 1996), which involved a plaintiff who refused to take HIV tests after the initial one she took on the day of exposure, was an appropriate “compromise.”

Domestic animals are personal property and there can be no recovery for emotional distress caused to the owner by defendant’s malicious or negligent destruction of an animal, *Jason v Parks*, 224 AD2d 494, 638 NYS2d 170 (2d Dept 1996); *Fowler v Ticonderoga*, 131 AD2d 919, 516 NYS2d 368 (3d Dept 1987).

f. EXPENSES INCURRED**PJI 2:285. Damages—Personal Injury—Expenses Incurred**

If you decide for plaintiff AB on the question of liability, AB will be entitled to recover the amount of reasonable expenditures for medical (and dental) services and medicines, including physician's charges, nursing charges, hospital expenses, diagnostic expenses and X-ray charges. Thus, you will include in your verdict the amount that you find from the evidence to be the fair and reasonable amount of the medical (and dental) expenses necessarily incurred as a result of AB's injuries. If you find that AB will need medical, hospital or nursing expenses in the future, you will include in your verdict an amount for those anticipated medical, hospital and nursing expenses which are reasonably certain to be incurred in the future and that were necessitated by plaintiff's injuries. If you find that AB is entitled to an award for medical (and dental) expenses to be incurred in the future, you will fix the dollar amount of expenses over the entire period that you find AB will incur such expenses and include that amount in your verdict. In your verdict you will state separately the amount awarded for medical (and dental) expenses to date, if any, and, if you make an award for future medical (and dental expenses), you will state in your verdict the amount awarded and the period of years over which such award is intended to provide compensation. Do not state an amount per year but only a total amount for the entire period.

Comment

See CPLR 4111(d), (f); *Schultz v Harrison Radiator Div. General Motors Corp.*, 90 NY2d 311, 660 NYS2d 685, 683 NE2d 307 (1997); *Feeney v Long Island R. Co.*, 116 NY 375, 22 NE 402 (1889); *Brown v State*, 184 AD2d 126, 592 NYS2d 533 (4th Dept 1992) (damages included costs of myoelectric and body-powered prosthesis, including annual maintenance and periodic replacement); *Jones v New York Cent. & H.R.R. Co.*, 99 App Div 1, 90 NYS 422 (3d Dept 1904). The foregoing

charge should be used in conjunction with PJI 2:301 relating to itemized verdicts and collateral source reduction principles in personal injury actions, including itemization of expenses; see also PJI 2:151A(1) and 2:151A(2) (itemized verdicts and collateral source reduction principles in medical, dental and podiatric malpractice actions).

The determination of the Workers' Compensation Board regarding the duration of a worker's disability is not entitled to preclusive effect in a personal injury action by the worker as to the matter of the worker's claim for compensation for medical expenses, *Auqui v Seven Thirty One Ltd. Partnership*, 22 NY3d 246, 980 NYS2d 345, 3 NE3d 682 (2013) (reversing upon reargument *Auqui v Seven Thirty One Ltd. Partnership*, 20 NY3d 1035, 962 NYS2d 579, 985 NE2d 889 (2013)); see also *Balcerak v Nassau*, 94 NY2d 253, 701 NYS2d 700, 723 NE2d 555 (1999) (no identity of issue between Workers' Compensation Board's determination that injury was work-related and application for enhanced benefits under General Municipal Law § 207-c).

Damages for future medical expenses are available regardless of whether the plaintiff's injuries are permanent, and it is error to charge that such damages may be awarded only upon a finding of permanence, *Gallagher v Samples*, 6 AD3d 659, 776 NYS2d 585 (2d Dept 2004); see *Rizzo v DeSimone*, 6 AD3d 600, 775 NYS2d 531 (2d Dept 2004).

There is no independent cause of action for medical monitoring where plaintiff's only injury is the financial burden associated with such monitoring, *Caronia v Philip Morris USA, Inc.*, 22 NY3d 439, 982 NYS2d 40, 5 NE3d 11 (2013). However, the expense of medically monitoring a plaintiff placed at risk for developing an illness or injury in the future may be recovered as consequential damages if plaintiff has sustained physical injury, id, or property damage, *Ivory v International Business Machines Corp.*, 116 AD3d 121, 983 NYS2d 110 (3d Dept 2014). To the extent that cases preceding *Caronia* suggest otherwise, they are not to be followed.

As to the necessity for and sufficiency of evidence concerning the necessity or reasonableness of expenses, see Annot: 26 ALR5th 401; 89 ALR3d 87; 12 ALR3d 1347; 20 ALR5th 1; as to the recovery of damages for the expenses of medical monitoring to detect or prevent future disease or condition, see *Caronia v Philip Morris USA, Inc.*, 22 NY3d 439, 982 NYS2d 40, 5 NE3d 11 (2013); as to the cost of future cosmetic plastic surgery as element of damages, see Annot: 88 ALR3d 117; as to the excessiveness or adequacy of damages, see *Nautel v Crates*, 173 AD2d 936, 569 NYS2d 800 (3d Dept 1991) (failure to award any future damages rendered award inadequate where plaintiff's collarbone was permanently disfigured); Annot: 15 ALR4th 294.

The jury should not be charged on future medical expenses unless there is evidence of the need for them and their reasonable costs, *Beyer v Murray*, 33 AD2d 246, 306 NYS2d 619 (4th Dept 1970); see *Stylianou v Calabrese*, 297 AD2d 798, 748 NYS2d 36 (2d Dept 2002). An award

for future medical expenses must be supported by evidence of the cost of such expenses and evidence of the necessity of such care, *Kavanaugh v Nussbaum*, 129 AD2d 559, 514 NYS2d 55 (2d Dept 1987), *aff'd* as mod on other grounds, 71 NY2d 535, 528 NYS2d 8, 523 NE2d 284 (1988); *Faas v State*, 249 AD2d 731, 672 NYS2d 145 (3d Dept 1998); *Cramer v Kuhns*, 213 AD2d 131, 630 NYS2d 128 (3d Dept 1995); *Liebman v Otis Elevator Co.*, 145 AD2d 546, 536 NYS2d 100 (2d Dept 1988); *Buggs v Veterans Butter & Egg Co.*, 120 AD2d 361, 502 NYS2d 12 (1st Dept 1986); see *Swedowski v Ethicon, Inc.*, 6 AD3d 1198, 775 NYS2d 718 (4th Dept 2004). An expert's testimony, "off the top of his head," that the plaintiff had a "50/50" chance of requiring spinal surgery was insufficient to support a jury's award for the cost of that surgery, *Baptiste v RLP-East, LLC*, 182 AD3d 444, 122 NYS3d 292 (1st Dept 2020).

An injured plaintiff's inability to perform household services is a quantitative economic loss separate and apart from pain and suffering, *Cramer v Kuhns*, 213 AD2d 131, 630 NYS2d 128 (3d Dept 1995); see *Compani v State*, 183 AD2d 966, 583 NYS2d 582 (3d Dept 1992). Damages for loss of household services should be awarded only for those services which are reasonably certain to be incurred and necessitated by plaintiff's injuries, *Schultz v Harrison Radiator Div. General Motors Corp.*, 90 NY2d 311, 660 NYS2d 685, 683 NE2d 307 (1997). In *Schultz*, the court held that since plaintiff did not incur any actual expenditures for household services between the accident and the date of verdict, having relied on the gratuitous assistance of relatives and friends, the jury improperly awarded plaintiff an award for household services for that period.

Plaintiff may not recover for expenses which are too remote to be considered as proximately resulting from the injuries sustained, see *Statler v George A. Ray Mfg. Co.*, 195 NY 478, 88 NE 1063 (1909) (expenses of trip to the South for benefit of plaintiff's health held to be too remote).

The availability of government aid programs to cover the medical and other expenses of disabled individuals does not preclude recovery of such expenses from a tortfeasor, *Mercado v Institute for Urban Family Health*, 39 AD3d 409, 835 NYS2d 87 (1st Dept 2007). A married person is entitled to recover for expenses he or she paid on his or her own credit or out of his or her own funds, see *De Fosse v Lake George Marine Industries*, 281 App Div 1002, 120 NYS2d 449 (3d Dept 1953); Annot: 21 ALR3d 1113. A married person who has paid expenses for an injured spouse is entitled to recover those expenses in a derivative action, see PJI 2:316. Vacatur of award for past pecuniary damages is appropriate where the plaintiff's parent, under no legal obligation to do so, paid the expenses upon which the award was based, *Weinstein v New York Hosp.*, 280 AD2d 333, 720 NYS2d 475 (1st Dept 2001). To recover such damages, the parent must assert a derivative claim in the plaintiff's action, *id*; see PJI 2:318. However, damages for an infant's future medical expenses belong to the infant and not to the parent, see PJI 2:318.

**PJI 2:285A. Damages—Personal Injury—Expenses
Incurred—No-Fault Law**

Plaintiff is entitled to recover for his reasonable expenditures for medicines and medical services, and for any other reasonable and necessary expenses incurred as a result of the accident involved in this case. Some part of these expenses are covered by the no-fault law, and some are not. Plaintiff may recover only for those expenses outside the coverage of the no-fault law. You are not to be concerned with the question whether a particular item is covered. You must decide the amounts of the medical and other expenses so that I can enter a judgment in the proper amount. With respect to medical expenses the evidence was [*Here marshall the evidence on medical expense incurred*].

You must answer the following questions:

1. What is the amount of medical expenses incurred in the year following the accident?
2. What is the amount of medical expenses incurred or that will hereafter be incurred after that year, but which were ascertainable by the end of the first year following the accident?
3. What is the amount of other medical expenses, if any, not included in the answer to the first two questions?

In addition to medical expenses, plaintiff is entitled to recover for other reasonable and necessary expenses incurred. [*Here marshall the evidence as to other expenses incurred*].

You are to answer the following questions (with respect to each of the items for which plaintiff claims):

1. Did the plaintiff incur a reasonable and necessary expense for (*specify the item*)?
2. What was the amount per day charged for that service?

3. On how many days prior to and including
[Here specify the date falling one year after the accident.]
did plaintiff receive that service?

4. On how many days after *(the day given in 3)*
did plaintiff receive the service?

You will be given a form on which the questions are written. Try to make your answer unanimous; but if all of you cannot agree, when five of you have reached agreement, that agreement will constitute the answer. The foreman must then fill in the answer in the space left for that purpose and each of you must then sign his name in the appropriate place on the form.

Comment

[See also Introductory Statement, to this division.]

Based on Ins. L. §§ 5102(a), 5104(a), (c) to be used in a case covered by the no-fault law where there is a claim for recovery of economic loss greater than basic economic loss. This charge is to be used in conjunction with the charge at PJI 2:280, 2:280.1, 2:280.2 (pain and suffering), and is meant to be followed by the charge at PJI 2:290 (lost earnings).

Service charges for the health services listed in Ins. L. § 5102(a)(1) will be limited to the amounts permissible under Workers' Compensation Law schedules for industrial accidents, Ins. L. § 5108(a). Ins. L. § 5108(c) provides that the provider of health services specified in Ins. L. § 5102(a)(1) may not demand or request any payment in addition to those established pursuant to Ins. L. § 5108(a).

A special verdict seems best adopted to the decision of the claim for economic loss because the statutory method of determining "basic economic loss" begs attempts to put the law into terms "easily understandable to the lay Jury," see PJI3d 1:1 at 1. When the special verdict form is prepared for use, signature lines should be included after each question, see Comment, PJI 1:95. The completed special verdict form should be marked as a Court exhibit.

The special verdict suggested in the charge avoids the necessity of explaining the complexities of the no-fault law to the jury, and simply requires the jury to provide the court with the data that the court can then use to make the arithmetical computations necessary to determine whether there is a compensable loss greater than "basic economic loss," Ins. L. §§ 5102(a), 5104(a); see *Johnston v Colvin*, 145 AD2d 846, 535 NYS2d 833 (3d Dept 1988) (citing PJI); *Owens v State*, 96 AD2d 630, 464 NYS2d 870 (3d Dept 1983).

In the case of a covered plaintiff suing a covered defendant, the first-party benefits received or to be received by the plaintiff are to be deducted from the recovery available in the tort suit by the operation of Ins. L. § 5104(a), which makes "basic economic loss" unrecoverable by such a plaintiff, *Johnston v Colvin*, 145 AD2d 846, 535 NYS2d 833 (3d Dept 1988) (citing PJI); *McDonnell v Best Bus Co., Inc.*, 97 AD2d 433, 467 NYS2d 401 (2d Dept 1983). As there can be no recovery for basic economic loss, there is no reason for application of the collateral source rule, Comment to PJI 2:301, except where there is a suit by a derivative plaintiff (parent of injured infant or spouse of adult injured plaintiff) for medical expenses. The derivative action is not covered by Ins. L. § 5104(a), and there is no automatic exclusion of first-party benefits from the derivative recovery. However, it has been held that the amount of such first-party payments should be deducted from the sum recoverable by the derivative plaintiff, *Robinson v Sparta Taxi Inc.*, 80 Misc2d 525, 363 NYS2d 235 (Sup 1975). In such a case proof of the amount of benefits received should be taken out of the presence of the jury in accordance with CPLR 4533-b, and then the deduction from the verdict should be made by the Court. This avoids the possible prejudice which might result from introducing proof before the jury of the receipt of first-party benefits from an insurance company and the possible introduction of comments concerning receipt of first-party benefits in summation.

In all other no-fault contexts these problems are avoided because the receipt of first-party benefits has no relevance to the case in view of the fact that the amount of such benefits will not be included in the ultimate damage award, which will compensate only for damage elements not recoverable under the first-party system. Evidence of plaintiff's receipt of first-party benefits should be excluded, defendant should not be permitted to go into this matter on cross-examination of the plaintiff or a medical expert, and no comment on receipt of first-party benefits should be permitted in summation. The complementary operation of the fault and no-fault systems is covered in the damage charges of the Court and no evidence of receipt of first-party benefits is needed in the case. This same principle is operative when a covered plaintiff sues an uncovered defendant, for, in such a case, it is the clear intention of the statute that the plaintiff recover all damages from defendant without deduction for first-party benefits received, Ins. L. § 5104(a) and (b). In such a case duplication of benefits is avoided by Ins. L. § 5114(b) which places a lien upon plaintiff's recovery in favor of the first-party insurer in the amount of the benefits paid, *Biette v Baxter*, 57 NY2d 698, 454 NYS2d 535, 440 NE2d 534 (1982); see *Hyde v North River Ins. Co.*, 92 AD2d 1001, 461 NYS2d 468 (3d Dept 1983) (no lien when damages awarded solely for pain, suffering and future economic loss); *Westchester Fire Ins. Co. v Nesbitt*, 86 AD2d 23, 449 NYS2d 102 (4th Dept 1982) (if owner of vehicle has provided no-fault coverage, driver of vehicle is a "covered person" even if the driver has not provided no-fault coverage. Therefore no-fault carrier has no lien on recovery in action by "covered" pedestrian against "covered" driver); *Szeszku v*

Government Emp. Ins. Co., 87 Misc2d 22, 384 NYS2d 652 (Sup 1976) (no lien on arbitration award sought under uninsured motorist endorsement.) However, a workers' compensation carrier that has made payments for a job connected accident has a lien upon the proceeds of a judgment obtained by the employee even if the judgment did not include recovery for "basic economic loss," *Granger v Urda*, 44 NY2d 91, 404 NYS2d 319, 375 NE2d 380 (1978); *Stedman v New York*, 107 AD2d 600, 483 NYS2d 1013 (1st Dept 1985); *Orth v Coffey*, 70 AD2d 614, 416 NYS2d 324 (2d Dept 1979). Further, the no fault law, Ins. L. § 5102(b)(2), allows the deduction of the workers' compensation benefits from the insurer's payment of "basic economic loss," *Granger v Urda*, supra (urging legislative change); see also *Rabideau v Aetna Cas. & Sur. Co.*, 54 AD2d 1055, 388 NYS2d 719 (3d Dept 1976) (if award under uninsured motorist clause duplicates no-fault benefits, insurer is entitled to reduce uninsured motorist award by the amount of the no-fault benefits). *Grello v Daszykowski*, 44 NY2d 894, 407 NYS2d 633, 379 NE2d 161 (1978), modifies *Granger v Urda*, supra, by holding that the no fault carrier must reimburse the injured party to the extent of the lien recovered by the workers' compensation carrier; see *Mora v Ortiz*, 75 AD2d 563, 427 NYS2d 415 (1st Dept 1980) (same rule obtains if injured party settles his claim). But the injured party cannot obtain his reimbursement from the third party tortfeasor, *Ortiz v Queens Transit Corp.*, 70 AD2d 334, 420 NYS2d 878 (1st Dept 1979). If an employee, while operating his employer's vehicle, is injured by a third party, the injured employee may seek first party benefits under the policy covering the employer's vehicle, the coincident coverage afforded by workers' compensation notwithstanding, *Ryder Truck Lines, Inc. v Maiorano*, 44 NY2d 364, 405 NYS2d 666, 376 NE2d 1311 (1978). If an employee, while operating his employer's vehicle, is injured in an accident not involving another, the employee may recover first party benefits under the policy covering the employer's vehicle, the coincident coverage afforded by workers' compensation notwithstanding, *Ryder Truck Lines, Inc. v Maiorano*, supra (again suggesting the need for legislative change). The Legislature, in response to *Granger v Urda*, supra and *Grello v Daszykowski*, supra, by L. 1978, c. 572, eff. 7/1/78, amended WCL §§ 29; 227; and former Ins. L. § 674, now Ins. L. § 5105 to:

"require a workmen's compensation carrier which recovered a lien against an insured's recovery in an automobile liability action, or obtained a recovery in such an action as an assignee of the insured, between February 1, 1974 (the date that no-fault insurance became effective) and July 1, 1978, to notify the insured of the responsibility of the automobile insurance carrier to reimburse the insured to the extent that the lien represents first party benefits under the no-fault policy.

"provide that the workmen's compensation carrier shall not have a lien on the proceeds of a recovery in an action arising out of an automobile accident and may not institute an action for such a recovery as assignee of the insured.

"authorize the workmen's compensation carrier to recover

benefits paid to a claimant from the auto insurance carrier of a negligent third party under the inter-company loss transfer provisions of § 674 [now § 5105] of the Insurance Law; provided that at least one of the vehicles involved in the accident weighed more than 6500 lbs., or was a motor vehicle used principally for the transportation of persons for hire." Exec. Dept. Memo, 1978 McKinney's Sess. L. News, A-333. This legislation apparently does not affect the holding in *Rabideau v Aetna Casualty and Surety Co.*, *supra*.

g. LOSS OF EARNINGS

PJI 2:290. Damages—Personal Injury—Loss of Earnings—In General

Plaintiff AB is entitled to be reimbursed for any earnings lost as a result of (his, her) injuries caused by Defendant CD's negligence from the time of the accident to today. Moreover, if you find that as a result of those injuries AB has suffered a reduction in (his, her) capacity to earn money in the future, then AB is also entitled to be reimbursed for loss of future earnings.

Any award you make for earnings lost to date must not be the result of speculation; any award must be calculated from the number of days that you find AB was disabled from working by the injuries and the amount that you find AB would have earned had (he, she) not been disabled.

Any award you make for reduction of AB's earning capacity in the future should be determined on the basis of AB's earnings before the accident, the condition of AB's health, (his, her) prospects for advancement and the probabilities with respect to future earnings before the accident, the extent to which you find that those prospects or probabilities have been reduced by the injuries, the length of time that you find AB would reasonably be expected to work had (he, she) not been injured, the nature and hazards of AB's employment and any other circumstances which would have an effect on AB's earning capacity.

AB is now [*insert number*] years of age and has a (life expectancy according to the mortality tables, work life expectancy according to the work life expectancy tables in evidence) of [*insert number*] more years. Such tables are, of course, nothing more than statistical averages. They neither assure that AB will have the span of (working) life I have given you nor assure that AB's span will not be greater.

The figures I have given you are not binding upon you, but may be considered by you together with your own experience and the evidence you have heard in determining what AB's (life, work life) expectancy is. If you find that AB is entitled to an award for reduction in earning capacity in the future, you will fix the dollar amount of such reduction over the entire period that you find AB will suffer such reduction and include that amount in your verdict. In your verdict you will state separately the amount awarded for loss of earnings to date, if any, and, if you make an award for loss of future earnings, you will state in your verdict the amount awarded and the period of years over which such award is intended to provide compensation. Do not state an amount per year but only a total amount for the entire period.

Comment

Based on *Ehrgott v New York*, 96 NY 264 (1884); *Sheehan v Edgar*, 58 NY 631 (1874); *Toscarella v Purdy*, 217 AD2d 815, 629 NYS2d 833 (3d Dept 1995); *Calo v Perez*, 211 AD2d 607, 621 NYS2d 370 (2d Dept 1995); *Clanton v Agoglitta*, 206 AD2d 497, 615 NYS2d 68 (2d Dept 1994); *Butts v Braun*, 204 AD2d 1069, 612 NYS2d 520 (4th Dept 1994); *Doe v State*, 189 AD2d 199, 595 NYS2d 592 (4th Dept 1993); *Balmaceda v Perez*, 182 AD2d 983, 581 NYS2d 925 (3d Dept 1992); *Kirschhoffer v Van Dyke*, 173 AD2d 7, 577 NYS2d 512 (3d Dept 1991); *Melito v Genesee Hosp.*, 167 AD2d 842, 561 NYS2d 951 (4th Dept 1990) (citing PJI) (jury may properly consider plaintiff's age, health condition and other factors predating the injury); *Grayson v Irvmar Realty Corp.*, 7 AD2d 436, 184 NYS2d 33 (1st Dept 1959); see *Shubbuck v Conners*, 15 NY3d 871, 913 NYS2d 120, 939 NE2d 137 (2010); *Gombert v New York Cent. & H.R.R. Co.*, 195 NY 273, 88 NE 382 (1909); *Behrens v Metropolitan Opera Ass'n, Inc.*, 18 AD3d 47, 794 NYS2d 301 (1st Dept 2005) (citing PJI) (lost earnings recoverable although payable to single-owner S corporation); *Eichler v New York*, 196 AD2d 524, 601 NYS2d 318 (2d Dept 1993); *Restatement, Second, Torts*, § 924(b); 36 NYJur2d, *Damages* §§ 68, 69. The right to recover loss of earnings to the date of death survives the death of the injured person, *EPTL* § 11-3.2; *Holmes v New York*, 269 App Div 95, 54 NYS2d 289 (2d Dept 1945), *aff'd*, 295 NY 615, 64 NE2d 449 (1945).

Loss of earnings must be established with reasonable certainty focusing on the plaintiff's earning capacity before and after the accident, *Calo v Perez*, 211 AD2d 607, 621 NYS2d 370 (2d Dept 1995); *Clanton v Agoglitta*, 206 AD2d 497, 615 NYS2d 68 (2d Dept 1994); *Butts v Braun*, 204 AD2d 1069, 612 NYS2d 520 (4th Dept 1994); see

Shubbuck v Conners, 15 NY3d 871, 913 NYS2d 120, 939 NE2d 137 (2010); *Whalen v New York*, 270 AD2d 340, 704 NYS2d 305 (2d Dept 2000) (plaintiff met burden of proof with respect to lost earnings by submitting evidence that included documentation of wages received by union workers at plaintiff's pay scale and documentation of his employment during period immediately preceding accident). It is plaintiff's burden to establish his or her own loss of "actual" past earnings, for example, by submitting tax returns and/or other relevant documentation, *Papa v New York*, 194 AD2d 527, 598 NYS2d 558 (2d Dept 1993); see *Shubbuck v Conners*, supra; *Toscarelli v Purdy*, 217 AD2d 815, 629 NYS2d 833 (3d Dept 1995); *Balmaceda v Perez*, 182 AD2d 983, 581 NYS2d 925 (3d Dept 1992). In calculating lost earnings, the jury may consider the value of fringe benefits, as well as increases in earnings resulting from promotions that plaintiff would logically have received, *Paz v New York*, 185 AD2d 793, 586 NYS2d 970 (1st Dept 1992); see *Reid v Weir-Metro Ambulance Service, Inc.*, 191 AD2d 309, 595 NYS2d 40 (1st Dept 1993). However, if fringe benefits are to be considered, there must be evidence as to the nature and value of such benefits, *Toscarelli v Purdy*, supra (testimony that plaintiff received "medical benefits and meals" insufficient to support award). An award may include recovery for diminution of pension benefits if established with reasonable certainty based on plaintiff's earning ability both before and after the accident, *Lamot v Gondek*, 163 AD2d 678, 558 NYS2d 284 (3d Dept 1990). Lost earnings, in the case of the self-employed, means net profits, *Young v Utica Mut. Ins. Co.*, 86 AD2d 764, 448 NYS2d 83 (4th Dept 1982); see also *Bielich v Winters*, 95 AD2d 750, 464 NYS2d 189 (1st Dept 1983).

Although administrative agency findings of fact are generally entitled to preclusive effect in subsequent civil proceedings, the findings of the Workers' Compensation Board regarding the duration of a claimant's work-related disability is not binding in the claimant's subsequent plenary personal injury action, since the focus of the workers' compensation inquiry is the claimant's inability to work while the focus of the negligence action is broader, encompassing all of the enduring consequences of the accident (including lost income and future medical expenses), *Auqui v Seven Thirty One Ltd. Partnership*, 22 NY3d 246, 980 NYS2d 345, 3 NE3d 682 (2013) (reversing upon reargument *Auqui v Seven Thirty One Ltd. Partnership*, 20 NY3d 1035, 962 NYS2d 579, 985 NE2d 889 (2013)); see also *Balcerak v Nassau*, 94 NY2d 253, 701 NYS2d 700, 723 NE2d 555 (1999) (no identity of issue between Workers' Compensation Board's determination that injury was work-related and application for enhanced benefits under General Municipal Law § 207-c).

The evidence should be confined to the value of plaintiff's individual services during the time he or she was unable because of the injuries to perform such services, *Weir v Union Ry. Co. of New York City*, 188 NY 416, 81 NE 168 (1907). A plaintiff unemployed at the time of injury may prove his or her prior earnings and his or her expectation of employment, *Spence v State*, 6 Misc2d 1029, 165 NYS2d 896 (Ct Cl 1957), mod, 6 AD2d 1024, 178 NYS2d 45 (4th Dept 1958).

Loss of future earnings is a proper measure of damages, even as to an infant plaintiff, *Kavanaugh v Nussbaum*, 129 AD2d 559, 514 NYS2d 55 (2d Dept 1987), *aff'd* as *mod* on other grounds, 71 NY2d 535, 528 NYS2d 8, 523 NE2d 284 (1988); *Sullivan v Locastro*, 178 AD2d 523, 577 NYS2d 631 (2d Dept 1991); *Johnston v Colvin*, 145 AD2d 846, 535 NYS2d 833 (3d Dept 1988) (citing PJI); *Campolo by Campolo v Yonkers*, 137 AD2d 480, 524 NYS2d 229 (2d Dept 1988); *Ledogar v Giordano*, 122 AD2d 834, 505 NYS2d 899 (2d Dept 1986). However, an award for loss of future earnings may not be based upon speculation, *Davis v New York*, 264 AD2d 379, 693 NYS2d 230 (2d Dept 1999); *Eichler v New York*, 196 AD2d 524, 601 NYS2d 318 (2d Dept 1993); *Johnson v Danly Mach. Specialties, Inc.*, 183 AD2d 592, 584 NYS2d 26 (1st Dept 1992), but must be established with reasonable certainty, *Shubbuck v Conners*, 15 NY3d 871, 913 NYS2d 120, 939 NE2d 137 (2010); *Novko v State*, 285 AD2d 696, 728 NYS2d 259 (3d Dept 2001). Thus, while the value of future fringe benefits may be considered, *Reid v Weir-Metro Ambulance Service, Inc.*, 191 AD2d 309, 595 NYS2d 40 (1st Dept 1993); see *Rohring v Niagara Falls*, 192 AD2d 228, 601 NYS2d 740 (4th Dept 1993), *aff'd*, 84 NY2d 60, 614 NYS2d 714, 638 NE2d 62 (1994), where plaintiff was not a union member, it was too speculative to permit consideration of hypothetical union benefits that plaintiff would have received had he joined, *Hackworth v WDW Development, Inc.*, 224 AD2d 265, 637 NYS2d 720 (1st Dept 1996).

To establish with reasonable certainty lost future earnings, the plaintiff can adduce evidence permitting a comparison of the plaintiff's pre- and post-accident income or a comparison of the plaintiff's post-accident income with the income of similarly situated employees of the plaintiff's employer, *Shubbuck v Conners*, 15 NY3d 871, 913 NYS2d 120, 939 NE2d 137 (2010). Where the first method is used, the award must be predicated upon an assessment of plaintiff's pre-accident earning capacity, *Shubbuck v Conners*, *supra*; see *Butts v Braun*, 204 AD2d 1069, 612 NYS2d 520 (4th Dept 1994). An award for future lost earnings should be based upon plaintiff's occupation at time of her illness, *Marmo v Southside Hosp.*, 143 AD2d 891, 533 NYS2d 402 (2d Dept 1988). Thus, evidence that, after the accident, plaintiff undertook studies in order to pursue a new career is speculative on the issue of future earnings, *Johnson v Danly Mach. Specialties, Inc.*, 183 AD2d 592, 584 NYS2d 26 (1st Dept 1992). On the other hand, where plaintiff was a homemaker who was not employed at the time of the accident, but was qualified for employment without need for further training, had a prior work history, intended to return to work when her child began school, and positions were available to her, an award for loss of future earnings was appropriate, *Kirschhoffer v Van Dyke*, 173 AD2d 7, 577 NYS2d 512 (3d Dept 1991).

Where plaintiff returns to work after the accident but in a different job, in order to recover for loss of future earnings, plaintiff must show that the earnings in the new employment will be less than the earnings in the former employment, *Johnson v Danly Mach. Specialties, Inc.*, 183 AD2d 592, 584 NYS2d 26 (1st Dept 1992).

A tort victim suing for damages for permanent injuries is permitted to base the recovery on prospective earnings for the balance of the plaintiff's life expectancy at the time of the injury undiminished by any shortening of that expectancy as a result of the injury, *Doe v State*, 189 AD2d 199, 595 NYS2d 592 (4th Dept 1993). Thus, it is error to limit a plaintiff's future economic loss to post-injury life expectancy, *id.* Where proof in the record permits the loss to be ascertained with reasonable certainty, damages attributable to an injured person's lost earning capacity due to injury must be awarded directly to that person during his or her lifetime using a pre-injury life expectancy, *id.*

Although some degree of speculation is involved because of the unpredictability of some of the factors which must be taken into account in fixing damages, it is, nevertheless, proper for the jury to consider such factors, *Walther v News Syndicate Co.*, 276 App Div 169, 93 NYS2d 537 (1st Dept 1949); *Rothman v St. Barnabas Hospital for Chronic Diseases*, 20 AD2d 531, 244 NYS2d 791 (1st Dept 1963); *Lucivero v Long Island R. Co.*, 22 Misc2d 674, 200 NYS2d 728 (Sup 1960).

Awards for lost earnings and loss of future earnings must be itemized in a special verdict, CPLR 4111. The pattern charge should be used in conjunction with the pattern charges and verdict forms pertaining to special verdicts, see PJI 2:301 (special verdicts in personal injury actions generally); PJI 2:151A(1) and 2:151A(2) (special verdicts in medical, dental and podiatric malpractice cases). Although CPLR 4111(d) and (f) refer to "loss of earnings" and "impairment of earning ability" as separate items of damage, there is little, if any, distinction between the two items and, therefore, it is erroneous to identify both as separate items of past damages or to identify both as separate items of future damages, see *Taylor v Henderson*, 175 AD2d 590, 573 NYS2d 793 (4th Dept 1991); see also *Campbell v Elmira*, 198 AD2d 736, 604 NYS2d 609 (3d Dept 1993), *aff'd*, 84 NY2d 505, 620 NYS2d 302, 644 NE2d 993 (1994). An award for past loss of earnings would ordinarily be inclusive of past impairment of earning ability. Likewise, an award for future loss of earnings would ordinarily be inclusive of future impairment of earning ability.

The extent of plaintiff's loss of earnings is a question peculiarly for the jury, *Frey v Gerhard Lang Brewery*, 256 App Div 1054, 10 NYS2d 874 (4th Dept 1939), but in the absence of evidence as to what plaintiff's loss was, the issue should not be submitted to the jury, *Kane v Metropolitan St. Ry. Co.*, 88 NYS 162 (AppT 1904), *n o r.* An award may be set aside where the evidence as to loss of earnings is too speculative, *Toscarelli v Purdy*, 217 AD2d 815, 629 NYS2d 833 (3d Dept 1995) (implicit finding by jury that plaintiff would continue working as full-time nightclub entertainer for his entire 33 year life expectancy was "shocking" and was set aside); *Johnson v Danly Mach. Specialties, Inc.*, 183 AD2d 592, 584 NYS2d 26 (1st Dept 1992) (where plaintiff was employed as a press operator at time of accident and returned to work as a truck and forklift operator, award for future earnings was speculative in absence of showing that plaintiff would have earned more as press

operator or in a new career in television production had he continued his studies in the career); *Naveja v Hillcrest General Hosp.*, 148 AD2d 429, 538 NYS2d 584 (2d Dept 1989) (award should not have been based on plaintiff's prospective employment as a laboratory technician where plaintiff never worked in that position, did not have the necessary degree, and was not actively pursuing such a degree at the time of the injury); see *Galaz v Sobel & Kraus, Inc.*, 280 AD2d 427, 721 NYS2d 623 (1st Dept 2001) (plaintiff's testimony concerning loss of future income properly precluded as too speculative); *Eichler v New York*, 196 AD2d 524, 601 NYS2d 318 (2d Dept 1993); *Stringile v Rothman*, 142 AD2d 637, 530 NYS2d 838 (2d Dept 1988); *Wanamaker v Pietraszek*, 107 AD2d 1020, 486 NYS2d 523 (4th Dept 1985). If insufficient proof is presented, only nominal damages are recoverable, *Baker v Manhattan Ry. Co.*, 118 NY 533, 23 NE 885 (1890); *Leeds v Metropolitan Gas-Light Co.*, 90 NY 26 (1882); *Kies v Binghamton R. Co.*, 177 App Div 242, 163 NYS 736 (3d Dept 1917).

As to the use of expert testimony to establish future earning potential, see *Dennis v Dachs*, 85 AD2d 223, 88 AD2d 511, 448 NYS2d 1 (1st Dept 1982); *Stanley v Ford Motor Co.*, 49 AD2d 979, 374 NYS2d 370 (3d Dept 1975); PJI 1:90. Such a damage element may be proven through the testimony of an economist, but a vocational rehabilitation expert is ordinarily not qualified to give an opinion on the subject, *Smith v M.V. Woods Const. Co.*, 309 AD2d 1155, 764 NYS2d 749 (4th Dept 2003).

As to the sufficiency of evidence of impairment of earning capacity, see Annot: 18 ALR3d 88; see also Annot: 45 ALR3d 345.

Plaintiff has a duty to mitigate loss of earnings by reasonably seeking vocational rehabilitation, *Bell v Shopwell, Inc.*, 119 AD2d 715, 501 NYS2d 129 (2d Dept 1986); see *Aman v Federal Exp. Corp.*, 267 AD2d 1077, 701 NYS2d 571 (4th Dept 1999). However, there is no requirement that the issue of mitigation be presented as a separate item on the special verdict, *Rohring v Niagara Falls*, 192 AD2d 228, 601 NYS2d 740 (4th Dept 1993), *aff'd*, 84 NY2d 60, 614 NYS2d 714, 638 NE2d 62 (1994).

Evidence as to inflation is admissible on the issue of future economic losses, including loss of earnings, *Brown v State*, 184 AD2d 126, 592 NYS2d 533 (4th Dept 1992); *Andrialis by Andrialis v Snyder*, 159 Misc2d 419, 603 NYS2d 670 (Sup 1993); *Gambardelli v Allstate Overhead Garage Doors, Inc.*, 150 Misc2d 395, 576 NYS2d 770 (Sup 1991); see also Annot: 21 ALR4th 21. Prior to the enactment of CPLR Articles 50-A and 50-B (as to which see Comment to PJI 2:277), the issue of inflation was regarded as a factor to offset demands that awards for future damages be reduced to present value, see *Spadaccini v Dolan*, 63 AD2d 110, 407 NYS2d 840 (1st Dept 1978). However, to accommodate the workings of CPLR Articles 50-A and 50-B, the jury must be instructed to set forth the "full amount of future damages" in the verdict sheet, without reduction to present value, CPLR 4111(d) (medical, dental and podiatric malpractice cases), (f) (general tort litigation). Pur-

suant to Articles 50-A and 50-B, if future damages exceed \$250,000, judgment is not for a lump sum for such excess but for the present value of an annuity policy that will provide for the payment of the future damages in periodic installments, CPLR 5031(e); 5041(e); *Desiderio v Ochs*, 100 NY2d 159, 761 NYS2d 576, 791 NE2d 941 (2003). While the statutory provisions require that each subsequent annual installment be increased by 4% over the previous year's payment, the statutory provision for an annual adjustment of 4% does not preclude jury consideration of inflation and its impact on the amount of future damages to be awarded, *Bryant v New York City Health and Hospitals Corp.*, 93 NY2d 592, 695 NYS2d 39, 716 NE2d 1084 (1999); *Schultz v Harrison Radiator Div. General Motors Corp.*, 90 NY2d 311, 660 NYS2d 685, 683 NE2d 307 (1997); *Brown v State*, *supra*; *Andrialis by Andrialis v Snyder*, *supra*; *Gambardelli v Allstate Overhead Garage Doors, Inc.*, *supra*; see *Hackworth v WDW Development, Inc.*, 224 AD2d 265, 637 NYS2d 720 (1st Dept 1996). It is improper, however, for the jury to consider the effect of inflation on an award for future lost earnings in the absence of expert testimony, *Kelly v State*, 259 AD2d 962, 687 NYS2d 843 (4th Dept 1999).

Work and life expectancy tables may be used by the jury as a guide, *Blyskal v Kelleher*, 171 AD2d 718, 567 NYS2d 174 (2d Dept 1991); see *Lolik v Big V Supermarkets, Inc.*, 266 AD2d 759, 698 NYS2d 762 (3d Dept 1999) (citing PJI). Where work expectancy tables are used, the jury must be given the correct information from such tables and told that the data is to be considered along with all other evidence in arriving at a conclusion as to plaintiff's work life expectancy, *Chandler v Flynn*, 111 AD2d 300, 489 NYS2d 289 (2d Dept 1985) (citing PJI). The court may set aside the verdict where the work life expectancy found by the jury is a substantial departure from the statistical averages and is unsupported by plaintiff's pre-accident physical condition, his or her intentions concerning eventual retirement, the employment prospects of other persons in the same occupation, and other pertinent factors, see *Toscarelli v Purdy*, 217 AD2d 815, 629 NYS2d 833 (3d Dept 1995) (jury finding that plaintiff would continue working as full-time nightclub entertainer for entire 33 year life expectancy set aside as "shocking"); *Khulaqi v Sea-Land Services, Inc.*, 185 AD2d 973, 587 NYS2d 412 (2d Dept 1992) (jury finding that seaman would work to age 75 contrary to weight of the evidence). The court will not set aside the verdict, however, where proof of plaintiff's physical condition supports the jury's finding that plaintiff's life expectancy is less than the statistical average, *O'Rourke v Berner*, 249 AD2d 975, 672 NYS2d 216 (4th Dept 1998) (citing PJI). Data with respect to work life tables is set forth in Appendix B to this volume. With respect to life expectancy tables, see PJI 2:281 and Appendix A to this volume. If only life expectancy data is given the jury, it should be instructed that it may also consider the nature of plaintiff's occupation, *Oddo v Paterson Bridge Co.*, 219 App Div 518, 220 NYS 217 (2d Dept 1927), and the fact that plaintiff may retire, be laid off or become disabled from working before the end of his or her life expectancy, *Zaninovich v American Airlines, Inc.*, 26 AD2d 155, 271 NYS2d 866 (1st Dept 1966).

Although as official compilations, the Department of Labor tables may be judicially noticed, the preparation of any such tables involves judgment in the gathering of the underlying statistics that may affect the reliability of the table in relation to the fact situation before the court. Expert testimony concerning the reliability of the Department of Labor table may, therefore, be offered, and with respect to a privately prepared table, expert testimony would be required to allow the table to be used as a basis for an opinion, see generally as to expert testimony PJI 1:90. In either event the jury must be told that the table does not take into consideration the fact that the plaintiff may be temporarily laid off or temporarily disabled, that it is not conclusive, and is to be considered by them together with all the other evidence in the case in arriving at what they consider plaintiff's work life expectancy to be.

By statute, income tax considerations have been introduced into medical, dental and podiatric malpractice cases. Where plaintiff seeks recovery for lost earnings or impaired earning ability in those cases, evidence to establish the amount of income taxes is to be taken by the court, outside the presence of the jury, with the court to decide the amount of income taxes "with reasonable certainty" that plaintiff would have paid, CPLR 4546. The jury must be instructed not to make a reduction for income taxes and that the reduction is a matter for the court to decide, *id.* For a charge and Comment, see PJI 2:151B, B.1, B.2, 2:320.3. However, where the patient died as a result of the medical or dental malpractice and a wrongful death action is brought, the jury is to be instructed to consider the effect of income taxation on the amount of decedent's earnings that would have been available to support the beneficiaries of the action, see EPTL § 5-4.3, see PJI 2:320.1.

The no-fault law (as to which see Introductory Statement preceding PJI 2:75) permits recovery of lost earnings, but only if there is a loss exceeding "basic economic loss," Ins. L. § 5102(a)(2); 5104(a). In determining whether there has been economic loss exceeding "basic economic loss" the jury must determine whether certain medical and other expenses, see PJI 2:285A, and lost earnings covered by the no-fault law exceed \$50,000.00, Ins. L. 5102(a), 5104(a); *McDonnell v Best Bus Co., Inc.*, 97 AD2d 433, 467 NYS2d 401 (2d Dept 1983). The pattern charge is appropriate to elicit from the jury the total amount of earnings lost. From the amount of lost earnings fixed by the jury, there must be deducted the amount already received, if any, in the form of workers' compensation payments, Ins. L. § 5102(b)(2); *Johnston v Colvin*, 145 AD2d 846, 535 NYS2d 833 (3d Dept 1988), (citing PJI). Once that net figure is determined by the court, it can be added to the items of medical and other expense, see PJI 2:285A, to arrive at the total economic loss. If that loss exceeds \$50,000.00, judgment may be entered for the difference between \$50,000 and the total of economic loss. If the economic loss is less than \$50,000.00, and does not include items excluded by the no-fault law, there can be no award made to plaintiff, other than for pain and suffering, *Johnston v Colvin*, *supra* (citing PJI); as to recovery for pain and suffering (non-economic loss), see Introductory

Statement preceding PJI 2:75 and PJI 2:88–2:88D. Plaintiff may be entitled to recover certain expenses not covered by the no-fault law; i.e., medical expenses not incurred or ascertainable during the year following the accident, Ins. L. § 5102(a)(1), and the excess of other daily expenses over \$25.00 per day, or incurred more than one year after the accident, Ins. L. § 5102(a)(3), which are not covered under the no-fault law and may be recovered in an action without regard to the “basic economic loss” limitation.

Determination of lost earnings serves two purposes under the no-fault law. First, in computing the maximum amount of first party benefits; second, in computing the economic loss that may be recovered for injuries above basic economic loss. The maximum amount of \$2,000.00 as first party benefits is payable in any month during the first three years after the accident only if the lost earnings for that month reach \$2,500.00, *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451 n.3, 426 NYS2d 454, 403 NE2d 159 (1980) (resolving an ambiguity created by Ins. L. § 5102(a)(2) defining “basic economic loss” and Ins. L. § 5102(b)(1) defining “first party benefits”); Insurance Law subsequently amended to raise loss of earnings limitation from \$1,000 to \$2,000; see *Gurnee v Aetna Life and Cas. Co.*, 55 NY2d 184, 448 NYS2d 145, 433 NE2d 128 (1982). In a case of serious injury, the plaintiff may recover only as much of the economic loss that exceeds first party benefits. See Introductory Statement preceding PJI 2:75. Regardless of whether the injured party has suffered a “serious injury” or sustained “basic economic loss,” he or she may recover for lost earnings in excess of the \$2,000.00 per month paid as first party benefits, *Pascente v Stoye*, 116 Misc2d 641, 456 NYS2d 633 (NY City Ct 1982) (at time of decision, basic economic loss for loss of earnings capped at \$1,000 per month, rather than current \$2,000 per month cap, Ins. L. § 5102(a)(2)). Likewise, even in the absence of a serious injury, the injured party may seek recovery for lost earnings sustained more than three years after the accident, *Tortorello v Landi*, 136 AD2d 545, 523 NYS2d 165 (2d Dep’t 1988).

PJI 2:291. Damages—Personal Injury—Loss of Earnings—Unrealized Occupation or Profession

Plaintiff AB has offered evidence that at the time of the injury (he, she) was pursuing a course of training to become a [state occupation or profession]. If the injuries sustained by AB (have interfered, are reasonably certain to interfere in the future) with AB’s training, you may award such damages as you find that AB sustained because the injuries (delayed AB, prevented AB from) attaining the earning capacity of that (occupation, profession). In deciding this issue, you may consider AB’s talent, the training received, the opportuni-

ties and recognition already had, the future opportunities that (he, she) (has, was likely to have), as well as the likelihood, risks and contingencies involved in achieving success in the (*occupation, profession*).

Comment

Based on *Grayson v Irvmar Realty Corp.*, 7 AD2d 436, 184 NYS2d 33 (1st Dept 1959); *Calihan v State*, 36 NYS2d 840 (Ct Cl 1942), *aff'd*, 266 App Div 815, 42 NYS2d 440 (4th Dept 1943); and see *Kirschhoffer v Van Dyke*, 173 AD2d 7, 577 NYS2d 512 (3d Dept 1991); 36 NYJur2d Damages § 70; Annot: 18 ALR3d 88; Annot: 15 ALR2d 418.

The courts permit the assessment of damages based upon future earning potential of a career, although at the time of the injury, the plaintiff was only training for the career, *Grayson v Irvmar Realty Corp.*, 7 AD2d 436, 184 NYS2d 33 (1st Dept 1959), or had temporarily left the career, *Kirschhoffer v Van Dyke*, 173 AD2d 7, 577 NYS2d 512 (3d Dept 1991). The jury may consider the potential for earnings that existed at the time the injuries were suffered, *Faulk v Aware, Inc.*, 19 AD2d 464, 244 NYS2d 259 (1st Dept 1963), *aff'd*, 14 NY2d 899, 252 NYS2d 95, 200 NE2d 778 (1964). While future earning potential may be considered, the jury must also consider that potentialities are contingent and subject to unforeseen and unforeseeable vicissitudes, *Zaninovich v American Airlines, Inc.*, 26 AD2d 155, 271 NYS2d 866 (1st Dept 1966).

In order for the jury to consider the loss of a potential career, there must be evidence that plaintiff might have pursued the career in question or had some probability of qualifying for such a career, *Dobski ex rel. Dobski v Schenectady*, 272 AD2d 662, 706 NYS2d 777 (3d Dept 2000) (the possibility that sixteen-year-old may become nurse supported by testimony of infant and expert); *Schwall v Ambrosio*, 45 AD2d 732, 356 NYS2d 361 (2d Dept 1974) (the possibility that a twelve-year-old may, through his step-father, become an operating engineer too remote). Moreover, mere speculation as to what plaintiff or decedent might have earned is not an adequate basis for determining damages, *Wanamaker v Pietraszek*, 107 AD2d 1020, 486 NYS2d 523 (4th Dept 1985) (improper to compare potential of decedent, who had not finished college, with co-worker who was a college graduate and a graduate student, or with co-worker who speculated as to his next promotion).

PJI 2:292. Damages—Personal Injury—Loss of Earnings—Special Talent

Plaintiff AB has offered evidence that (he, she) has been studying for a career (*state career, e.g.: in opera, the theatre, music*) for which (he, she) has special talent. A person who has special talents is

entitled to recover damages for wrongful injury to the development of those talents. AB's recovery is not necessarily limited by the amount (he, she) actually earned before the injury. However, in deciding the amount of damage, you must consider the training already received by AB, the additional training necessary, the success and recognition already realized, the opportunities likely to be available to AB in the future, the risk and contingencies involved in achieving success, and the overall probability of success in the chosen field. In short, what is being valued is the probability that AB would have in fact realized future earnings from (his, her) special talent.

Comment

Based on *Grayson v Irvmar Realty Corp.*, 7 AD2d 436, 184 NYS2d 33 (1st Dept 1959); see 36 NYJur2d Damages § 70; Annot. 18 ALR3d 88; 15 ALR2d 418; see also Comment to PJI 2:291.

People who exploit rare and special talent, such as singers, musicians, and actors, may achieve great financial success. While the probability of selection for such achievement is relatively low, the opportunity for recognition and reward exists and such opportunities have an economic value which may be considered by the jury, *Grayson v Irvmar Realty Corp.*, 7 AD2d 436, 184 NYS2d 33 (1st Dept 1959). However, the jury may not assume that a young student will earn the income of an established professional, *id.*

The impairment of artistic pursuits is a proper element of damage even if the plaintiff did not receive financial remuneration and did not plan to seek such remuneration, *Riddle v Memorial Hospital*, 43 AD2d 750, 349 NYS2d 855 (3d Dept 1973) (housewife who, prior to accident, was an accomplished violinist); see generally *McDougald v Garber*, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 (1989) (fact finder may, in assessing nonpecuniary damages, consider the effect of the injuries on plaintiff's capacity to lead a normal life).

h. LOSS OF BUSINESS PROFITS

PJI 2:295. Damages—Personal Injury—Loss of Business Profits

A plaintiff who is in a business that depends upon (his/her) personal supervision or effort may recover damages to reimburse (him, her) for profits lost as a direct result of (his/her) inability, because of injuries, to devote (his, her) personal skill, talent or ability to the business. Such damages do not, however, include profits resulting from plaintiff's capital investment or profits derived from the work of others employed in the business. If you find that plaintiff is entitled to recover, you will make a separate award for the amount of business profits lost by plaintiff as a direct result of plaintiff's inability, because of the injuries, to attend to the business.

Comment

Lost profits from a personal business are recoverable only if, and to the extent that, the profits are dependent upon the personal skill, talents or ability of the plaintiff, as distinguished from profits that are the result of capital investment or the work of others, *Steitz v Gifford*, 280 NY 15, 19 NE2d 661 (1939), see *Behrens v Metropolitan Opera Ass'n, Inc.*, 18 AD3d 47, 794 NYS2d 301 (1st Dept 2005) (citing PJI); *Woodring v Board of Ed. of Manhasset Union Free School Dist.*, 79 AD2d 1022, 435 NYS2d 52 (2d Dept 1981) (employee profit sharing plan is not return on investment); see also *Colegrove v Corning*, 54 AD2d 1093, 388 NYS2d 964 (4th Dept 1976). To recover for lost business earnings, it is not necessary to establish the existence of an executed contract for plaintiff's services, if plaintiff can otherwise demonstrate a stable and ready market for his or her services, *Orr v Kiamesha Concord, Inc.*, 167 AD2d 153, 561 NYS2d 234 (1st Dept 1990). For a discussion of loss of profits by a corporation, see *Dunlop Tire & Rubber Corp. v FMC Corp.*, 53 AD2d 150, 385 NYS2d 971 (4th Dept 1976). The element of personal services must "predominate over a small and purely incidental or supplemental investment of capital," *Kronold v New York*, 186 NY 40, 78 NE 572 (1906); see *Spreen v Erie R. Co.*, 219 NY 533, 114 NE 1049 (1916); *Galanis v Simon*, 222 App Div 330, 225 NYS 673 (4th Dept 1927), *aff'd*, 250 NY 524, 166 NE 310 (1928); *Banker's Trust Co. of Western New York v Steenburn*, 95 Misc2d 967, 409 NYS2d 51 (Sup 1978), *aff'd* without opinion, 70 AD2d 786, 418 NYS2d 723 (4th Dept 1979); 36 NYJur2d, Damages § 71.

Upon a showing that plaintiff's absence would result in a loss, and

evidence of the compensation ordinarily paid to others for rendering like services, plaintiff may recover the reasonable cost of hiring a substitute although there is substantial capital invested in the business, *Walker v Erie R. Co.*, 63 Barb 260 (NY Gen Term 1872); see *Weir v Union Ry. Co. of New York City*, 188 NY 416, 81 NE 168 (1907); *Kallasy v New York Telephone Co.*, 70 AD2d 749, 416 NYS2d 887 (3d Dept 1979); *Perlman v Shanck*, 192 App Div 179, 182 NYS 767 (1st Dept 1920), but that award is a form of special damages and must be pleaded, *Gumb v Twenty-Third St. Ry. Co.*, 114 NY 411, 21 NE 993 (1889); *Perlman v Shanck*, *supra*; see *Wheaton v Guthrie*, 89 AD2d 809, 453 NYS2d 480 (4th Dept 1982) (value of plaintiff wife's services in conducting family business properly claimed as part of husband's derivative claim).

If the damages result directly from and as a natural consequence of the wrongful act, the inquiry becomes whether the plaintiff belongs to a class where his or her income depends on personal skill, taste, or ability in the particular calling, *Galanis v Simon*, 222 App Div 330, 225 NYS 673 (4th Dept 1927), *affd*, 250 NY 524, 166 NE 310 (1928); see *Young v Utica Mut. Ins. Co.*, 86 AD2d 764, 448 NYS2d 83 (4th Dept 1982). Where, however, the facts disclose such a preponderance of the business element over the personal element or such an admixture of the two that the personal earnings cannot be segregated from the returns upon invested capital, the profits of the business should not be considered in determining the amount of damages to which the plaintiff is entitled, *Kronold v New York*, 186 NY 40, 78 NE 572 (1906), see Annot: 45 ALR3d 345. Thus, damages do not include loss of business profits if the profits are an "uncertain and fluctuating increment of capital invested," but do include profits where a small amount of invested capital is incidental to the performance of services "practically personal in their nature," *Walsh v New York Cent. & H.R.R. Co.*, 204 NY 58, 97 NE 408 (1912); see *Steitz v Gifford*, 280 NY 15, 19 NE2d 661 (1939); *Spreen v Erie R. Co.*, 219 NY 533, 114 NE 1049 (1916); *Gombert v New York Cent. & H.R.R. Co.*, 195 NY 273, 88 NE 382 (1909); *Weir v Union Ry. Co. of New York City*, 188 NY 416, 81 NE 168 (1907); *Kronold v New York*, *supra*; *Ehrgott v New York*, 96 NY 264 (1884); *Neumann v Metropolitan Tobacco Co.*, 20 Misc2d 1013, 189 NYS2d 600 (Sup 1959).

The burden is upon plaintiff to show that the loss is of personal earnings rather than a return upon invested capital, *Gombert v New York Cent. & H.R.R. Co.*, 195 NY 273, 88 NE 382 (1909); *Bissonette v National Biscuit Co.*, 100 F2d 1003 (2d Cir 1939). The rule applies to a wrongful death action as well as to an action for personal injury, *Spreen v Erie R. Co.*, 219 NY 533, 114 NE 1049 (1916), and because lost earnings may be recovered in an action brought by decedent's personal representative for conscious pain and suffering, lost profits, if otherwise allowable, should be recoverable in such an action, see *id.* Plaintiff has the burden of proving lost profits with "reasonable certainty and without speculation," *Wolf Street Supermarkets, Inc. v McPartland*, 108 AD2d 25, 487 NYS2d 442 (4th Dept 1985), but mathematical precision is not required to establish the reasonable certainty of lost earnings, *Steitz v*

Gifford, 280 NY 15, 19 NE2d 661 (1939); Orr v Kiamesha Concord, Inc., 167 AD2d 153, 561 NYS2d 234 (1st Dept 1990). A self-employed person is not entitled to gross earnings but only to lost profits, measured by "the total receipts that he would have produced . . . and deducting therefrom only such business expenses as would necessarily be related to the production of that income," Young v Utica Mut. Ins. Co., 86 AD2d 764, 448 NYS2d 83 (4th Dept 1982).

i. COLLATERAL SOURCES

PJI 2:301. Damages—Personal Injury—Collateral Sources—Itemized Verdict

If you decide for the plaintiff on the question of liability, you must next consider past and future damages, including an award for past and future pain and suffering, if any. Based upon the evidence you may also include an award for each of the following items, separately divided into amounts intended to compensate the plaintiff for damages incurred before your verdict and amounts intended to compensate the plaintiff for damages to be incurred in the future: *[State items which apply:]* medical expenses, dental expenses, loss of earnings, impairment of earning ability, custodial care, rehabilitation services. If you make an award for any item of damages to be incurred in the future, then for each such item, you must state the period of years over which the amount awarded is intended to provide compensation *[add only in cases subject to Articles 50-A and 50-B]* and the amount you fix must represent the full amount awarded to plaintiff for that item of damage for that future period without reduction to present value.

Your verdict will include answers to the following questions which will be submitted to you in writing:

(1) State separately the amount awarded for the following items of damages, if any, from the time of the occurrence up to the date of your verdict:

- (a) Medical expenses;
- (b) Dental expenses;
- (c) Loss of earnings;
- (d) Impairment of earning ability;
- (e) Custodial care;

(f) Rehabilitation services;

(g) Pain and suffering up to the date of your verdict.

If you decide not to make an award as to any item, you will insert the word “none” as to that item.

(2) State separately the amount awarded for the following items of damages, if any, to be incurred in the future:

(a) Medical expenses;

(b) Dental expenses;

(c) Loss of earnings;

(d) Impairment of earning ability;

(e) Custodial care;

(f) Rehabilitation services;

(g) Pain and suffering, including the permanent effect of the injury, from the time of verdict to the time that plaintiff could be expected to live.

[Where there is an issue as to whether a particular claimed expense was paid by defendant or provided gratuitously, state: An award to plaintiff for loss of (wages, salary, medical expenses) must be only for the amount that plaintiff actually lost, paid or is required to pay. Plaintiff may not recover for any expense that was paid by defendant or for any services that were provided free of charge.]

If you decide not to make an award as to any item, you will insert the word “none” as to that item.

(3) If you do decide to award any amounts intended to compensate the plaintiff for damages

to be incurred in the future, then for each item for which an award is made, state the period of years over which such amounts are intended to provide compensation. For any item for which an award is not made, you will insert the word “none” as to that item.

Comment

Caveat 1: The special verdict form, PJI 2:301 SV—I, pertains to all actions subject to CPLR Article 50B and to actions subject to CPLR Article 50A that were commenced before July 26, 2003. Special verdict forms for medical, dental and podiatric malpractice actions, SV—I (applicable to actions commenced before July 26, 2003) and SV-II (applicable to actions, other than wrongful death actions, commenced on or after July 26, 2003), are set forth, respectively, following PJI 2:151A(1) and 2:151A(2). For a discussion of the 2003 amendments to CPLR Article 50A and CPLR 4111(d), see Comments to PJI 2:151A(1), 2:151A(2) and PJI 2:277. The charge in PJI 2:301 may need to be amended for cases governed by CPLR Article 50A commenced on or after July 26, 2003.

Caveat 2: The foregoing charge, and the accompanying special verdict forms set forth at the end of the Comment, cover the items of damage specifically listed in CPLR 4111(d) and others as well. The listing is for illustration purposes and must be reviewed and edited prior to use in particular cases. As discussed in the following Comment, the court must take care to omit items which are duplicative or which are not supported by evidence, see *Taylor v Henderson*, 175 AD2d 590, 573 NYS2d 793 (4th Dept 1991); see also *Hill v Muchow*, 178 AD2d 954, 579 NYS2d 254 (4th Dept 1991). As to “loss of earnings” and “future impairment of earning ability,” except in the most unusual circumstances, there is little, if any, distinction between the two items and, therefore, it is erroneous to identify both as separate items of past damages or to identify both as separate items of future damages, see *Taylor v Henderson*, *supra*.

Caveat 3: The collateral source offsets, if any, are to be subtracted before the calculation of a structured judgment is made pursuant to CPLR article 50-B, *Firmes v Chase Manhattan Automotive Finance Corp.*, 50 AD3d 18, 852 NYS2d 148 (2d Dept 2008).

The Common Law Rule of Collateral Source Payments

Under the common-law rule in New York, evidence that plaintiff was compensated from a collateral source was generally inadmissible to reduce damages, *McKay v West Seneca*, 41 NY2d 931, 394 NYS2d 637, 363 NE2d 361 (1977); *Healy v Rennert*, 9 NY2d 202, 213 NYS2d 44, 173 NE2d 777 (1961); see *Oden v Chemung County Indus. Development Agency*, 87 NY2d 81, 637 NYS2d 670, 661 NE2d 142 (1995); but see

Inchaustegui v 666 5th Ave. Ltd. Partnership, 96 NY2d 111, 725 NYS2d 627, 749 NE2d 196 (2001) (common-law rule against consideration of collateral sources inapplicable to breach of contract cases; consequently, landlord's damages may be reduced by any insurance proceeds landlord received). This rule requires the use of special precautions in cases where the defense proffers evidence of plaintiff's retirement to establish that he or she ceased working for reasons other than the claimed injuries, *Kish v Board of Educ. of New York*, 76 NY2d 379, 559 NYS2d 687, 558 NE2d 1159 (1990). Because such evidence could lead jurors to speculate about pension benefits in assessing plaintiff's damages, it should be precluded unless it is "centrally relevant to issues in substantial dispute" and then only if appropriate limiting instructions are given both at the time the evidence is admitted and during the final charge, *id.*

The common-law rule was subject to a number of exceptions. For example, defendant was permitted to introduce otherwise barred evidence of collateral source payments if plaintiff opened the door, *Havas v Victory Paper Stock Co., Inc.*, 90 AD2d 864, 456 NYS2d 489 (3d Dept 1982). Additionally, plaintiff could not recover for the value of gratuitously rendered medical services, *Coyne v Campbell*, 11 NY2d 372, 230 NYS2d 1, 183 NE2d 891 (1962), or for wages or salary gratuitously paid by plaintiff's employer, *Drinkwater v Dinsmore*, 80 NY 390 (1880). Plaintiff's recovery could also be reduced for donations or voluntary contributions, *Teeter v Burhans*, 28 AD2d 615, 280 NYS2d 28 (3d Dept 1967). Recovery for losses reimbursed by collateral sources was not barred, however, if plaintiff had "in some way paid for the benefits, or [was] absolutely or conditionally liable to repay his benefactor," *Silinsky v State-Wide Ins. Co.*, 30 AD2d 1, 289 NYS2d 541 (2d Dept 1968). On the other hand, medical expense payments made to plaintiff by defendant's insurance carrier are from the same, rather than a collateral, source and, consequently, plaintiff has always been barred from recovering the same expenses in a personal injury action, *Moore v Leggette*, 24 AD2d 891, 264 NYS2d 765 (2d Dept 1965), *aff'd*, 18 NY2d 864, 276 NYS2d 118, 222 NE2d 737 (1966); *Szybura v Elmira*, 28 AD2d 1154, 284 NYS2d 190 (3d Dept 1967). With respect to payments made by another tortfeasor in partial satisfaction of plaintiff's claim, see PJI 2:275A, 2:275B and 2:275C.

CPLR 4545: The Statutory Rules for Collateral Source Payments

The common-law refusal to allow collateral source payment to be used in mitigation of damages has been dramatically altered by various statutory developments, *Iazzetti v New York*, 94 NY2d 183, 701 NYS2d 332, 723 NE2d 81 (1999); *Bryant v New York City Health and Hospitals Corp.*, 93 NY2d 592, 695 NYS2d 39, 716 NE2d 1084 (1999); see *Fisher v Qualico Contracting Corp.*, 98 NY2d 534, 749 NYS2d 467, 779 NE2d 178 (2002). Effective for cases commenced on or after November 12, 2009, CPLR 4545 permits reduction of awards for past and future economic loss by amounts received from collateral sources in all personal injury, wrongful death and property damage actions. For actions com-

menced prior to November 12, 2009, medical, dental or podiatric malpractice actions are subject to the provisions of former CPLR 4545(a), while actions by public employees against their employers are governed by former CPLR 4545(b) and other actions for personal injury, property damage or wrongful death are governed by former CPLR 4545(c). The primary effect of the November 12, 2009 amendments to CPLR 4545 was to prospectively abrogate *Iazzetti v New York*, 94 NY2d 183, 701 NYS2d 332, 723 NE2d 81 (1999), and place public employers on an equal footing with their private counterparts. Before the amendment, the former CPLR 4545(b), which was applicable to personal injury suits by public employees against their employers, permitted collateral source reductions for past but not future economic losses. The amendments repealed both former CPLR 4545(b) and former CPLR 4545(a) (permitting collateral source reductions in medical, dental and podiatric malpractice actions), which became unnecessary once the different rules for different types of actions were eliminated.

The statute does not affect a plaintiff's right to prove to the jury all of his or her losses regardless of whether or not they are or will be compensated from collateral sources. Rather, both before and after the November 12, 2009 amendment, the effect of CPLR 4545 is to permit a defendant to introduce evidence of such compensation to the court so that the court can make corresponding deductions from the jury's award. In the event that comparative fault has been attributed to the plaintiff, the deduction for collateral source payments should precede the deduction for comparative fault, *Rodgers v 72nd Street Associates*, 269 AD2d 258, 703 NYS2d 456 (1st Dept 2000).

The former provisions of CPLR 4545 and the associated case law are applicable to actions commenced before November 12, 2009. Accordingly, if such actions involve claims by public employees against their employers, the above charge and the verdict form below should be used, but the damage awards may be reduced only by collateral source reimbursement for past costs or expenses, *Iazzetti v New York*, 94 NY2d 183, 701 NYS2d 332, 723 NE2d 81 (1999).

For personal injury actions commenced before November 12, 2009 (other than actions by public employees against their employers), CPLR 4545(c) permits the introduction of evidence and requires the court to determine whether the cost of past and future medical care, dental care, custodial care or rehabilitation services, loss of earnings, or other economic loss "was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source such as insurance (except for life insurance), social security (except those benefits provided under title XVIII of the social security act) [42 USC §§ 1395 et seq. Health Insurance for the Aged and Disabled (Medicare)], workers' compensation, or employee benefit programs (except such collateral sources entitled by law to liens against any recovery of the plaintiff)." Under CPLR 4545(a), as amended, only life insurance and "payments as to which there is a statutory right of reimbursement" are exempt from the collateral source reduction provisions.

The “reasonable certainty” test set forth in the statute is akin to clear and convincing proof, such that a defendant seeking to offset a personal injury award by a collateral source payment must bear the burden of showing that it is “highly probable” that the plaintiff will continue to be eligible for the benefits in question, *Staats v Wegmans Food Markets, Inc.*, 63 AD3d 1573, 880 NYS2d 423 (4th Dept 2009); *Kihl v Pfeffer*, 47 AD3d 154, 848 NYS2d 200 (2d Dept 2007); *Young v Knickerbocker Arena*, 281 AD2d 761, 722 NYS2d 596 (3d Dept 2001); see *Johnson v New York City Transit Authority*, 88 AD3d 321, 929 NYS2d 215 (1st Dept 2011). The November 12, 2009 amendments did not change the rule that “[i]n order to find that any future cost or expense will, with reasonable certainty, be replaced or indemnified . . . , the court must find that the plaintiff is legally entitled to the continued receipt of such collateral source, pursuant to a contract or otherwise enforceable agreement, subject only to the continued payment of a premium and such other financial obligations as may be required by such agreement,” CPLR 4545(a); see former CPLR 4545(c). The defendant has the burden of establishing an entitlement to a collateral source reduction, *Johnson v New York City Transit Authority*, *supra*; *Kihl v Pfeffer*, *supra*; *Faas v State*, 249 AD2d 731, 672 NYS2d 145 (3d Dept 1998). Where there was limited evidence produced at trial and the court failed to hold a hearing regarding collateral source payments, the evidence failed to satisfy the burden of proof regarding collateral sources, *Faas v State*, *supra*.

Evidence of collateral source payment is to be received by the court outside the presence of the jury only after the jury has returned its verdict, CPLR 4545(a) (former CPLR 4545(c)), and only if the verdict shows that the jury has made an award for the special damages covered by CPLR 4545(c). However, as a practical matter, the court should by conference, prior to charge, ascertain what items of collateral source payments will be claimed in order to prepare an itemized verdict which separately sets forth the items of economic loss as to which collateral source reductions will be claimed. Where it is manifest that the jury has already discounted plaintiff’s receipt of a specific collateral source payment, no further reduction pursuant to the statute is warranted, see *Levy v Gemma Contracting Co.*, 184 AD2d 219, 584 NYS2d 802 (1st Dept 1992).

A post-trial hearing to determine the existence and deductibility of collateral-source income may be requested at any time before judgment is entered unless the court directs otherwise, *Turuseta v Wyassup-Laurel Glen Corp.*, 91 AD3d 635, 937 NYS2d 76 (2d Dept 2012); *Firmes v Chase Manhattan Automotive Finance Corp.*, 50 AD3d 18, 852 NYS2d 148 (2d Dept 2008). A defendant who does not request a hearing within that time waives the statutory right to a collateral-source set-off, *Firmes v Chase Manhattan Finance Corp.*, *supra*. The 15-day deadline for post-trial motions made under CPLR article 44 is inapplicable to motions for collateral-source hearings, *Firmes v Chase Manhattan Automotive Finance Corp.*, *supra*. To be entitled to a collateral-source hearing, defendant must offer some competent evidence from available sources

that plaintiff's economic loss may have been, or may in the future be, reimbursed or indemnified by collateral sources, *Firmes v Chase Manhattan Automotive Finance Corp.*, supra; see *Kromah v 2265 Davidson Realty LLC*, 169 AD3d 539, 95 NYS3d 36 (1st Dept 2019); but see *Williams v Turner Const. Inc.*, 2 AD3d 217, 768 NYS2d 314 (1st Dept 2003) (suggesting that request for hearing insufficient where defendant did not carry burden of showing that plaintiff's economic loss "was or, will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source").

A disability payment, though made out of a union retirement pension account, is a collateral source where the payment "replaced or indemnified" past lost earnings, as shown by the fact that the employee would not have received this payment unless he was unable to work and was the recipient of a Social Security disability pension, and no additional contributions were required to be made to the plan in order for the employee to receive the benefit payment which did not reduce the amount of his retirement pension, *Abar v Freightliner Corp.*, 208 AD2d 999, 617 NYS2d 209 (3d Dept 1994); see *Terranova v New York City Transit Authority*, 49 AD3d 10, 850 NYS2d 123 (2d Dept 2007) (accident disability retirement pension payments that would not have been received but for accident corresponded directly to jury award for future lost wages and should have been deducted from award).

For actions subject to collateral source reduction under CPLR 4545, if the court finds that any cost or expense was or will, with reasonable certainty, be replaced or indemnified by any collateral source, the court must reduce the award by the amount of such finding, less an amount equal to the premiums paid by plaintiff for such benefits for the two year period immediately preceding the accrual of the action and less an amount equal to the projected future cost to plaintiff of maintaining such benefits. For actions commenced before November 12, 2009 and subject to former CPLR 4545(b), the court must exclude from the collateral source reduction an amount equal to "any" contribution made by the injured public employee toward the cost of the collateral source benefit, *Iazzetti v New York*, 94 NY2d 183, 701 NYS2d 332, 723 NE2d 81 (1999).

The burden of establishing an entitlement to a collateral source reduction entails a two-tiered inquiry, *Kihl v Pfeffer*, 47 AD3d 154, 848 NYS2d 200 (2d Dept 2007). First, defendant must establish with reasonable certainty that plaintiff actually has received or will receive payments from a collateral source, *id.* Such payments may include homeowner's insurance recoveries, disability pension payments received in lieu of future lost pension benefits, disability retirement payments in lieu of lost future ordinary pension benefits, health insurance benefits not subject to liens, certain Social Security benefits and workers' compensation benefits not subject to liens, *id.*; but see *Young v Tops Markets, Inc.*, 283 AD2d 923, 725 NYS2d 489 (4th Dept 2001) (plaintiff who had never applied for social security benefits not "legally entitled" to "continued receipt" of such benefits). Second, defendant must show with

reasonable certainty that the payments specifically correspond to particular items of economic loss awarded by the trier of fact, *Andino v Mills*, 31 NY3d 553, 81 NYS3d 331, 106 NE3d 714 (2018); *Kihl v Pfeffer*, supra; see *Iazzetti v New York*, 94 NY2d 183, 701 NYS2d 332, 723 NE2d 81 (1999); *Bryant v New York City Health and Hospitals Corp.*, 93 NY2d 592, 695 NYS2d 39, 716 NE2d 1084 (1999); *Oden v Chemung County Indus. Development Agency*, 87 NY2d 81, 637 NYS2d 670, 661 NE2d 142 (1995). In determining whether compensatory funds correspond to particular items of economic loss, courts must look to the nature, not the label, of the compensatory funds, *Andino v Mills*, supra.

As applied to future collateral source payments, the first prong of the two-tiered inquiry requires an affirmative finding by the court that a contract or other enforceable agreement entitled the plaintiff to the ongoing receipt of the benefits, conditioned only upon the continued payment of premiums or other financial obligations required by the agreement, *Kihl v Pfeffer*, 47 AD3d 154, 848 NYS2d 200 (2d Dept 2007); see *Young v Knickerbocker Arena*, 281 AD2d 761, 722 NYS2d 596 (3d Dept 2001); The inquiry involves an analysis of the unique facts of each case, *Kihl v Pfeffer*, supra. The reasonable certainty test is met when defendant's proof establishes a high probability that covered expenses will be replaced or indemnified, *id.* For example, the required level of reasonable certainty may be met where plaintiff's future benefits are secured by a collective bargaining agreement or other contractual arrangement, *id.* The reasonable certainty test may also be satisfied where plaintiff is entitled to indefinite payment of first-party workers' compensation benefits that are not subject to a compensation carrier's lien, *id.*, or to Social Security disability payments based on plaintiff's future inability to work, *Meeks v Verizon New York, Inc.*, 28 AD3d 991, 814 NYS2d 310 (3d Dept 2006), see *Kihl v Pfeffer*, supra.

On the other hand, where there are variables that could impair or preclude plaintiff's receipt of collateral source payments in the future, the requisite "reasonable certainty" is not established and a reduction for such collateral source payments is impermissible, *Kihl v Pfeffer*, 47 AD3d 154, 848 NYS2d 200 (2d Dept 2007). Thus, a reduction for future benefits derived from plaintiff's spouse's health insurance coverage was impermissible since the continuance of coverage was dependent on a number of factors outside of plaintiff's control. These factors included the spouse's continued employment at the same job, the permanency of the spouse's benefit package, the indefinite continuation of the marriage and the life expectancy and work-life expectancy of the spouse upon whose work the health coverage depends, *id.* Similarly, defendants failed to meet their burden of establishing plaintiff's continued eligibility for benefits where there was evidence that plaintiff had shown some improvement and, although still partially disabled, was capable of performing limited sedentary work, *Young v Knickerbocker Arena*, 281 AD2d 761, 722 NYS2d 596 (3d Dept 2001). However, the mere possibility that a disabled plaintiff's condition may improve or that the administrative criteria for the receipt of benefits may change is too speculative to preclude application of the collateral source rule, *Terra-*

nova v New York City Transit Authority, 49 AD3d 10, 850 NYS2d 123 (2d Dept 2007); *Caruso v Russell P. LeFrois Builders, Inc.*, 217 AD2d 256, 635 NYS2d 367 (4th Dept 1995).

In the event that comparative fault has been assessed to the plaintiff, the deduction for collateral source payments should precede the deduction for comparative fault, *Rodgers v 72nd Street Associates*, 269 AD2d 258, 703 NYS2d 456 (1st Dept 2000).

Damages for future pain and suffering are available regardless of whether the plaintiff's injuries are permanent, *Gallagher v Samples*, 6 AD3d 659, 776 NYS2d 585 (2d Dept 2004); *Rizzo v DeSimone*, 6 AD3d 600, 775 NYS2d 531 (2d Dept 2004). The \$2,000 death benefit provided under no-fault insurance (Insurance Law § 5103(a)(4)) is paid to offset economic loss and constitutes a collateral source to be offset against the recovery, *Hosmer v Distler*, 150 AD2d 974, 541 NYS2d 650 (3d Dept 1989).

With respect to the itemized verdict required by CPLR 4111(f), the jury must specify the applicable elements of special and general damages upon which the award is based and the amount assigned to each element, including, but not limited to medical expenses, dental expenses, loss of earnings, impairment of earning ability and pain and suffering. Each element must be further itemized into amounts intended to compensate the plaintiff for damages incurred prior to verdict and amounts intended to compensate the plaintiff for damages to be incurred in the future. The jury must set forth the period of years over which the amounts awarded for future damages are intended to provide compensation. In cases subject to Articles 50-A and 50-B the jury must be instructed in making this computation to award the full amount of future damages without reduction to present value, CPLR 4111(f); see *Brown v State*, 184 AD2d 126, 592 NYS2d 533 (4th Dept 1992). The purpose of this itemization is to enable the court to apply the collateral source reduction principles and to enable the court to enter judgment in accordance with the structured judgment provisions of CPLR Articles 50-A and 50-B. In a non-jury trial, CPLR 4213(b) imposes a similar requirement upon the court. The collateral source offsets are to be subtracted before the calculation of a structured judgment is made pursuant to CPLR article 50-B, *Firmes v Chase Manhattan Automotive Finance Corp.*, 50 AD3d 18, 852 NYS2d 148 (2d Dept 2008).

Under CPLR 4545, there must be a direct correlation between the item of loss and the type of collateral reimbursement before the required statutory offset may be made, *Fisher v Qualico Contracting Corp.*, 98 NY2d 534, 749 NYS2d 467, 779 NE2d 178 (2002); *Oden v Chemung County Indus. Development Agency*, 87 NY2d 81, 637 NYS2d 670, 661 NE2d 142 (1995); *Johnson v New York City Transit Authority*, 88 AD3d 321, 929 NYS2d 215 (1st Dept 2011); *Shue v Red Creek Cent. School Dist.*, 266 AD2d 899, 697 NYS2d 437 (4th Dept 1999). The burden of establishing this correlation is on the party seeking the reduction, *Krum v Green Island Const. Co. Inc.*, 249 AD2d 730, 671 NYS2d 563 (3d Dept

1998). In *Oden*, plaintiff was awarded, among other things, \$66,000 for lost pension benefits and \$80,000 for future lost earnings and health and welfare benefits. The defendants sought to have the total award for future economic loss, \$146,000, reduced by \$141,330, the value of disability retirement benefits the plaintiff expected to receive over his lifetime. The Court ruled that plaintiff's retirement pension benefits had not been shown to replace the lost future earnings and health and welfare benefits for which the jury awarded him \$80,000. Rather, those benefits were paid in lieu of ordinary pension benefits and did not correspond to any future earning capacity plaintiff may have had because he would have been free to earn income from another job without loss of his disability retirement pension benefits, see *Johnson v New York City Transit Authority*, 88 AD3d 321, 929 NYS2d 215 (1st Dept 2011) (disability pension may be collateral source of loss of earnings award, but defendant failed to establish direct match between pension benefit and loss of earnings award); *Hayes v Normandie LLC*, 306 AD2d 133, 761 NYS2d 645 (1st Dept 2003) (plaintiff's pension benefits were not collateral source payments). Therefore, the Court held that the application of CPLR 4545(c) was limited to applying plaintiff's anticipated \$141,330 disability pension benefits to reduce to zero the \$66,000.00 award for lost ordinary pension benefits that the disability pension benefits did replace. *Oden* demonstrates the need for the trial court to specifically itemize the claimed items of economic damage on the verdict sheet. In *Shue v Red Creek Cent. School Dist.*, *supra*, the court held that the absence of an itemized verdict specifying the amount assigned to each element of economic loss precluded defendant from establishing a direct correspondence between the award for economic loss and the social security survivor benefits to which plaintiff and her children were entitled.

In contrast to *Oden v Chemung County Indus. Development Agency*, 87 NY2d 81, 637 NYS2d 670, 661 NE2d 142 (1995), in *Andino v Mills*, 31 NY3d 553, 81 NYS3d 331, 106 NE3d 714 (2018), the plaintiff, a New York City police officer accidentally injured in the line of duty, was awarded damages for future lost earnings and future lost pension benefits. The defendants sought to have the awards under these two categories of loss offset by the plaintiff's accident disability retirement (ADR) benefits, which (1) provide compensation to an injured police officer upon cessation of salary, but may be reduced during the time period before the officer would have been eligible for service retirement if the officer is able to engage in a "gainful occupation," and (2) provide lifetime compensation upon reaching retirement age, without any reductions based upon actual or potential employment income. The Court held that the defendants were entitled to collateral source offsets for both future lost earnings and future lost pension benefits, since ADR benefits are designed to sequentially compensate injured officers for lost earnings prior to retirement age and function as a pension after retirement age, see *Mays v Green*, 204 AD3d 1530, 165 NYS3d 786 (4th Dept 2022) (award of lost wages reduced by social security disability retirement benefits).

Social Security benefits can be used to offset future losses provided that, with reasonable certainty, they will indemnify plaintiff, *Bryant v*

New York City Health and Hospitals Corp., 93 NY2d 592, 695 NYS2d 39, 716 NE2d 1084 (1999). In *Bryant*, the Court held that Social Security survivor benefits paid to a child should be offset against an award for the child's future losses, *id*; see *Mays v Green*, 204 AD3d 1530, 165 NYS3d 786 (4th Dept 2022) (award of lost wages reduced by social security disability retirement benefits); *Hayes v Normandie LLC*, 306 AD2d 133, 761 NYS2d 645 (1st Dept 2003) (social security payments received by plaintiff and his family members were intended to compensate for lost earnings and were properly treated as collateral source payments). In *Young v Knickerbocker Arena*, 281 AD2d 761, 722 NYS2d 596 (3d Dept 2001), the court held that it was improper to offset plaintiff's award for past loss of earnings by the amount of Social Security Benefits paid to plaintiff's minor children. The court noted that the entitlement to such payments belongs to plaintiff's children, and not to plaintiff. In *Shue v Red Creek Cent. School Dist.*, 266 AD2d 899, 697 NYS2d 437 (4th Dept 1999), the court held that the social security survivor benefits to which plaintiff and her children were entitled were intended to compensate for decedent's loss of earnings, while the damages awarded for economic loss by the jury compensated plaintiff and the children not only for lost earnings, but also for loss of household services and parental guidance resulting from decedent's death. Therefore, absent an itemized verdict specifying the amount assigned to each element of loss, the court held that there was no direct correspondence between the award for economic loss and the social security survivor benefits to which plaintiff and the children were entitled, *id*.

By its terms, CPLR 4545 applies to admissibility of evidence at trial and to judgments, *Teichman by Teichman v Community Hosp. of Western Suffolk*, 87 NY2d 514, 640 NYS2d 472, 663 NE2d 628 (1996). The statute is silent as to pre-trial settlements and nothing in the rules governing settlement of an infant's claim indicates that such settlements must be reduced by collateral source payments, *id*; see *Firmes v Chase Manhattan Automotive Finance Corp.*, 50 AD3d 18, 852 NYS2d 148 (2d Dept 2008) (collateral-source-reduction provisions of CPLR 4545 inapplicable to actions that settle before trial); CPLR 1206, 1207, 1208. Parties to the settlement of an infant's claim may consider whether the infant has received collateral source payments, but CPLR 4545 does not compel the conclusion that medical expenses were necessarily excluded from the settlement, *Teichman by Teichman v Community Hosp. of Western Suffolk*, *supra*.

Intervention in Tort Action by Plaintiff's Health Insurer

Two basic points should be observed regarding whether a health insurer may intervene in a personal injury action and attempt to establish a claim in subrogation for reimbursement of expenses paid on behalf of the plaintiff-insured. First, under General Obligations Law § 5-335, a settlement between a plaintiff and tortfeasor essentially extinguishes a health insurer's right of subrogation except as to a claim based on statutory reimbursement, see *Trezza v Trezza*, 104 AD3d 37, 957 NYS2d 380 (2d Dept 2012) (federal statute; Medicare). Second, if the action does

not settle and progresses to trial, the issue of whether intervention by a health insurer should be permitted has split the Departments of the Appellate Division. The First, Second and Third Departments refuse to permit such intervention, see *Halloran v Don's 47 West 44th Street Restaurant Corp.*, 255 AD2d 206, 680 NYS2d 227 (1st Dept 1998); *Berry v St. Peter's Hosp. of City of Albany*, 250 AD2d 63, 678 NYS2d 674 (3d Dept 1998); *Humbach v Goldstein*, 229 AD2d 64, 653 NYS2d 950 (2d Dept 1997), and the Fourth Department generally allows it, see *Poblocki v Todoro*, 55 AD3d 1346, 865 NYS2d 448 (4th Dept 2008).

Rights of Collateral Source Payors

The collateral source payor in some instances has a derivative action against the wrongdoer to recover the payment: (a) General Municipal Law § 207-a(7) (fire fighters); § 207-c(6) (police officers), see *McKay v West Seneca*, 41 NY2d 931, 394 NYS2d 637, 363 NE2d 361 (1977) (compensation carrier may assert lien on officer's recovery in third-party action); *Suffern v Baelis*, 215 AD2d 751, 627 NYS2d 420 (2d Dept 1995) and *Buffalo v Murry*, 79 AD2d 1096, 435 NYS2d 842 (4th Dept 1981) (police officer could not maintain action because of exclusivity of no fault insurance law, as to which see Introductory Statement preceding PJI 2:75; therefore municipality precluded from suit under General Municipal Law § 207-c(6), its right to recover being derivative in nature); see also *Kurtz v Sanford Fire Apparatus Corp.*, 147 AD2d 952, 537 NYS2d 407 (4th Dept 1989); (b) Workers' Compensation Law § 29(2) (employee); (c) Federal Medical Care Recovery Act, 42 USC §§ 2651-2653, see *U.S. v Wittrock*, 268 F Supp 325 (EDPa 1967) (member of armed services); *Seneca v Mohawk*, 52 AD2d 1053, 384 NYS2d 564 (4th Dept 1976) (United States brought separate suit for cost of treatment in Veteran's Administration hospital pursuant to 42 USC § 2651); *Hefferman v Hertz Corp.*, 34 AD2d 552, 309 NYS2d 706 (2d Dept 1970) (United States has absolute right to intervene under Federal Medical Care Recovery Act in action by injured member of armed forces against his tortfeasors); *Noone*, Federal Medical Care Recovery Act, 55 ABAJ 259; (d) Mental Hygiene Law § 43.07(b); see *Tinnerholm v Parke, Davis & Co.*, 411 F2d 48 (2d Cir 1969) (patient in institution or facility); (e) Social Services Law § 104-b (public assistance lien); see *Kidney by Kidney v Kolmar Laboratories, Inc.*, 68 NY2d 343, 509 NYS2d 491, 502 NE2d 168 (1986) (voluntary payments by defendant's insurer included in lien under Social Services Law § 104-b); *Baker v Sterling*, 39 NY2d 397, 384 NYS2d 128, 348 NE2d 584 (1976); *Kinsfather v Grueneberg*, 47 AD2d 789, 365 NYS2d 903 (3d Dept 1975); (f) Social Services Law § 104(1) (authorizing public welfare officials to bring proceedings against recipients of various forms of public assistance who obtain property within ten years after receiving such benefits); see *Gold ex rel. Gold v United Health Services Hospitals, Inc.*, 95 NY2d 683, 723 NYS2d 117, 746 NE2d 172 (2001); *Baker v Sterling*, *supra*.

Medicaid is a jointly funded Federal and State program that pays for necessary medical care of qualifying indigent persons, see 42 U.S.C. § 1396 et seq.; Social Services Law § 363 et seq. Medicaid applicants

must assign to the State the right to seek reimbursement from any third party, up to the amount of medical assistance paid, 42 U.S.C. § 1396k(a)(1)(A); Social Services Law § 366(4)(h)(1); 18 NYCRR 360-7.4(a)(4). In New York, as a corollary to this assignment, the local social services district is subrogated, to the extent of its expenditures for medical care furnished, to all rights a Medicaid recipient may have to third party reimbursement, Social Services Law § 367-a(2)(b); 18 NYCRR 360-7.4(a)(6). Pursuant to this assignment and subrogation scheme, the Department of Social Services obtains all of the rights that the recipient has against a third party to recover for medical expenses, including the ability to immediately pursue those claims against a third party, *Gold ex rel. Gold v United Health Services Hospitals, Inc.*, 95 NY2d 683, 723 NYS2d 117, 746 NE2d 172 (2001); *Cricchio v Pennisi*, 90 NY2d 296, 660 NYS2d 679, 683 NE2d 301 (1997). As an alternative to suing the responsible third party directly, the Department may pursue reimbursement indirectly by placing a lien on personal injury suits brought by a Medicaid recipient against the responsible party, see Social Services Law § 104-b. A Medicaid lien attaches to any verdict, decision, decree, judgment, award or final order in any suit, action or proceeding in any court or administrative tribunal of New York State respecting such injuries, as well as the proceeds of any settlement thereof, and continues until discharged by the public welfare official, Social Services Law § 104-b(3), (7). However, regardless of the amount of Medicaid funds actually expended on behalf of the injured person, the amount that may be recovered pursuant to a Medicaid lien is limited to the amount of the judgment or settlement that was intended to compensate the injured Medicaid recipient for medical costs, *Arkansas Dept. of Health and Human Services v Ahlborn*, 547 US 268, 126 S Ct 1752 (2006); see *Wos v E.M.A. ex rel. Johnson*, 133 S Ct 1391 (2013). In contrast, where a supplemental needs trust has been established under state and federal law, the Medicaid lien may be applied against all of the remaining assets in the trust after the recipient's death, *Matter of Abraham XX.*, 11 NY3d 429, 871 NYS2d 599, 900 NE2d 136 (2008).

The right of the Department of Social Services to seek recovery of expenditures for medical care furnished from responsible third parties is not derived from § 104(1) or 104-b of the Social Services Law, but rather from Medicaid's own assignment, subrogation and recoupment provisions, *Gold ex rel. Gold v United Health Services Hospitals, Inc.*, 95 NY2d 683, 723 NYS2d 117, 746 NE2d 172 (2001); *Calvanese v Calvanese*, 93 NY2d 111, 688 NYS2d 479, 710 NE2d 1079 (1999); *Cricchio v Pennisi*, 90 NY2d 296, 660 NYS2d 679, 683 NE2d 301 (1997). Under the relevant provisions of the Social Services Law, governmental agencies have broad authority to satisfy a lien for medical services from the entire amount of a personal injury judgment or settlement, *Gold ex rel. Gold v United Health Services Hospitals, Inc.*, *supra*. Although Social Services Law § 104(1) does not apply in cases involving the unique recoupment provisions of the Social Services Law specific to Medicaid, it continues to be a recoupment mechanism when other forms of public assistance are involved, *id.* Thus, when public welfare officials rely solely on § 104(1) of the Social Services Law, the limitation in § 104(2) that

restricts an agency's ability to recover when the public assistance recipient is under 21 continues to apply, *id.* The Department of Social Services is entitled to satisfy a Medicaid lien placed on the proceeds of a personal injury settlement pursuant to Social Services Law § 104-b before a plaintiff may transfer those funds to a supplemental needs trust, *Cricchio v Pennisi*, 90 NY2d 296, 660 NYS2d 679, 683 NE2d 301 (1997). For a detailed discussion of supplementary needs trusts, see *Matter of Abraham XX.*, 11 NY3d 429, 871 NYS2d 599, 900 NE2d 136 (2008).

A workers' compensation carrier's lien extends to payments made by the United States under the Military Claims Act, *Ryan v General Elec. Co.*, 26 NY2d 6, 307 NYS2d 880, 256 NE2d 188 (1970). The cause of action is derivative in nature, *Buffalo v Maggio*, 21 NY2d 1017, 291 NYS2d 1, 238 NE2d 494 (1968). However, the court may deduct from the lien a portion representing the value of the services provided by plaintiff's attorney, *Workers' Compensation Law* § 29(1). With respect to the method of apportioning such attorney's fees, see *Kelly v State Ins. Fund*, 60 NY2d 131, 468 NYS2d 850, 456 NE2d 791 (1983); *Becker v Huss Co., Inc.*, 43 NY2d 527, 402 NYS2d 980, 373 NE2d 1205 (1978); see *Wood v Firestone Tire & Rubber Co.*, 123 Misc2d 812, 475 NYS2d 735 (Sup 1984). A party who has paid workers' compensation benefits is not entitled to file a workers' compensation lien against the employee's recovery under the National Vaccine Injury Program, 42 USC §§ 300aa-1 et seq., *Atkinson v New York*, 96 NY2d 809, 727 NYS2d 376, 751 NE2d 455 (2001).

Itemized Verdict

The pattern charge, and the accompanying special verdict form set forth at the end of the Comment, cover the items of damage specifically listed in CPLR 4111(f) and others as well. The listing is for illustration purposes and must be reviewed and edited prior to use in particular cases. The court must take care to omit items which are duplicative or which are not supported by evidence, see *Taylor v Henderson*, 175 AD2d 590, 573 NYS2d 793 (4th Dept 1991); see also *Hill v Muchow*, 178 AD2d 954, 579 NYS2d 254 (4th Dept 1991).

CPLR 4111(f) refers to "loss of earnings" and "impairment of earning ability" as separate items of damage. Except in the most unusual circumstances, there is little, if any, distinction between the two items and, therefore, it is erroneous to identify both as separate items of past damages or to identify both as separate items of future damages, see *Taylor v Henderson*, 175 AD2d 590, 573 NYS2d 949 (4th Dept 1991). An award for past loss of earnings would ordinarily be inclusive of past impairment of earning ability. Likewise, an award for future loss of earnings would ordinarily be inclusive of future impairment of earning ability. To list both loss of earnings and impairment or earning ability as separate items may be appropriate only in unusual circumstances where it is conceptually possible to distinguish between the categories.

It is apparent the Legislature used the term "pain and suffering" in

CPLR 4111(f) to encompass all items of general damages, see *McDougald v Garber*, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 (1989); *Lamot v Gondek*, 163 AD2d 678, 558 NYS2d 284 (3d Dept 1990); see also *Bartoli v Asto Const. Corp.*, 22 AD3d 437, 802 NYS2d 463 (2d Dept 2005) (disfigurement is aspect of pain and suffering not separate element of damages). An award for future pain and suffering is inclusive of damages for the permanent effect of the injury, measured from the date of verdict to the date plaintiff could be expected to live, *Booth v J.C. Penney Co., Inc.*, 169 AD2d 663, 565 NYS2d 77 (1st Dept 1991). It is improper to permit the jury to award damages for shock and fright as a category of damages separate from past pain and suffering, *Eaton v Comprehensive Care America, Inc.*, 233 AD2d 875, 649 NYS2d 293 (4th Dept 1996). To avoid confusion and duplication, the interrogatory as to past damages should be restricted to the time from the occurrence to the date of verdict, with the interrogatory as to future pain and suffering being addressed to the time from verdict to the end of plaintiff's life expectancy, *Booth v J.C. Penney Co., Inc.*, *supra*.

Although custodial care and rehabilitation services are not mentioned specifically in CPLR 4111(f), they constitute special damages and should be listed in the special verdict form. CPLR 4545(a), and former CPLR 4545(c), specifically require reduction for collateral source payments for "custodial care and rehabilitation services."

A special verdict form for use in conjunction with the pattern charge follows. In preparing the special verdict form for use, the court should omit items which would be duplicative of other items or which are not supported by evidence. Signature lines should be included after each question, see Comment, PJI 1:95. The completed special verdict form should be marked as a Court exhibit.

Special Verdict Form PJI 2:301 SV-1

If your verdict is in favor of the plaintiff, answer the following:

(1) State separately the amount awarded for the following items of damages, if any, up to the date of your verdict:

- | | | |
|-----|--|----------|
| (a) | Medical expenses; | \$ _____ |
| (b) | Dental expenses; | \$ _____ |
| (c) | Loss of earnings; | \$ _____ |
| (d) | Impairment of earning ability; | \$ _____ |
| (e) | Custodial care; | \$ _____ |
| (f) | Rehabilitation services; | \$ _____ |
| (g) | Pain and suffering up to the date of your verdict. | \$ _____ |
| | Total | \$ _____ |

If you decide not to make an award as to any of the above items, you will insert the word "none" as to that item.

At least five jurors must agree on the answer to this question.

(2) State separately the amount awarded for the following items of damages, if any, from the date of your verdict to be incurred in the future:

- | | | |
|-----|---|---------|
| (a) | Medical expenses; | \$ ____ |
| (b) | Dental expenses; | \$ ____ |
| (c) | Loss of earnings; | \$ ____ |
| (d) | Impairment of earning ability; | \$ ____ |
| (e) | Custodial care; | \$ ____ |
| (f) | Rehabilitation services; | \$ ____ |
| (g) | Pain and suffering, including the permanent effect of the injury, from the time of verdict for the time that plaintiff could be expected to live. | \$ ____ |
| | Total | \$ ____ |

If you decide not to make an award as to any of the above items, you will insert the word "none" as to that item.

At least five jurors must agree on the answer to this question.

(3) If you have made any award for amounts intended to compensate the plaintiff for damages to be incurred in the future, then for each item for which an award is made, state the period of years over which such amounts are intended to provide compensation.

- | | | |
|-----|---|------------|
| (a) | Medical expenses; | ____ years |
| (b) | Dental expenses; | ____ years |
| (c) | Loss of earnings; | ____ years |
| (d) | Impairment of earning ability; | ____ years |
| (e) | Custodial care; | ____ years |
| (f) | Rehabilitation services; | ____ years |
| (g) | Pain and suffering, including the permanent effect of the injury. | ____ years |

If you make no award as to any of the above items, you will insert the word "none" as to that item.

At least five jurors must agree on the answer to this question.

j. SUBSEQUENT INJURY**PJI 2:305. Damages—Personal Injury—Subsequent Injury—Medical Malpractice**

If you find that the defendant was negligent and that defendant's negligence caused plaintiff's injury, defendant is responsible for the injury and the pain and suffering caused by defendant's negligence. Defendant is also liable for any aggravation of the injury and for any additional pain and suffering caused by any negligence or lack of skill of any doctor who treated the plaintiff for the original injury.

Comment

Based upon *Milks v McIver*, 264 NY 267, 190 NE 487 (1934); *Sauter v New York Cent. & H.R.R. Co.*, 66 NY 50 (1876); see *Glaser v M. Fortunoff of Westbury Corp.*, 71 NY2d 643, 529 NYS2d 59, 524 NE2d 413 (1988); *Hill v St. Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904, 490 NE2d 823 (1986) (citing PJI); *Suria v Shiffman*, 67 NY2d 87, 499 NYS2d 913, 490 NE2d 832 (1986); *Derby v Prewitt*, 12 NY2d 100, 236 NYS2d 953, 187 NE2d 556 (1962); *Zillman v Meadowbrook Hospital Co., Inc.*, 45 AD2d 267, 358 NYS2d 466 (2d Dept 1974); *Musco v Conte*, 22 AD2d 121, 254 NYS2d 589 (2d Dept 1964); 36 NY Jur 2d, Damages § 63.

A wrongdoer is responsible for the proximate result of his or her wrongful conduct. The aggravation by a treating physician of an injury suffered by the plaintiff because of the negligence of the defendant is deemed to be a proximate result of the original wrong even if the aggravation is the result of lack of ordinary skill and constitutes malpractice on the part of the physician, *Sauter v New York Cent. & H.R.R. Co.*, 66 NY 50 (1876). For the charge on medical malpractice, see PJI 2:150.

The original wrongdoer is not responsible, however, for the aggravation of plaintiff's injuries resulting from plaintiff's negligent failure to obtain medical assistance, to use due care in selecting a physician, or to follow the physician's advice, *Alberti v New York, L.E. & W.R. Co.*, 118 NY 77, 23 NE 35 (1889); *Lyons v Erie Ry. Co.*, 57 NY 489 (1874); see *Wagner v Mittendorf*, 232 NY 481, 134 NE 539 (1922); *McCraun v New York*, 12 AD2d 482, 207 NYS2d 685 (1st Dept 1960); Annot: 20 ALR 524; cf. *Ferrara v Bernstein*, 179 AD2d 79, 582 NYS2d 673 (1st Dept 1992), *aff'd*, 81 NY2d 895, 597 NYS2d 636, 613 NE2d 542 (1993) (although plaintiff's failure to obtain follow up medical treatment may constitute comparative negligence, jury may find that plaintiff's negligence was not proximate cause of injury). However, plaintiff is not

bound to follow the physician's advice blindly, *Fafard v Ajamian*, 60 AD2d 853, 400 NYS2d 856 (2d Dept 1978); *Williams v Brooklyn*, 33 App Div 539, 53 NYS 1007 (2d Dept 1898); see PJI 2:325.

Although the original wrongdoer and the negligent health care provider are both liable to the plaintiff, *Milks v McIver*, 264 NY 267, 190 NE 487 (1934), they are not joint tortfeasors in the sense that the plaintiff cannot obtain full recovery against the subsequent tortfeasor, the negligent health care provider, see *Derby v Prewitt*, 12 NY2d 100, 236 NYS2d 953, 187 NE2d 556 (1962). The plaintiff has separate causes of action against the original wrongdoer and the negligent health care provider, but may include in the claim against the original wrongdoer the damage caused by the subsequent medical negligence, *id.* The health care provider may be held liable for the additional injuries it has caused but not for the injuries caused by the original wrongdoer, *id.* If the injury caused by the first health care provider is aggravated by the negligence of a second health care provider, the first health care provider is liable for that aggravation, *Hill v St. Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904, 490 NE2d 823 (1986) (citing PJI). Where the injuries are incapable of any reasonable allocation, the second health care provider may be held liable for the injuries caused by the first health care provider as well as the aggravation of those injuries, *Ravo v Ravo v Rogatnick*, 70 NY2d 305, 520 NYS2d 533, 514 NE2d 1104 (1987); *Innvar v Liviu Schapira, M.D., P.C.*, 166 AD2d 632, 561 NYS2d 60 (2d Dept 1990).

The common law rule—that a release of the original tortfeasor bars an action against the health care provider—was abrogated by the enactment of GOL § 15-108, *Hill v St. Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904, 490 NE2d 823 (1986). A release of one tortfeasor does not release any other, unless specifically stated in the release, but settlement with one reduces the amount recoverable from the other, *id.* Under GOL § 15-108, where the original tortfeasor settles with plaintiff, the original tortfeasor is precluded from obtaining contribution from the successive tortfeasor, see *Glaser v M. Fortunoff of Westbury Corp.*, 71 NY2d 643, 529 NYS2d 59, 524 NE2d 413 (1988). GOL § 15-108 only applies where parties are liable in tort for the same injury, *Ackerman v Price Waterhouse*, 252 AD2d 179, 683 NYS2d 179 (1st Dept 1998).

With regard to the duty of an injured person to submit to an operation to minimize damages, see PJI 2:325. With regard to the original wrongdoer's right to indemnity from the health care provider, see Comment to PJI 2:275.

PJI 2:306. Damages—Personal Injury—Subsequent Injury—Subsequent Accident

If you find that subsequent to an original injury which was caused by defendant's negligence, plaintiff was injured in a second accident,

and if you find that the original injury was a substantial factor in causing the second accident, the plaintiff is entitled to recover from defendant for any aggravation of plaintiff's original injury or any additional injury, or both, that you find resulted from the second accident.

Comment

Caveat: The charge assumes no culpable conduct on plaintiff's part. If there is evidence of culpable conduct on the part of the plaintiff causing either the first or the second accident, or both (including failure to follow a physician's instructions), comparative negligence must be charged, PJI 2:36.

Based on *Wagner v Mittendorf*, 232 NY 481, 134 NE 539 (1922); *Ferrara v Galluchio*, 5 NY2d 16, 176 NYS2d 996, 152 NE2d 249 (1958); see *Daliendo v Johnson*, 147 AD2d 312, 543 NYS2d 987 (2d Dept 1989) (citing PJI); *Durso v New York*, 96 AD2d 458, 464 NYS2d 769 (1st Dept 1983) (concurring opinion); 36 NYJur2d 109-110, *Damages* § 62. Proximate cause must be established, see Annot: 31 ALR3d 1000. The term "substantial factor" is used in the pattern charge to incorporate the element of proximate cause and should be defined and expanded upon as indicated in PJI 2:70 and Comment. Thus, a plaintiff who acted reasonably in failing to have an operation on his knee can recover from the original tortfeasor for injuries suffered in later falls when his knee buckled, *Goldman v State*, 28 AD2d 782, 280 NYS2d 879 (3d Dept 1967); see PJI 2:325.

Subsequent disease which aggravates an earlier tortious injury is within the rule of the charge, see Annot: 79 ALR 351; 22 ALR 1486, as is suicide induced by the injury, *Fuller v Preis*, 35 NY2d 425, 363 NYS2d 568, 322 NE2d 263 (1974); see *Watkins v Labiak*, 282 AD2d 601, 723 NYS2d 227 (2d Dept 2001) (recognizing potential liability for suicide of person resulting from negligent conduct, but precluding recovery on ground that suicide was not foreseeable consequence of defendant's alleged negligence); Annot: 77 ALR3d 311; 11 ALR2d 751; but see *D'Addezio v Agway Petroleum Corp.*, 186 AD2d 929, 589 NYS2d 206 (3d Dept 1992); *Wells v St. Luke's Memorial Hosp. Center*, 129 AD2d 952, 515 NYS2d 335 (3d Dept 1987). If in the course of treating the plaintiff a physician causes bona fide apprehension to arise in plaintiff resulting in a severe case of cancerophobia, plaintiff can recover from the original tort-feasor for the mental anguish suffered by reason of such cancerophobia, *Ferrara v Galluchio*, 5 NY2d 16, 176 NYS2d 996, 152 NE2d 249 (1958); see *Bossio v Fiorillo*, 210 AD2d 836, 620 NYS2d 596 (3d Dept 1994); *Matter of Eighth Judicial Dist. Asbestos Litigation*, 190 AD2d 1009, 595 NYS2d 575 (4th Dept 1993).

PJI 2:307. Damages—Personal Injury—Subsequent Injury—Successive Accidents

Plaintiff claims that defendant caused injuries

to the plaintiff in separate accidents that occurred close together in time and place. If you find that both of these defendants were negligent and that the negligence of each was a substantial factor in causing injury to the plaintiff, you will render a verdict in favor of the plaintiff against each defendant. In such case you will determine the extent of the injuries each defendant caused to the plaintiff and award a separate verdict in favor of plaintiff against each defendant in such amount as you find will fairly and adequately compensate the plaintiff for the injuries caused. In such case neither defendant is liable for any injury sustained by the plaintiff as the result of the separate negligence of the other defendant.

If you find, however, that the negligence of both defendants caused plaintiff's injuries but that, because of the nature of the accident and the nearness in time of the negligent acts and resulting injuries, you cannot determine which of the plaintiff's injuries were caused by each defendant, both defendants will be liable for all of the plaintiff's injuries.

Comment

If the injuries caused by the concurrent acts of two persons are plainly separable so that the damage caused by each can be distinguished, each is liable only for the damage that he or she caused, *Larsen v Clark*, 283 App Div 1064, 131 NYS2d 165 (2d Dept 1954), *aff'd*, 308 NY 995, 127 NE2d 846 (1955); *Burt Olney Canning Co. v State*, 230 NY 351, 130 NE 574 (1921); *O'Donnell v Syracuse*, 184 NY 1, 76 NE 738 (1906); *Chipman v Palmer*, 77 NY 51 (1879); *Slater v Mersereau*, 64 NY 138 (1876); *Auchmuty v Ham*, 1 Denio 495 (NY Sup 1845); *Brush v Lindsay*, 210 App Div 361, 206 NYS 304 (2d Dept 1924); see *Zillman v Meadowbrook Hospital Co., Inc.*, 45 AD2d 267, 358 NYS2d 466 (2d Dept 1974); *Cicero v Zaccheo*, 45 AD2d 1001, 358 NYS2d 84 (2d Dept 1974); *Sherman v Leicht*, 238 App Div 271, 264 NYS 492 (4th Dept 1933); Annot: 100 ALR2d 16; 85 ALR2d 267. For subsequent injuries which are the natural and probable consequence of the original injury, see PJI 2:305 and PJI 2:306. If injuries are caused by the concurrent acts of two or more defendants, defendants are jointly responsible even though plaintiff's injury would have resulted from the negligence of only one of them, see PJI 2:71.

The instant charge deals with the narrow class of cases where the

wrongful acts of the several defendants are not precisely concurrent in point of time, and there is evidence upon which it may be found that both defendants contributed to plaintiff's injuries, but there is, or so the jury might find, insufficient evidence upon which to base a finding as to which accident caused which injury. In such case, defendants are both liable for the entire injury, *Ravo by Ravo v Rogatnick*, 70 NY2d 305, 520 NYS2d 533, 514 NE2d 1104 (1987); *Hawkes v Goll*, 256 App Div 940, 9 NYS2d 924 (2d Dept 1939), *aff'd*, 281 NY 808, 24 NE2d 484 (1939); *Stathis v Jamaica Hosp.*, 187 AD2d 499, 589 NYS2d 606 (2d Dept 1992); see *Prosser and Keeton, Torts* (5th Ed) Section 52. As to contribution, see *Ravo by Ravo v Rogatnick*, *supra*; PJI 2:275.

4. PROPERTY DAMAGE

PJI 2:310. Damages—Property—Loss of Use of Automobile

The plaintiff claims that (he, she) has been damaged through the loss of use of (his, her) automobile. If you find that the plaintiff's automobile was damaged in the accident and that plaintiff had it repaired and lost its use thereof for a time reasonably needed to make such repairs, you must include in your verdict for the plaintiff such amount as you find from the evidence will fully and fairly compensate the plaintiff for such loss of use. This is true even though plaintiff's automobile was normally used by (him, her) for pleasure rather than for business, and even though plaintiff did not lease another automobile to take the place of (his, her) own while the repairs were being made.

Comment

Based on *Johnson v Scholz*, 276 App Div 163, 93 NYS2d 334 (2d Dept 1949); *Rapp v Mabbett Motor Car Co.*, 201 App Div 283, 194 NYS 200 (4th Dept 1922); *Moore v Metropolitan St. Ry. Co.*, 84 App Div 613, 82 NYS 778 (2d Dept 1903); *Central Greyhound Lines v Bonded Freightways*, 193 Misc 320, 82 NYS2d 671 (Sup 1948); *Naughton Mulgrew Motor Car Co. v Westchester Fish Co.*, 105 Misc 595, 173 NYS 437 (AppT 1918); see 8 Am Jur 2d 607–610, *Automobiles and Highway Traffic* §§ 1047–1049; 8B NYJur2d *Automobiles & Other Vehicles* § 1135; Annot: 18 ALR3d 497.

When plaintiff's vehicle has been damaged beyond repair, the measure of damages is the difference in market value before and after the damage, see *Owens v State*, 96 AD2d 630, 464 NYS2d 870 (3d Dept 1983), and in such case plaintiff cannot recover for loss of use without proof that for a stated period there was an inability to obtain delivery of a replacement vehicle, *Allanson v Cummings*, 81 AD2d 16, 81 AD2d 1031, 439 NYS2d 545 (4th Dept 1981) (quoting PJI); *Colonial Motor Coach Corporation v New York Cent. R. Co.*, 131 Misc 891, 228 NYS 508 (Sup 1928). It has been held that plaintiff cannot recover the rental expense of a replacement vehicle incurred because of a delay of the insurance carrier in determining total loss in an action to recover rental expense of a replacement vehicle, plaintiff must show unavailability under market conditions of a replacement vehicle that could be purchased, *Cecere v Harquail*, 104 AD2d 6, 481 NYS2d 533 (4th Dept 1984).

When, however, the automobile has been repaired, plaintiff is entitled to compensation for the loss of its use for the time reasonably needed to make the repairs, *Johnson v Scholz*, 276 App Div 163, 93 NYS2d 334 (2d Dept 1949); *Moore v Metropolitan St. Ry. Co.*, 84 App Div 613, 82 NYS 778 (2d Dept 1903); see Annot: 18 ALR3d 497. This principle rests upon the theory that one deprived of the use of his property by the wrong of another is entitled to compensation for such loss, *Allen v Fox*, 51 NY 562 (1873).

Ordinarily, loss of use is proved by the testimony of an expert as to the rental value of a similar vehicle, *Central Greyhound Lines v Bonded Freightways*, 193 Misc 320, 82 NYS2d 671 (Sup 1948).

PJI 2:311. Damages—Property with Market Value

If plaintiff's (automobile, property) was damaged by the defendant's negligence, you will award to the plaintiff as damages the difference between its market value immediately before and immediately after it was damaged, or the reasonable cost of repairs necessary to restore it to its former condition, whichever is less.

Thus, if the reasonable cost of repairs exceeds the reduction in market value, you will award the amount by which the market value was reduced. If the reasonable cost of repairs is less than the reduction in market value, you will award to the plaintiff the reasonable cost of repairs required to restore the (automobile, property) to its condition immediately before it was damaged.

Comment

Caveat: The pattern charge applies to a situation where property has depreciated in value since its purchase and is subsequently damaged by the negligence of another, *Franklin Corp. v Prahler*, 91 AD3d 49, 932 NYS2d 610 (4th Dept 2011) (citing PJI). If the property at issue allegedly increased in value since its purchase and repairs will not fully restore the property to its market value before it was damaged, and the trial evidence supports those allegations, the jury should, on the plaintiff's request, consider the extent of the diminution in value of the property, *id.* In such a case, the general rule reflected in the pattern charge—the plaintiff receives the lesser of the difference between the property's market value immediately before and immediately after it was damaged, or the reasonable cost of repairs necessary to restore the property to its former condition—is replaced by a different rule: the plaintiff's damages are the difference between the property's market value immediately before and immediately after it was damaged, see *id.*

Based on *Fisher v Qualico Contracting Corp.*, 98 NY2d 534, 749 NYS2d 467, 779 NE2d 178 (2002); *Gass v Agate Ice Cream*, 264 NY 141, 190 NE 323 (1934); *Pittsford Canalside Properties, LLC v Pittsford Village Green*, 154 AD3d 1303, 63 NYS3d 167 (4th Dept 2017); *Parkoff v Stavsky*, 109 AD3d 646, 970 NYS2d 817 (2d Dept 2013); *Interested Underwriters at Lloyds as Subrogees of Everyone's Stores, Inc. v Third Holding Corp.*, 88 AD2d 863, 451 NYS2d 759 (1st Dept 1982); *Deutsch v National Properties, Inc.*, 19 AD2d 823, 243 NYS2d 658 (1st Dept 1963); *Johnson v Scholz*, 276 App Div 163, 93 NYS2d 334 (2d Dept 1949); see *Hartshorn v Chaddock*, 135 NY 116, 31 NE 997 (1892); Annot: 1 ALR3d 801; 73 ALR2d 719. The reasonable cost of towing a damaged vehicle to a garage for repairs is also recoverable, *Moore v Metropolitan St. Ry. Co.*, 84 App Div 613, 82 NYS 778 (2d Dept 1903); *Dillon v Mundet*, 145 NYS 975 (AppT 1914), *n o r*. In the typical case where the property depreciated in value since its purchase and is subsequently damaged, the court of course, should review for the jury the specific evidence of the cost of the repairs and diminution in value of the property and explain to the jury that their verdict may not exceed the cost of repairs or the diminution of market value, whichever is less. However, in the unusual case where the property increased in value since its purchase and repairs will not fully restore the property to its market value before it was damaged, the plaintiff may recover the diminution in value of the property, i.e., the difference between the property's market value immediately before and immediately after it was damaged, *Franklin Corp. v Prahler*, 91 AD3d 49, 932 NYS2d 610 (4th Dept 2011).

Generally, cost of the repairs necessary to restore the property to its former condition is available as a measure of damages subject to the limitation that the cost of repairs not exceed either (1) the diminution in value, or (2) the value of the property itself, *Gass v Agate Ice Cream*, 264 NY 141, 190 NE 323 (1934); *Pittsford Canalside Properties, LLC v Pittsford Village Green*, 154 AD3d 1303, 63 NYS3d 167 (4th Dept 2017); see *Franklin Corp. v Prahler*, 91 AD3d 49, 932 NYS2d 610 (4th Dept 2011) (citing PJI); *Benavie v Baker*, 72 AD2d 541, 420 NYS2d 735 (2d Dept 1979) (damages for injury to shade trees); *Johnson v Scholz*, 276 App Div 163, 93 NYS2d 334 (2d Dept 1949). Plaintiff need not prove both cost of restoration and diminution of value. In "mitigation" of damages defendant has the burden of proving that the lesser amount will adequately compensate plaintiff, *Fisher v Qualico Contracting Corp.*, 98 NY2d 534, 749 NYS2d 467, 779 NE2d 178 (2002); *Jenkins v Etlinger*, 55 NY2d 35, 447 NYS2d 696, 432 NE2d 589 (1982); see *Jaklitsch v Finnerty*, 96 AD2d 690, 466 NYS2d 774 (3d Dept 1983). Of course, if plaintiff proves neither diminution nor cost of repairs, the property damage action must be dismissed, see *Farrell v Klapach*, 24 AD2d 590, 262 NYS2d 203 (2d Dept 1965). As to the method of proving cost of repairs, see CPLR 4533-a.

Where repairs are made but they do not restore the property to its value before the injury, the remaining diminution in value may be shown and added to the cost of the repairs in fixing plaintiff's damages, see *Johnson v Scholz*, 276 App Div 163, 93 NYS2d 334 (2d Dept 1949).

However, if the repairs fully restored the vehicle to its condition before the accident, a claim based on unrealized diminution in resale value because of the accident itself or a Carfax report is not cognizable, *Parkoff v Stavsky*, 109 AD3d 646, 970 NYS2d 817 (2d Dept 2013); see *Angielczyk v Lipka*, 132 AD3d 1380, 17 NYS3d 547 (4th Dept 2015) (citing PJI). Further, a party may not benefit by the injury, *Gass v Agate Ice Cream*, 264 NY 141, 190 NE 323 (1934); see *Fisher v Qualico Contracting Corp.*, 98 NY2d 534, 749 NYS2d 467, 779 NE2d 178 (2002), and if the property is more valuable after its repair than it was before the injury, the defendant is entitled to have the increase in value deducted from the cost of the repairs for which there is liability, *Parilli v Brooklyn City R.R.*, 236 App Div 577, 260 NYS 60 (2d Dept 1932).

The pattern charge and the preceding commentary apply to a situation where property has depreciated in value since its purchase and is subsequently damaged by the negligence of another, *Franklin Corp. v Prahl*, 91 AD3d 49, 932 NYS2d 610 (4th Dept 2011) (citing PJI). If, however, the property at issue allegedly increased in value since its purchase and repairs will not fully restore the property to its market value before it was damaged, the plaintiff may recover the diminution in value of the property, *id.* Examples of property that increased in value since their purchase that could not be fully restored to their market value before they were damaged include a collector sports car and a violin, see *id.* In a case involving property that increased in value, the general damages rule—that the plaintiff receives the lesser of the difference between the property’s market value immediately before and immediately after it was damaged, or the reasonable cost of repairs necessary to restore the property to its former condition—is replaced by a different rule: the plaintiff’s damages are the difference between the property’s market value immediately before and immediately after it was damaged, see *id.*

In case of total destruction of the property, the measure of damages is its reasonable market value just prior to destruction, *Gass v Agate Ice Cream*, 264 NY 141, 190 NE 323 (1934); *Deutsch v National Properties, Inc.*, 19 AD2d 823, 243 NYS2d 658 (1st Dept 1963).

In general, an owner may recover the retail market value of an article lost or destroyed by another. However, where the owner is a merchant whose stock has been damaged or destroyed, its wholesale value is the basis for determining damages, because that will be the replacement cost, *Wehle v Haviland*, 69 NY 448 (1877); *Dubiner’s Bootery, Inc. v General Outdoor Advertising Co.*, 10 AD2d 923, 200 NYS2d 757 (1st Dept 1960); *Deutsch v National Properties, Inc.*, 19 AD2d 823, 243 NYS2d 658 (1st Dept 1963); 2 Clark, *New York Law of Damages* 1386, Section 801; 4 Minzer, *Damages in Tort Actions*, Section 37.01(1)(b); see *Swain v 383 West Broadway Corp.*, 216 AD2d 38, 627 NYS2d 393 (1st Dept 1995) (jury’s award, representing paintings’ fair market value at retail, was excessive because it failed to consider commissions art galleries charged plaintiff to sell paintings). In *Dubiner’s Bootery*, the court said “The measure of damages is not the retail sell-

ing price but the replacement cost and any damages actually sustained by reason of the absence of the articles while in the process of replacement.”

The measure of damages for an unauthorized sale by a broker or a money lender or other pledgee of stock is the difference between the amount, if any, which was credited to plaintiff as the proceeds of such unauthorized sale and either (a) the market value of the stock at the time of such sale, or (b) the highest value of such stock within a reasonable time after plaintiff learned of such conversion, whichever value is higher, but punitive damages are not usually allowed, *Mayer v Monzo*, 221 NY 442, 117 NE 948 (1917); *Mullen v J.J. Quinlan & Co.*, 195 NY 109, 87 NE 1078 (1909); *Colt v Owens*, 90 NY 368 (1882); *Baker v Drake*, 53 NY 211 (1873); *Baker v Drake*, 66 NY 518 (1876); *German v Snedeker*, 257 App Div 596, 13 NYS2d 237 (1st Dept 1939), *aff'd*, 281 NY 832, 24 NE2d 492 (1939); *Gelb v Zimet Bros., Inc.*, 34 Misc2d 401, 228 NYS2d 111 (Sup 1962), *aff'd*, 18 AD2d 967, 237 NYS2d 989 (1st Dept 1963); *Gerdes v Reynolds*, 30 NYS2d 755 (Sup 1941). For a stockbroker's unauthorized covering of a short sale, the measure of damages is the difference between the price at which the stock was bought and its lowest market price within a reasonable time thereafter, *Raisis v Eisele & King, Libaire, Stout & Co.*, 20 AD2d 392, 246 NYS2d 942 (1st Dept 1964), *aff'd*, 16 NY2d 557, 260 NYS2d 834, 208 NE2d 779 (1965); *Barber v Ellingwood*, 144 App Div 512, 129 NYS 414 (1st Dept 1911); *Stone v Allen*, 161 Misc 100, 291 NYS 330 (Sup 1936); and see discussion and review of cases in dissenting opinion in *Matter of Mills*, 139 App Div 54, 123 NYS 671 (1st Dept 1910), *aff'd*, 200 NY 583, 94 NE 1096 (1911), cited with approval in *Barber v Ellingwood*, *supra*. As to the conversion of property with a fluctuating market value, see *Hoffman v Dorner*, 86 AD2d 651, 447 NYS2d 20 (2d Dept 1982).

In *Fisher v Qualico Contracting Corp.*, 98 NY2d 534, 749 NYS2d 467, 779 NE2d 178 (2002), the Court of Appeals examined the application of the collateral source rule in CPLR 4545(c) to the damages formula stated in the above charge. In *Fisher*, the plaintiff contended that for the purpose of the CPLR 4545(c) offset, replacement cost insurance proceeds correspond only to the cost of restoration and not to diminution in market value. The Court stated that replacement cost and diminution in market value are “simply two sides of the same coin.” The Court held that the collateral source payment, which was comprised of replacement cost insurance proceeds, corresponded to the property loss, and was properly offset against the damages award, regardless of whether the damages were based on replacement cost or diminution in market value.

PJI 2:312. Damages—Property Without Market Value

Generally, the measure of damages for (injury to, loss of) personal property is based upon the value of the property at the time of the (injury,

loss). When, as in this case, the property (lost, damaged, destroyed) has no reasonable market value, plaintiff may recover the difference in money between the value to plaintiff of the property before and after the (loss, damage, destruction). In determining the amount of such loss, you consider the evidence presented with respect to: (*here list relevant factors such as: the original cost of such property when new, the price paid for it by the plaintiff and its age at the time of purchase, the value of the materials and labor used in producing it, its utility, the use it has received and its age at the time of the (loss, damage, destruction), the extent of its deterioration or depreciation, if any, and its general condition at the time of its (loss, damage, destruction), whether it may be (repaired, replaced, reproduced), and, if so, the expense of (repairing, replacing, reproducing) it and its value as so (repaired, replaced, reproduced) as compared to the value before its (loss, damage, destruction)*)), together with all other evidence presented to establish its value to the plaintiff and the extent of plaintiff's damage. Having these elements in mind, and carefully weighing each in the exercise of your sound judgment, you will determine the loss in money which the plaintiff suffered by reason of the (injury to, loss of, destruction of) plaintiff's property in this case. You may not, however, take into account the sentimental value of the property to the plaintiff.

Comment

Based on *McAnarney v Newark Fire Ins. Co.*, 247 NY 176, 159 NE 902 (1928); *Lake v Dye*, 232 NY 209, 133 NE 448 (1921); *Hawver v Bell*, 141 NY 140, 36 NE 6 (1894); *Jones v Morgan*, 90 NY 4 (1882).

This charge assumes that the amount of recovery is not limited by an agreement between the parties; as to which see *Charles F. Winson Gems, Inc. v D. Gumbiner, Inc.*, 57 NY2d 813, 455 NYS2d 600, 441 NE2d 1118 (1982).

Property recognized as having no practical market value includes wearing apparel in use, household goods and effects owned and kept for personal use, *Lake v Dye*, 232 NY 209, 133 NE 448 (1921), manuscripts, family portraits, heirlooms and antiques, *McAnarney v Newark Fire Ins. Co.*, 247 NY 176, 159 NE 902 (1928); *MacGregor v Watts*, 254 App Div 904, 5 NYS2d 525 (2d Dept 1938); 36 NYJur2d, Damages § 86, 153–

155; artisans' tools, special machinery, table linens and the like, *Furlan v Rayan Photo Works*, 171 Misc 839, 12 NYS2d 921 (Mun Ct 1939); *D. Appleton & Co. v Zeese-Wilkinson Co.*, 140 Misc 653, 251 NYS 532 (AppT 1931); 2 Clark, New York Law of Damages, 1388, Section 802, and other property for which there may be no ready market, see *McAnarney v Newark Fire Ins. Co.*, 247 NY 176, 159 NE 902 (1928).

Second-hand clothing or household furnishings may have a market value, but such value is so low in comparison with the item's real worth to the owner that where it is held for the owner's personal use, it is treated as property without market value, *Lake v Dye*, 232 NY 209, 133 NE 448 (1921); 36 NYJur2d, Damages § 86, 153–155; Annot: 34 ALR3d 816.

Expert opinion evidence as to value is not required, *Blauvelt v Cleveland*, 198 App Div 229, 190 NYS 881 (4th Dept 1921) (dog). An owner may testify as to his or her estimate of the value to him or her of such property, *Merrill v Grinnell*, 30 NY 594 (1864); *Peters v Berkeley*, 219 App Div 261, 219 NYS 709 (1st Dept 1927); *Taft v Smith, Gray & Co.*, 76 Misc 283, 134 NYS 1011 (AppT 1912); see 36 NYJur2d, Damages § 83, 148–150; Annot: 12 ALR2d 902; 37 ALR2d 967; cf. *Prignitz v McTiernan*, 18 Misc 651, 43 NYS 974 (Co Ct 1896); 2 Clark, New York Law of Damages 1389, Section 802; 4 Minzer, Damages in Tort Actions, Section 37.01(2)(a). Where a defendant loses plaintiff's property and plaintiff incurs some expense in finding it, defendant must be credited with the value of the recovered property, less plaintiff's reasonable expenses in recovering it, *Jones v Morgan*, 90 NY 4 (1882).

Although an article has no market value in a given place or at a given time, if it has a market value at another place or at another time, such may be shown as evidence of value, *Jones v Morgan*, 90 NY 4 (1882); 36 NYJur2d, Damages § 81, 143–145; 2 Clark, New York Law of Damages 1390, Sections 804, 805; 4 Minzer, Damages in Tort Actions, Section 37.01(1)(a); Annot: 12 ALR2d 902. Plaintiff need not prove market value as a condition precedent to presenting other evidence of value, see Annot: 12 ALR2d 902. The burden of proof of value is, of course, upon the plaintiff, see *Valentino v Nasio Studio*, 136 Misc 826, 242 NYS 277 (AppT 1930); Annot: 12 ALR2d 902; see also 4 Minzer, Damages in Tort Actions, Section 37.01(2)(2).

PJI 2:313. Damages—Property—Interest

If you find for the plaintiff on the claim for property damage, the date of the occurrence will determine the time from which interest will be computed. Since there is a dispute in this case concerning the date of occurrence, you must, in rendering your verdict, fix that date.

Comment

In computing the interest on damage awards there exists no distinc-

tion between intentional and unintentional torts and the relevant statute does not differentiate between either category of tort claim, see CPLR 5001. No charge with respect to interest other than the above is necessary, *id.*, and, indeed CPLR 5001(c) provides that if the jury is discharged without specifying the date the court shall fix the date on motion, unless the date is not in dispute, in which event the clerk may fix it on affidavit; see *Phelps v A. R. Gundry, Inc.*, 23 AD2d 960, 261 NYS2d 194 (4th Dept 1965). Plaintiff's failure to request an instruction as to interest is not a waiver of the right to it, *Buffalo Oil Terminal, Inc. v William B. Kimmins & Sons, Inc.*, 42 Misc2d 499, 248 NYS2d 499 (Sup 1964), *aff'd*, 23 AD2d 970, 260 NYS2d 621 (4th Dept 1965), nor will the erroneous rejection by the jury of plaintiff's claim for interest affect his or her right to it, *Elliott v Gian*, 19 AD2d 196, 241 NYS2d 364 (4th Dept 1963). Where the damage accrued at different times, a special verdict should be submitted to the jury and it may be necessary to submit the several dates from which interest will be computed, see *Brandt Corp. v Warren Automatic Controls Corp.*, 37 AD2d 563, 322 NYS2d 291 (2d Dept 1971). If an award contains both amounts for which pre-verdict interest may and may not be awarded, and they cannot be separated, then interest runs on the entire verdict from the date of the verdict, *Brandt Corp. v Warren Automatic Controls Corp.*, *supra*.

Actions for damages to or interference with property, tangible or intangible, arising from a tort are within CPLR 5001, 5 Weinstein, Korn & Miller, New York Civil Practice 5001.05. But, except in an action for wrongful death (EPTL § 5-4.3), no interest may be obtained prior to the verdict in an action for personal injuries, see *De Long Corp. v Morrison-Knudsen Co.*, 20 AD2d 104, 244 NYS2d 859 (1st Dept 1963), *aff'd*, 14 NY2d 346, 251 NYS2d 657, 200 NE2d 557 (1964); 5 Weinstein, Korn & Miller, New York Civil Practice, Section 5001.07, even where the recovery for such injuries is based upon a breach of an implied warranty of fitness for use, *Gillespie v Great Atlantic & Pacific Tea Co.*, 26 AD2d 953, 276 NYS2d 372 (2d Dept 1966), *mod on other grounds*, 21 NY2d 823, 288 NYS2d 907, 235 NE2d 911 (1968).

General Municipal Law § 3-a determines the maximum interest allowable in any judgment or accrued claim against a municipal corporation in an action to recover damages for personal injury or wrongful death. Where the statute provides for a lesser rate of interest against municipalities than the rate applicable in tort actions generally, the rate of interest payable by a municipality is determined as if the municipality were the sole defendant, see generally *Klos v New York City Transit Authority*, 240 AD2d 635, 659 NYS2d 97 (2d Dept 1997). Where the municipality is liable for the entire amount of the judgment, interest is calculated on the entire amount, regardless of the jury's apportionment of fault as between defendants, *Angona v Nassau*, 129 AD2d 543, 514 NYS2d 36 (2d Dept 1987). Generally as to interest in a wrongful death action, see Comment to PJI 2:320.

For the purposes of this section "municipal corporation" means a city, county, village, town, school district, a special or public improve-

ment district organized for the purpose of financing the cost of a public improvement or a pension or retirement fund supported in whole or in part by any of them, GML § 3-a(3).

As to interest, see Public Authorities Law §§ 1212(6), 1276(5); *Sullivan v Locastro*, 178 AD2d 523, 577 NYS2d 631 (2d Dept 1991). Pursuant to Public Authorities Law § 1212(6), the interest chargeable to the New York City Transit Authority shall not exceed 3% per year, see *Klos v New York City Transit Authority*, 240 AD2d 635, 659 NYS2d 97 (2d Dept 1997). Where a plaintiff chooses to sue several public authorities and the City of New York, the legal maximum rate that can be applied against the judgment that can be recovered against the New York City Transit Authority is 3%, *id.* For a further discussion of the interest rates applicable against various governmental entities, see Comment to PJI 2:320.5.

State Finance Law Section 16 provides that the “rate of interest to be paid by the State upon judgment or accrued claim against the State shall not exceed nine percentum per annum.” The amount of interest necessary to bring a payment into accord with the constitutional requirement of just compensation is a judicial question, although the interest rate fixed by the legislature will be deemed presumptively reasonable unless the claimant rebuts the presumption with evidence of prevailing market rates establishing that the statutory rate is so unreasonably low as not to constitute just compensation, *520 East 81st Street Associates v State*, 99 NY2d 43, 750 NYS2d 833, 780 NE2d 518 (2002). For a discussion of the factors to be applied in determining the rate of interest in an action against the State based on personal injuries, see *Auer v State*, 283 AD2d 122, 727 NYS2d 507 (3d Dept 2001) (abrogated by, *Denio v State*, 7 NY3d 159, 818 NYS2d 802, 851 NE2d 1153 (2006)).

5. DERIVATIVE ACTIONS**a. RE SPOUSE****PJI 2:315. Damages—Derivative Action Re Spouse—Loss of Services**

If you find that the injured plaintiff's (husband, wife) is entitled to recover, you will award the (husband, wife) damages for the monetary value of lost services and society which you find plaintiff (husband, wife) sustained by the loss of (his, her) spouse's services and society.

In deciding the amount of such damages, you may take into consideration the nature and extent of the (husband's, wife's) services and society before the injury, including (his, her) disposition, temperament, character and attainments; the interest (he, she) showed in (his, her) home; the social life of (his, her) family and in the comfort, happiness, education and general welfare of the members of the family; the services (he, she) rendered in superintending the household, training the children, assisting (his, her) spouse in the management of the business or affairs in which the spouse was engaged, if any; (his, her) acts of affection, love and sexual intercourse and the extent to which the injuries (he, she) sustained prevented (him, her) from performing such services and providing such society. You will award plaintiff (husband, wife) such an amount based upon the evidence and upon your own observation, experience and knowledge conscientiously applied to the facts and circumstances as in your judgment will compensate (him, her) for the monetary value of the lost services and society that you find (he, she) has sustained and is reasonably certain to sustain in the future by reason of (his, her) spouse's inability to perform such services and provide such society as a result of (his, her) injuries. Your award, if any, for loss of spousal services and society will be in separate amounts for past and future damages. In addition, you will

state the number of years over which your award for future damages is meant to cover.

Comment

Based upon *Millington v Southeastern Elevator Co.*, 22 NY2d 498, 293 NYS2d 305, 239 NE2d 897 (1968); *Butler v Manhattan Ry. Co.*, 143 NY 417, 38 NE 454 (1894); *Blaechinska v Howard Mission & Home for Little Wanderers*, 130 NY 497, 29 NE 755 (1892); *Good v Mantaibano*, 50 AD2d 885, 377 NYS2d 167 (2d Dept 1975); 45 NYJur2d 383–390, Domestic Relations §§ 290–295; Restatement, Second, Torts, § 693, Comment e; see *Buckley v National Freight, Inc.*, 90 NY2d 210, 659 NYS2d 841, 681 NE2d 1287 (1997); *Liff v Schildkrout*, 49 NY2d 622, 427 NYS2d 746, 404 NE2d 1288 (1980). Note, however, that under the FELA and the Jones Act there is no right of action for loss of consortium, *Spinola v New York Cent. R. R.*, 33 AD2d 74, 305 NYS2d 437 (2d Dept 1969); *Troy*, Loss of Consortium in Federal Employer's Liability and Other Federal Act Cases, 11 For the Defense 102, but as to loss of consortium in an action governed by general maritime law, see *Alvez v American Export Lines, Inc.*, 46 NY2d 634, 415 NYS2d 979, 389 NE2d 461 (1979), *aff'd*, 446 US 274, 100 SCt 1673 (1980). A loss of consortium claim cannot be based on employment discrimination, *Belle v Zelmanowicz*, 305 AD2d 272, 761 NYS2d 26 (1st Dept 2003).

There is no right of recovery for loss of consortium in an action for injuries sustained by a firefighter under General Municipal Law § 205-a, *Korfman v Parkway Village Associates*, 110 AD2d 886, 488 NYS2d 438 (2d Dept 1985). However, in an action for injuries sustained by a police officer under General Municipal Law § 205-e, the plaintiff's wife may assert a derivative cause of action, *Cammilleri v S & W Realty Associates*, 243 AD2d 530, 663 NYS2d 222 (2d Dept 1997); see *Dubois v Vanderwalker*, 245 AD2d 758, 665 NYS2d 460 (3d Dept 1997). Deprivation of marital association can be inferred from the nature of the injuries, *Murphy v Durmiaki*, 36 AD2d 556, 317 NYS2d 584 (3d Dept 1971), and, therefore, in the usual case it is proper to charge that a verdict in favor of the injured spouse requires a verdict in favor of the derivatively suing spouse, *De Ordio v Teresi*, 65 AD2d 890, 410 NYS2d 418 (3d Dept 1978). The evidence should establish causation and show the nature of the pre-accident relationship between the spouses, *Christman v Bailey*, 38 AD2d 773, 327 NYS2d 966 (3d Dept 1972); see *Rakich v Lawes*, 186 AD2d 932, 589 NYS2d 617 (3d Dept 1992) (long distance marriage); *Davis v Blum*, 70 AD2d 583, 416 NYS2d 57 (2d Dept 1979) (evidence of husband's alcoholism admissible to controvert evidence of exemplary home life).

Consortium represents the marital partners' interest in the continuance of the marital relationship as it existed at its inception, *Buckley v National Freight, Inc.*, 90 NY2d 210, 659 NYS2d 841, 681 NE2d 1287 (1997); *Anderson v Eli Lilly & Co.*, 79 NY2d 797, 580 NYS2d 168, 588 NE2d 66 (1991). No definite rule by which to measure recovery for loss of services and society can be stated; the matter is addressed to the

sound discretion of the jury, *Millington v Southeastern Elevator Co.*, 22 NY2d 498, 293 NYS2d 305, 239 NE2d 897 (1968); *Robison v Lockridge*, 230 App Div 389, 244 NYS 663 (4th Dept 1930). However, where the amount of damages awarded in the derivative action is grossly excessive, the court may order a new trial on that issue, in the absence of a stipulation by plaintiff to accept a lesser sum, see *Van Syckle v Powers*, 106 AD2d 711, 483 NYS2d 756 (3d Dept 1984). The damages recoverable include services rendered in a family business, *Wheaton v Guthrie*, 89 AD2d 809, 453 NYS2d 480 (4th Dept 1982), and the cost of providing a substitute to perform the extraordinary health care services originally rendered by the injured spouse, *Protzman v State*, 91 AD2d 853, 458 NYS2d 408 (4th Dept 1982).

Punitive damages cannot be recovered by a spouse in a derivative action, Annot: 25 ALR3d 1416. A verdict against a defendant in favor of a spouse in a derivative action but in favor of the defendant against the plaintiff spouse in the same action are inconsistent, Annot: 66 ALR3d 472. Moreover, verdicts for the husband and against the wife are inconsistent and should be set aside, *Hagler v Consolidated Edison Co. of New York, Inc.*, 99 AD2d 725, 472 NYS2d 340 (1st Dept 1984); *Watts v Kather*, 23 AD2d 815, 258 NYS2d 581 (4th Dept 1965).

Since the loss of consortium claim is personal to the spouse, it is improper to charge the jury to consider the effect of the injury to the other spouse "on the home, the whole family," *Fafard v Ajamian*, 60 AD2d 853, 400 NYS2d 856 (2d Dept 1978). Under settled New York law, because consortium represents each marital partner's interest in the continuance of the marital relationship as it existed at the inception of the marriage, a loss of consortium cause of action by the spouse of an injured person does not lie if the alleged tortious conduct and resultant injuries occur prior to the marriage, *Anderson v Eli Lilly & Co.*, 79 NY2d 797, 580 NYS2d 168, 588 NE2d 66 (1991); *Lesocovich v 180 Madison Ave. Corp.*, 165 AD2d 963, 561 NYS2d 851 (3d Dept 1990). Thus, a husband can not recover for loss of consortium sustained as a result of the wife's exposure to DES while in utero since the wrongful conduct and the injuries occurred prior to marriage, *Anderson v Eli Lilly & Co.*, *supra*. Likewise, a cause of action does not lie for loss of consortium where, prior to the marriage, the plaintiff's spouse was exposed to, and ingested, a toxic substance that remained in his body and eventually caused illness, but the illness did not occur until after the marriage began, *Consorti v Owens-Corning Fiberglas Corp.*, 86 NY2d 449, 634 NYS2d 18, 657 NE2d 1301 (1995). This is due to the New York rule fixing the occurrence of tortious injury as the date when the toxic substance invades or is introduced into the body, *id.*

Recovery in the derivative action was limited to the period between the accident and the separation where husband and wife separated after the accident, *Dooley v Skodnek*, 138 AD2d 102, 529 NYS2d 569 (2d Dept 1988). Where loss of the enjoyment of sexual relations is properly compensable, the court should prevent defense counsel from using the assertion of such a claim to cast negative aspersions on plaintiff's

character, *Vassura v Taylor*, 117 AD2d 798, 499 NYS2d 120 (2d Dept 1986).

A loss of consortium claim must be joined with the injured spouse's claim for illness or bodily harm whenever possible, *Buckley v National Freight, Inc.*, 90 NY2d 210, 659 NYS2d 841, 681 NE2d 1287 (1997); *Millington v Southeastern Elevator Co.*, 22 NY2d 498, 293 NYS2d 305, 239 NE2d 897 (1968). When the injured spouse releases his or her claim in the settlement of an action, the release bars the other spouse from thereafter commencing a separate action for loss of consortium, *Buckley v National Freight, Inc.*, *supra*. In *Champagne v State Farm Mut. Auto. Ins. Co.*, 185 AD2d 835, 586 NYS2d 813 (2d Dept 1992) (abrogated on other grounds by, *Liberty Mut. Fire Ins. Co. v National Cas. Co.*, 90 AD3d 859, 935 NYS2d 319 (2d Dept 2011)), where both spouses' actions were brought together, the court held that settlement by the injured spouse did not preclude the continuance of the derivative action. The *Buckley* court left open the question of whether a release would bar a loss of consortium claim that a defendant knew to be pending when it obtained the release from the injured spouse.

The percentage of comparative fault of the injured plaintiff-spouse must be applied to reduce the total amount of the award for loss of consortium, *Maidman v Stagg*, 82 AD2d 299, 441 NYS2d 711 (2d Dept 1981). The percentage of comparative fault in the accident attributable to the derivatively suing spouse will reduce the amount of damages recoverable for loss of services, *Florsz v Ogruk*, 184 AD2d 546, 585 NYS2d 220 (2d Dept 1992).

Where there are claims for both loss of services and expenses, PJI 2:315 and PJI 2:316, should be combined.

The mother of a stillborn child may recover for any injuries she sustained, including her suffering as a result of the stillbirth, and the father may recover for loss of her services and consortium, *Broadnax v Gonzalez*, 2 NY3d 148, 777 NYS2d 416, 809 NE2d 645 (2004); *Endresz v Friedberg*, 24 NY2d 478, 301 NYS2d 65, 248 NE2d 901 (1969).

A child has no action for the loss of parental consortium, e.g., support, training, attention and the like against a third person negligently injuring a parent, *De Angelis v Lutheran Medical Center*, 58 NY2d 1053, 462 NYS2d 626, 449 NE2d 406 (1983).

PJI 2:316. Damages—Derivative Action Re Spouse— Expenses Incurred

If you find that the plaintiff AB is entitled to recover, you will award (his, her) (husband, wife) damages for the expenses you find (he, she) has incurred for medical, hospital, nursing and household services and supplies made necessary as a

result of the injured person's injuries. You will award such amounts as you find to be the fair and reasonable value of the services and supplies required to date.

Comment

Caveat: Note that the charge deals only with past medical expenses. Future medical expenses are normally to be awarded to the injured party, see PJI 2:285.

Based on *Butler v Manhattan Ry. Co.*, 143 NY 417, 38 NE 454 (1894); *Orben v State Investing Co.*, 197 App Div 658, 189 NYS 243 (1st Dept 1921). Evidence must be presented of the reasonable value of the services incurred, 45 NYJur2d, Domestic Relations, §§ 290–316. The derivative cause of action is available to both husbands and wives, *MacIver v Lyon*, 43 AD2d 806, 350 NYS2d 477 (4th Dept 1973); see *Millington v Southeastern Elevator Co.*, 22 NY2d 498, 293 NYS2d 305, 239 NE2d 897 (1968). Where injuries sustained by the wife result in a stillbirth, the husband may recover the cost of funeral expenses as expenses incidental to his wife's injuries, *Endresz v Friedberg*, 24 NY2d 478, 301 NYS2d 65, 248 NE2d 901 (1969).

As to the necessity for and sufficiency of evidence concerning the reasonableness of expenses, see Annot: 12 ALR3d 1347.

As to services performed by a member of the family, see PJI 2:318.

Where there are claims for both loss of services and expenses, PJI 2:315, and the instant charge (PJI 2:316) should be combined.

As to special verdicts, itemization of past and future damages, and the issue of present value, see PJI 2:151C, 2:229A, 2:301.

The no-fault law does not cover a derivative plaintiff; see PJI 2:285A. Thus, the damage limitations of Ins. L. § 5104(a) do not apply to the derivative claim; see *Robinson v Sparta Taxi Inc.*, 80 Misc2d 525, 363 NYS2d 235 (Sup 1975); see also *Barker v Scott*, 81 Misc2d 414, 365 NYS2d 756 (Sup 1975), but in order to avoid duplication of benefits, the defendant must be credited with the amount of first-party benefits paid to the injured party, *Robinson v Sparta Taxi Inc.*, supra.

b. RE CHILD

PJI 2:317. Damages—Derivative Action Re Child—Loss of Services

A parent has a right to the services of a child. If you find that (*plaintiff-father, plaintiff-mother*) is entitled to recover, you will award (him, her) damages for the pecuniary loss which you find (he, she) sustained by the loss of the infant's services.

Take into consideration the services performed by the child before the occurrence, the age, health, skill, training, industry, and experience of the child and the extent to which the injuries (he, she) sustained disabled (him, her) from performing services and, with reasonable certainty, will disable (him, her) from performing services in the future until the child becomes 18 years of age. Based upon these factors, you will award the reasonable value of the child's services which the parent[s] (has, have) been, and will be, deprived of as a result of those injuries.

Comment

Based on *Gilbert v Stanton Brewery*, 295 NY 270, 67 NE2d 155 (1946); *Clarke v Eighth Ave. R. Co.*, 238 NY 246, 144 NE 516 (1924); *Barnes v Keene*, 132 NY 13, 29 NE 1090 (1892); *Dollard v Roberts*, 130 NY 269, 29 NE 104 (1891); *Cumming v Brooklyn City R. Co.*, 109 NY 95, 16 NE 65 (1888); see *Clark*, New York Law of Damages, § 377; 45 NYJur2d, Domestic Relations § 519; Restatement, Second, Torts § 703. Loss of companionship is not an element of the damages, *Gilbert v Stanton Brewery, Inc.*, *supra*; *George v Windham*, 169 AD3d 876, 94 NYS3d 363 (2d Dept 2019); *Devito v Opatich*, 215 AD2d 714, 627 NYS2d 441 (2d Dept 1995); *White v New York*, 37 AD2d 603, 322 NYS2d 920 (2d Dept 1971); *Beyer v Murray*, 33 AD2d 246, 306 NYS2d 619 (4th Dept 1970); Annot: 54 ALR4th 112. Punitive damages cannot be recovered by a parent in a derivative action, *Tidd v Skinner*, 225 NY 422, 122 NE 247 (1919); Annot: 25 ALR3d 1416.

Tinnerholm v Parke, Davis & Co., 411 F2d 48 (2d Cir 1969), recovery for loss of services was allowed as to an infant injured at age three months and who suffered mental damage requiring institutionalization. Thus, it is not necessary for services to have been provided prior to the injury.

If there is a question of fact concerning emancipation, the following

should be given with the above charge:

PJI 2:317.1

It is claimed that the child AB was emancipated. Emancipation of a child means the liberation of the child from parental control and surrender by the parents of authority over the child. It means that the child is thrown upon (his, her) own resources and is free to act upon (his, her) own responsibility and according to (his, her) own wishes. Emancipation may come about by express agreement between parents and child or it may be implied by their conduct. In determining whether AB was emancipated on [date of injury], you will take into consideration the evidence that you accept as true concerning ([Here list pertinent evidence, such as: conversations between AB and (his, her) parents; the conduct of (his, her) parents toward AB; the work that AB did; the money earned by AB; the uses or purposes for which the money was spent or saved; where AB lived; by whom AB's day-to-day expenses for food, clothing, laundry, medical services and the like were paid; by whom the decisions concerning AB's day-to-day activity were made.]) If you conclude that on [date of accident] AB's parents had liberated (him, her) from their control and AB was allowed to act upon (his, her) own responsibility and according to (his, her) own wishes, your finding will be that AB was emancipated, and your verdict on the parent's cause of action will be for the defendant. If you conclude that on that date AB was not liberated from his parents' control and the parents had not allowed AB to act upon (his, her) own responsibility and according to (his, her) own wishes, your finding will be that AB was not emancipated. The burden of proving to your satisfaction by a fair preponderance of the evidence that AB was not emancipated is upon the plaintiff.

What constitutes emancipation is a question of law, but whether there has been an emancipation is a question of fact; see *Gittleman v Gittleman*, 81 AD2d 632, 438 NYS2d 130 (2d Dept 1981); *St. Croix* by

White v St. Croix, 17 AD2d 692, 229 NYS2d 969 (4th Dept 1962); Crosby v Crosby, 230 App Div 651, 246 NYS 384 (3d Dept 1930). With respect to the facts to be considered by the jury, the examples in the pattern charge are supported by Stanley v National Union Bank, 115 NY 122, 22 NE 29 (1889); Giovagnoli v Ft. Orange Const. Co., 148 App Div 489, 133 NYS 92 (3d Dept 1911); Cohen v Schnepf, 94 AD2d 783, 463 NYS2d 29 (2d Dept 1983); Terwilliger v Terwilliger, 201 Misc 453, 106 NYS2d 481 (Sup 1951); Cohen v Delaware, L. & W.R. Co., 150 Misc 450, 269 NYS 667 (Sup 1934).

Caveat: While the suggested charge places the burden of proof on the issue upon the plaintiff, the burden in a child support context has been placed upon the party asserting the child's emancipation; see Gittleman v Gittleman, 81 AD2d 632, 438 NYS2d 130 (2d Dept 1981); see also CJS, Parent & Child, § 90.

The cases speak of the services of the child "during minority." Notwithstanding the fact that Domestic Relations Law § 32 and Family Court Act § 413, 414 charge parents with the support of children under the age of 21, DRL § 2 provides that "A 'minor' or 'infant' . . . is a person under the age of eighteen years" and the latter age is used in the charge with respect to a claim for loss of services. But, as held in Clough v Board of Ed. of Spencerport Central School Dist., Monroe County, 56 AD2d 233, 392 NYS2d 170 (4th Dept 1977), because the parent has an obligation to support until the child reaches 21, the parent has a derivative cause of action for medical, hospital, and nursing expenses until the child is 21 years. The child, however, cannot directly maintain an action on his or her own behalf to recover such expenses incurred by his parents, Radcliffe v Hofstra University, 200 AD2d 562, 606 NYS2d 333 (2d Dept 1994). Since an emancipated child is entitled to his or her own earnings and to recover for their loss, 45 NYJur2d, Domestic Relations § 578, the above charge will not be given when the evidence establishes emancipation as a matter of law.

Emancipation means that the infant is freed from parental control and has a right to his or her own earnings; it deprives the parent of control over the child and involves surrender of the right to care, custody, and earnings as well as the renunciation of parental duties, 45 NYJur2d, Domestic Relations §§ 570–577. The minor child may be emancipated by the parents consent, express or implied, Stanley v National Union Bank, 115 NY 122, 22 NE 29 (1889). Emancipation may be a question for the jury, St. Croix v St. Croix, 17 AD2d 692, 229 NYS2d 969; Crosby v Crosby, 230 App Div 651, 246 NYS 384 (3d Dept 1930); Tremper v Tremper, 35 Misc2d 846, 231 NYS2d 430 (Sup 1962). Factors that may be considered by the jury are: conversations between parent and child, conduct of parents toward child, where the child lived, what work the child did, who paid the expenses of the child's maintenance, who made decisions concerning the child's everyday activities; see Stanley v National Union Bank, 115 NY 122, 22 NE 29 (1889); Giovagnoli v Ft. Orange Const. Co., 148 App Div 489, 133 NYS 92 (3d Dept 1911); Cohen v Delaware, L. & W.R. Co., 150 Misc 450, 269 NYS

667 (Sup 1934); whether the parents abandoned the child, ordered the child from the home, or are so degraded that the child could not in decency live with them, *Murphy v Murphy*, 206 Misc 228, 133 NYS2d 796 (Sup 1954); that by court order the child was in the custody of the Welfare Commissioner, *St. Croix v St. Croix*, supra; that the child is married, *Cochran v Cochran*, 196 NY 86, 89 NE 470 (1909); but see *Matter of Palumbo*, 172 Misc 55, 14 NYS2d 329 (Dom Rel Ct 1939); that the child suffers from an illness rendering the child dependent, see *Kinsey v Kinsey*, 200 Misc 760, 107 NYS2d 212 (Dom Rel Ct 1951); and that the parent provides a weekly allowance for the child, *Hardy v Eagle*, 25 Misc 471, 54 NYS 1045 (AppT 1898).

Caveat: In *Clarke v Eighth Ave. R. Co.*, 238 NY 246, 144 NE 516 (1924), it was held that plaintiff-father was entitled to recover an amount sufficient “to compensate him for prospective loss of services of the infant during his minority, less what it would have cost to have supported and maintained him during that time had he not been injured.” However, the court noted that there was a concession to that effect. In terms of economic result, there is no more reason for deducting cost of support in a parent’s derivative action than there would be for deducting from the loss of earnings claim of an adult the cost of daily sustenance. The net gain to the parent’s coffers from the child’s services is the entire amount of the child’s earnings, for the parent is obligated to support the child in any event. Logically, therefore, a child’s earnings should be diminished by the cost of support only in a death case, for in such a case the parent has been relieved of the obligation of support which the parent had while the child lived. Even if it be considered that net gain to the parent is always to be measured by earnings less cost of support, indiscriminate application of the *Clarke* rule is inequitable, for what is involved in most cases is not loss of the child’s entire earnings but diminution of the child’s earning capacity. To deduct support in such a case ignores the fact that what is being dealt with is not the net gain by the parent from the earnings of the child but the amount by which that net gain has been diminished. The pattern charge, therefore, does not follow the *Clarke* case.

CPLR 1201 provides that an infant may appear by a parent having legal custody or by other persons or entities named therein. Except where one of the parents has been awarded sole legal custody, each parent has an independent right to commence an action on behalf of the infant, *Mullins v Saul*, 130 AD2d 634, 515 NYS2d 561 (2d Dept 1987). If each parent brings an action on behalf of the infant and for derivative damages, the actions may be consolidated, CPLR 602, but only one of the causes of action on behalf of the infant will survive, *Mullins v Saul*, supra. Where there are irreconcilable differences between the parents and their respective attorneys as to the conduct of the infant’s action, the court will appoint a guardian ad litem to represent the infant, and the guardian ad litem has the right to select the infant’s counsel, *Mullins v Saul*, supra. Each parent has a right to bring a derivative action to recover for the services the parent lost and the expenses the parent paid, *Liebler v Our Lady of Victory Hospital*, 43 AD2d 898, 351 NYS2d 480 (4th Dept 1974). Although both parents cannot recover for the same

expenses and loss of services, each may assert claims for the separate expenses borne and losses suffered, *id.* Each has a right to be represented by counsel of his or her own choice with respect to the derivative cause of action, *Mullins v Saul*, *supra*.

A step-parent who stands in *loco parentis* to an infant may also maintain a derivative action, *Syczhk v Szczerbaniewicz*, 233 App Div 342, 252 NYS 780 (4th Dept 1931). A parent who adopted the injured child after the tort at issue occurred has standing to assert a derivative claim for the child's future medical expenses, but not for loss of the child's services, society and companionship, *De'Leone ex rel. Angel v New York*, 45 AD3d 254, 845 NYS2d 241 (1st Dept 2007). While the court in *De'Leone* left open the question whether the child's biological parent may have standing to assert either a derivative claim or a claim on behalf of the child, it noted that any such claim would be limited to the time preceding the termination of that parent's parental rights.

Where there are claims for both loss of services and expenses, the instant charge and PJI 2:318 should be combined.

A child has no action for the loss of parental consortium, e.g., support, training, attention and the like against a third person negligently injuring a parent, *De Angelis v Lutheran Medical Center*, 58 NY2d 1053, 462 NYS2d 626, 449 NE2d 406 (1983); see Annot: 69 ALR2d 528.

**PJI 2:318. Damages—Derivative Action Re Child—
Expenses Incurred**

If you find that the infant (“AB”) is entitled to recover, you will award (*plaintiff-father, plaintiff-mother*) as damages the fair and reasonable value of the expenses (he, she) incurred by reason of the medical, hospital, and nursing services and supplies that were necessary as a result of AB's injuries. (*If the evidence supports a claim for future damages, state: You may not, however, award to the parent any amount for such expenses as may be incurred in the future, since you are to consider such future expenses only in connection with AB's claim in this case.*)

Comment

Based upon *Clarke v Eighth Ave. R. Co.*, 238 NY 246, 144 NE 516 (1924); *Cumming v Brooklyn City R. Co.*, 109 NY 95, 16 NE 65 (1888); *Stiles v Caddick*, 11 AD2d 889, 203 NYS2d 484 (3d Dept 1960); see 46 NYJur2d, Domestic Relations § 927. Proof must be presented of the value of the services incurred, *Heater v Delaware, L. & W.R. Co.*, 90

App Div 495, 85 NYS 524 (3d Dept 1904). As to the necessity for and sufficiency of evidence concerning the reasonableness of expenses, see Annot: 12 ALR3d 1347.

Future medical expenses for an infant when awarded must be included in the verdict for the infant, not that of the parent, *Clarke v Eighth Ave. R. Co.*, 238 NY 246, 144 NE 516 (1924); *Benitez v Trumble*, 57 AD2d 716, 395 NYS2d 551 (4th Dept 1977); *Brod v Central School Dist. No. 1 of Towns of Sand Lake and Poestenkill, Rensselaer County*, 53 AD2d 1002, 386 NYS2d 125 (3d Dept 1976); *Beyer v Murray*, 33 AD2d 246, 306 NYS2d 619 (4th Dept 1970). Limiting the parent to expenses paid out or incurred prior to trial assures that money for future expenses will be subject to court order and thus affords greater protection to the infant, *Clarke v Eighth Ave. R. Co.*, supra; *Cumming v Brooklyn City R. Co.*, 109 NY 95, 16 NE 65 (1888); see *Baker v Sterling*, 39 NY2d 397, 384 NYS2d 128, 348 NE2d 584 (1976). There is no common-law right of recovery in favor of a parent who pays the medical expenses of an adult child, even if the child lives in the parent's home, *Dunphy v J & I Sports Enterprises, Inc.*, 297 AD2d 23, 748 NYS2d 595 (2d Dept 2002).

A parent who has been reimbursed from funds of the child for expenses may not recover for them in the derivative action, *Clarke v Eighth Ave. R. Co.*, 238 NY 246, 144 NE 516 (1924). The rule is different, however, when reimbursement is by insurance which the parent has provided, see Comment to PJI 2:301. Recovery in the derivative action for expenses reimbursed by insurance or other collateral source is governed by CPLR 4545(c).

A parent who adopted the injured child after the tort at issue occurred has standing to assert a derivative claim for the child's future medical expenses, but not for loss of the child's services, society and companionship, *De'Leone ex rel. Angel v New York*, 45 AD3d 254, 845 NYS2d 241 (1st Dept 2007). While the court in *De'Leone* left open the question whether the child's biological parent may have standing to assert either a derivative claim or a claim on behalf of the child, it noted that any such claim would be limited to the time preceding the termination of that parent's parental rights. With respect to which parent is entitled to bring a derivative action and with respect to an emancipated infant, see Comment to PJI 2:317. Where there are claims for both loss of services and expenses, the instant charge and PJI 2:317 should be combined.

A negligent failure to test for or to advise prospective parents of the possibility of the birth of an impaired child is not actionable by the child as "wrongful life," or "wrongful conception" *Becker v Schwartz*, 46 NY2d 401, 413 NYS2d 895, 386 NE2d 807 (1978) (Down's Syndrome); *Howard v Lecher*, 42 NY2d 109, 397 NYS2d 363, 366 NE2d 64 (1977) (Tay-Sachs disease); *Stewart v Long Island College Hosp*, 30 NY2d 695, 332 NYS2d 640, 283 NE2d 616 (1972) (effect on fetus of mother's measles during pregnancy); see *Williams v State*, 18 NY2d 481, 276 NYS2d 885,

223 NE2d 343 (1966) (no cause of action for plaintiff born out of wedlock to mentally deficient mother who conceived while patient in State hospital); *Weed v Meyers*, 251 AD2d 1062, 674 NYS2d 242 (4th Dept 1998) (cause of action on behalf of children cannot be maintained against defendant doctor based on alleged failure to provide genetic counseling to father for retinoblastoma, a hereditary form of eye cancer). Where a child is conceived and born after the negligent performance of a sterilization procedure upon one of the parents, the claim sounds in “wrongful life” or “wrongful conception,” and there can be no recovery for the future maintenance and support of the child, *O’Toole v Greenberg*, 64 NY2d 427, 488 NYS2d 143, 477 NE2d 445 (1985) (tubal ligation); *Miller v Rivard*, 180 AD2d 331, 585 NYS2d 523 (3d Dept 1992) (vasectomy); *Abbariao v Blumenthal*, 107 AD2d 556, 483 NYS2d 296 (1st Dept 1985) (tubal ligation); *Weintraub v Brown*, 98 AD2d 339, 470 NYS2d 634 (2d Dept 1983) (vasectomy); see *Mears v Alhadeff*, 88 AD2d 827, 451 NYS2d 133 (1st Dept 1982) (negligently performed abortion). The parents of such a child are not entitled to recover damages for emotional distress occasioned by the birth and gradual death of the child, *Becker v Schwartz*, *supra*; *Howard v Lecher*, *supra*; see PJI 2:280. However, in *Broadnax v Gonzalez*, 2 NY3d 148, 777 NYS2d 416, 809 NE2d 645 (2004), the Court of Appeals overruled its prior decision in *Tebbutt v Virostek*, 65 NY2d 931, 493 NYS2d 1010, 483 NE2d 1142 (1985), and held that an expectant mother may recover damages for emotional distress resulting from a miscarriage or stillbirth that was caused by medical malpractice, even in the absence of independent physical injury.

Where a pregnant woman generally opposed to abortion decides to submit to one based upon negligent medical advice—that the child would be born with a serious, congenital defect—she may recover for the emotional distress resulting from the abortion and the death of the fetus, *Martinez v Long Island Jewish Hillside Medical Center*, 70 NY2d 697, 518 NYS2d 955, 512 NE2d 538 (1987). Likewise, recovery is permitted for the physical and emotional injuries sustained by a pregnant woman as the result of an abortion occasioned by a physician’s negligent failure to detect her pregnancy prior to prescribing a drug potentially harmful to the fetus, *Lynch v Bay Ridge Obstetrical and Gynecological Associates, P.C.*, 72 NY2d 632, 536 NYS2d 11, 532 NE2d 1239 (1988). In addition, recovery was allowed for the physical and emotional injuries suffered by a pregnant woman from a miscarriage due to the defendant’s negligence in failing to advise her that she could still be pregnant due to an incomplete abortion, *Ferrara v Bernstein*, 81 NY2d 895, 597 NYS2d 636, 613 NE2d 542 (1993). On the other hand, a woman who was erroneously advised that she was pregnant and who was treated for that condition for months is limited to recovery for pecuniary loss and may not, in the absence of any physical trauma, recover for emotional distress, *Lancellotti v Howard*, 155 AD2d 588, 547 NYS2d 654 (2d Dept 1989). In addition, where plaintiffs were suing for alleged negligent implanting of wife’s fertilized ova in another woman, and there was no allegation of negligence or physical injury concerning the initial physical intrusion into the wife’s body, they may not seek damages for emotional injuries caused by defendant’s negligence in

improperly implanting the ova because no form of physical trauma was sustained, *Creed v United Hosp.*, 190 AD2d 489, 600 NYS2d 151 (2d Dept 1993). It should be noted, however, that the rationales in these cases may be affected by the decision in *Broadnax v Gonzalez*, 2 NY3d 148, 777 NYS2d 416, 809 NE2d 645 (2004), which held that an expectant mother may recover damages for emotional distress resulting from a miscarriage or stillbirth that was caused by medical malpractice, even in the absence of independent physical injury.

Where the child is carried to term and is born with defects, neither the parent nor the impaired child may recover for failure to perform an abortion, *Stewart v Long Island College Hosp*, 30 NY2d 695, 332 NYS2d 640, 283 NE2d 616 (1972). The parents may, however, recover damages measured by the cost of care and treatment of the child, *Becker v Schwartz*, 46 NY2d 401, 413 NYS2d 895, 386 NE2d 807 (1978); see *B.F. v Reproductive Medicine Associates of New York, LLP*, 30 NY3d 608, 69 NYS3d 543, 92 NE3d 766 (2017); *Foote v Albany Medical Center Hosp.*, 16 NY3d 211, 919 NYS2d 472, 944 NE2d 1111 (2011). Since parents have no legal obligation to support children after they become 21, see Family Court Act § 413; Domestic Relations Law § 32; Social Services Law § 101, any recovery is limited to the extraordinary expenses incurred or to be incurred prior to the child's 21st birthday, *Bani-Esraili v Lerman*, 69 NY2d 807, 513 NYS2d 382, 505 NE2d 947 (1987). The existence of government programs that provide resources to a disabled child will not, as a matter of law, eliminate the parents' financial obligation for their child's extraordinary medical and educational expenses during the child's minority, *Foote v Albany Medical Center Hosp.*, 16 NY3d 211, 919 NYS2d 472, 944 NE2d 1111 (2011). There can be no recovery for the normal expenses of rearing, maintaining, supporting, or educating a normal but unwanted child, *Abbariao v Blumenthal*, 107 AD2d 556, 483 NYS2d 296 (1st Dept 1985); *Weintraub v Brown*, 98 AD2d 339, 470 NYS2d 634 (2d Dept 1983); *Sorkin v Lee*, 78 AD2d 180, 434 NYS2d 300 (4th Dept 1980). Because the cause of action for expenses incurred on behalf of an impaired child during minority belongs to the parents, the child has no cause of action for the recovery of the extraordinary expenses that the child will incur for special care and services upon reaching majority, *Alquijay by Alquijay v St. Luke's-Roosevelt Hosp. Center*, 63 NY2d 978, 483 NYS2d 994, 473 NE2d 244 (1984). Where sterility results from medical malpractice, there is no recovery for the loss and deprivation of children and their companionship, but recovery may be had for any physical injuries sustained by the patient and any mental and emotional distress attending those injuries, *Villa v Marciano*, 167 AD2d 828, 561 NYS2d 938 (4th Dept 1990); *Hahn v Taefi*, 115 AD2d 946, 497 NYS2d 522 (4th Dept 1985). However, negligent delay in delivery which causes the mother emotional distress related to a previous condition may be compensable, *Prado v Catholic Medical Center of Brooklyn and Queens, Inc.*, 145 AD2d 614, 536 NYS2d 474 (2d Dept 1988) (mother feared real possibility of rupture of prior rectocystocele repair). But the Prado case has been limited to its "exceptional" factual circumstances, *Guinaldo v Allen*, 171 AD2d 535, 567 NYS2d 255 (1st Dept 1991).

Although there can be no recovery for household services provided gratuitously by friends and relatives, *Schultz v Harrison Radiator Div. General Motors Corp.*, 90 NY2d 311, 660 NYS2d 685, 683 NE2d 307 (1997), a parent who renders nursing services to the child may recover the reasonable value of such services, *Auer v State*, 289 AD2d 626, 733 NYS2d 784 (3d Dept 2001); see *King v State*, 56 AD2d 964, 393 NYS2d 93 (3d Dept 1977). Giving up a more lucrative occupation in order to act as nurse would not entitle a parent to recover for loss of earnings while performing such services, *Barnes v Keene*, 132 NY 13, 29 NE 1090 (1892); *Syczkh v Szczerbaniewicz*, 233 App Div 342, 252 NYS 780 (4th Dept 1931). In such cases there should be added between the first and second sentences of the above charge, the following:

PJI 2:318.1

Such damages also include the reasonable value of the nursing services necessarily performed by the (plaintiff-father, plaintiff-mother) for the infant. If you find that such services were performed, the amount you should award will be measured by the amount customarily paid for such services.

Medicaid is a jointly funded Federal and State program that pays for necessary medical care of qualifying indigent persons. See 42 U.S.C. § 1396 *et seq.*; Social Services Law § 363 *et seq.* Medicaid applicants must assign to the State the right to seek reimbursement from any third party, up to the amount of medical assistance paid, 42 U.S.C. § 1396k(a)(1)(A); Social Services Law § 366(4)(h)(1); 18 NYCRR 360-7.4(a)(4). In New York, as a corollary to this assignment, the local Social Services District is subrogated, to the extent of its expenditures for medical care furnished, to any rights a Medicaid recipient may have to third party reimbursement, Social Services Law § 367-a(2)(b); 18 NYCRR 360-7.4(a)(6). Pursuant to this assignment and subrogation scheme, the Department of Social Services obtains all of the rights that the recipient has against the third party to recover for medical expenses, including the ability to immediately pursue those claims against the third party, *Gold ex rel. Gold v United Health Services Hospitals, Inc.*, 95 NY2d 683, 723 NYS2d 117, 746 NE2d 172 (2001); *Cricchio v Pennisi*, 90 NY2d 296, 660 NYS2d 679, 683 NE2d 301 (1997). As an alternative to suing the responsible third party directly, the Department may pursue reimbursement indirectly by placing a lien on personal injury suits brought by a Medicaid recipient against the responsible party, see Social Services Law § 104-b. A Medicaid lien attaches to any verdict, decision, decree, judgment, award or final order in any suit, action or proceeding in any court or administrative tribunal of New York State respecting such injuries, as well as the proceeds of any settlement thereof, and continues until discharged by the public welfare official, Social Services Law § 104-b(3), (7).

The right of the Department of Social Services to seek recovery of

expenditures for medical care furnished from responsible third parties is not derived from § 104(1) or 104-b of the Social Services Law, but rather from Medicaid's own assignment, subrogation and recoupment provisions, *Gold ex rel. Gold v United Health Services Hospitals, Inc.*, 95 NY2d 683, 723 NYS2d 117, 746 NE2d 172 (2001); *Calvanese v Calvanese*, 93 NY2d 111, 688 NYS2d 479, 710 NE2d 1079 (1999); *Cricchio v Pennisi*, 90 NY2d 296, 660 NYS2d 679, 683 NE2d 301 (1997). Under the relevant provisions of the Social Services Law, governmental agencies have broad authority to satisfy a lien for medical services from the entire amount of a personal injury judgment or settlement, *Gold ex rel. Gold v United Health Services Hospitals, Inc.*, *supra*. Although Social Services Law § 104(1) does not apply in cases involving the unique recoupment provisions of the Social Services Law specific to Medicaid, it continues to be a recoupment mechanism when other forms of public assistance are involved, *id.* Thus, when public welfare officials rely solely on § 104(1) of the Social Services Law, the limitation in § 104(2) that restricts an agency's ability to recover when the public assistance recipient is under 21 continues to apply, *id.*

The Department of Social Services is entitled to satisfy a Medicaid lien placed on the proceeds of a personal injury settlement pursuant to Social Services Law § 104-b before a plaintiff may transfer those funds to a supplemental needs trust, *Cricchio v Pennisi*, 90 NY2d 296, 660 NYS2d 679, 683 NE2d 301 (1997). The entire amount of a personal injury settlement is available to satisfy a Medicaid lien, and not solely that portion of the settlement specifically allocated to past medical expenses, *Calvanese v Calvanese*, 93 NY2d 111, 688 NYS2d 479, 710 NE2d 1079 (1999).

The no-fault law does not cover a derivative plaintiff; see PJI 2:285A. Thus the damage limitations of Ins. L. § 5104(a) do not apply to the derivative claim; see *Barker v Scott*, 81 Misc2d 414, 365 NYS2d 756 (Sup 1975); *Robinson v Sparta Taxi Inc.*, 80 Misc2d 525, 363 NYS2d 235 (Sup 1975). But in order to avoid duplication of benefits, the defendant must be credited with the amount of first party benefits paid to the injured party, *Robinson v Sparta Taxi Inc.*, *supra*.

Where the child's action is settled but the parent's derivative action is not, the provisions of GOL § 15-108 are inapplicable, and the parent may recover, without reduction, the full amount of the damages proven, *Gallina v State*, 115 AD2d 251, 495 NYS2d 831 (4th Dept 1985). The parent did not join in the settlement, and the release by the child did not affect a release of the parent's claim in the case, *id.*

6. ACTION FOR WRONGFUL DEATH AND CONSCIOUS PAIN

PJI 2:320. Damages—Actions for Wrongful Death and Conscious Pain and Suffering

As you have heard, the plaintiff, EF, is the representative of the estate of AB. EF makes two claims: the first claim seeks damages on behalf of *[list distributees]* resulting from the death of AB and the second claim seeks damages for the injuries suffered and losses sustained by AB before (he, she) died. You must separately consider each of these claims.

As to the first claim, damages are the amount that you find to be fair and just compensation for the monetary losses resulting from AB's death to each of the persons for whom this claim is brought. Those persons are: *[list the distributees by name and state their relationship to decedent]*.

EF claims that these individuals have sustained monetary loss as a result of AB's death in that *[state items of pecuniary loss claimed by plaintiff]*. Defendant CD claims *[state CD's claims in relation to distributees' alleged pecuniary loss]*.

The law limits damages resulting from AB's death to monetary injuries. You may not consider or make any award for sorrow, mental anguish, injury to feelings, or for loss of companionship. You must decide the monetary losses to *[list the distributees by name]* caused by AB's death on *[give date of death]*. In deciding the amount of monetary losses, you should consider the character, habits and ability of AB; the circumstances and condition of *[list the distributees by name]*; the services that AB would have performed for (him, her, them); the portion of (his, her) earnings that AB would have spent in the future for the care and support of *[list the distributees by name]*; the age and life expectancy of AB; the ages and life expectancies of *[list the distributees by name]*; and *[where the distributees include children]* the value of the intellectual, moral, and

physical training, guidance and assistance that AB would have given the children had (he, she) lived. You should also consider the amount, if any, by which AB, if (he, she) had lived, would have increased (his, her) estate from (his, her) earnings and thus added to the amount that would have been inherited from (him, her), provided that you find that at least one of *[list the distributees by name]* would have been alive to inherit from (him, her) had AB not died on *[state date of death]*.

AB was, at the time of (his, her) death *[state age]* and, according to the life expectancy tables, had a life expectancy of *[state number of years]*. (His, her) spouse was then *[state age]* and had a life expectancy of *[state number of years]*. The children were *[state ages]* and had life expectancies, respectively of *[state number of years]*. Life expectancy tables are simply statistical averages. A person might live longer or die sooner than the time indicated by those tables. The figures I just mentioned are not controlling but may be considered by you together with the evidence you heard concerning the health, habits, employment and activities of AB prior to (his, her) death and those of *[list the distributees by name]* in determining what their respective life expectancies were at the time AB died.

You must decide what portion of (his, her) earnings AB would have spent for the care and support of *[list the distributees by name]*. In making your decision, you must consider: the amount AB earned per (week, month, year) prior to (his, her) death; the part of those earnings that AB contributed to the care and support of each of the distributees and the pattern of those contributions; the position that AB had with (his, her) employer at the time that (he, she) died; (his, her) prospects for advancement and the probabilities with respect to (his, her) future earnings; the risks of (his, her) occupation; the condition of (his, her) health and the length of time that (he, she) would reasonably be expected to continue working. As to this last fac-

tor, the work expectancy of AB was, according to work expectancy tables, [*state number of years*]. That figure, like the life expectancy figures I mentioned earlier, is only a statistical average and is furnished simply as a guide. In determining what portion of (his, her) available earnings AB would have applied in the future to the care and support of (his, her) children, you should consider that AB was not legally obligated to contribute to the support of any child who became 21 years old. However, AB could have stopped supporting a child under 21 who [*e.g., became self-supporting*] or could have decided to continue to support a child who was older than 21. If, on the evidence, you deem it reasonably probable that any of the children would have [*e.g., become self-supporting*] prior to age 21, or that AB would have contributed to the support of any of them beyond age 21, you may use as the date of termination of support of that child a date which is earlier or later than 21 as you deem proper.

As I stated before, it is the monetary value of AB to each of the distributees that you must decide. That value is incapable of exact proof. Taking into account all the factors I have discussed, you must use your own common sense and sound judgment based on the evidence in deciding the amount of the monetary loss suffered by each of the distributees.

The amount you award for monetary losses sustained by each of the distributees must represent the full amount of such losses without reduction to present value. You must also decide the period of years for which that amount is intended to provide compensation.

You will make a separate award for those reasonable expenses for AB's funeral and burial lot and those that were ([*where appropriate*] paid by the spouse, for which the spouse is responsible) for medical aid, nursing and other care required to treat AB's injuries.

As to the claim for damages sustained by AB before (he, she) died, which is the second claim I mentioned to you earlier, plaintiff is entitled to recover such sum as you find will fairly and justly compensate for AB's pain and suffering during such time as (he, she) was conscious from the moment of injury to the moment of death. Conscious pain and suffering means pain and suffering of which there is some level of awareness by AB. In addition, plaintiff is entitled to recover those reasonable expenses that were paid or incurred by (AB, AB's estate) for medical aid, nursing and other care required to treat AB's injuries, and such amount for loss of earnings as you find AB would have earned between the date of injury and the date of death had (he, she) not been injured.

[*The following should be charged when there is evidence that the decedent experienced pre-impact terror, see Caveat 3 below:*] Plaintiff is also entitled to recover the amount you find that will fairly and justly compensate for the emotional pain and suffering actually endured by AB between the moment AB realized that (he, she) was going to be gravely injured or die and the moment AB sustained a physical injury. In order to find that plaintiff is entitled to recover for these damages, you must find that (a) AB was aware of the danger that caused (his, her) grave injury or death, (b) AB was aware of the likelihood of grave injury or death, and (c) AB suffered emotional distress as a result of (his, her) awareness of (his, her) impending grave injury or death.

Your verdict will include answers to the following questions, which will be submitted to you in writing:

1. State the total amount of monetary loss, if any, to each of [*list the distributees by name*] resulting from AB's death. For the children of AB this monetary loss should include the deprivation of the intellectual, moral and physical training and education that AB would have given. [*In cases tried*

in the Second Department, consider stating in place of the preceding sentence: State the total amount of monetary loss, if any, to (list the distributees by name) resulting from AB's death, without specifying the amount of monetary loss for each individual (see Caveat 2 below)].

2. For each person for whom an award is made in your answer to Question No. 1, state the period of years over which the amount awarded for such monetary loss is intended to provide compensation [*In cases tried in the Second Department, consider omitting this question, see Caveat 2 below*].

3. State the amount awarded, if any, for the following items of damage incurred or paid by AB's spouse:

- (a) Medical expenses;
- (b) Nursing and other expenses;
- (c) Funeral expenses, including any burial lot.

4. State the amount awarded for the following items of damage sustained before AB's death, if any, incurred by AB prior to (his, her) death or for which AB's estate is responsible [*Only include items that are supported by the evidence in the case before the court*]:

- (a) Medical expenses;
- (b) Nursing and other expenses;
- (c) Dental expenses;
- (d) Loss of earnings/Impairment of earning ability;
- (e) Custodial care;
- (f) Rehabilitation services;
- (g) Emotional pain and suffering AB endured between the moment AB realized that (he, she) was going to be gravely injured or die

and the moment AB sustained a physical injury;

- (h) Pain and suffering of AB from the moment of physical injury to the moment of death;**
- (i) Funeral expenses, including a burial lot.**

If you decide not to make an award as to any item, you will insert the word “none” as to that item.

Caveat 1: Where the distributees are persons other than the surviving spouse and children, the charge must be modified accordingly.

Caveat 2: As a general rule, the jury should allocate the total amount of economic loss among the distributees. In *Huthmacher v Dunlop Tire Corp.*, 309 AD2d 1175, 765 NYS2d 111 (4th Dept 2003), the Fourth Department held that the jury must allocate the amount of economic loss among the distributees. However, in *Carter v New York City Health and Hospitals Corp.*, 47 AD3d 661, 851 NYS2d 588 (2d Dept 2008), the Second Department stated, in what appears to be dicta, that it was improper in a wrongful death case to ask the jury to itemize the amount of economic loss to be awarded to each distributee. The Carter court also stated that the jury’s role is limited to determining the total wrongful death damages to be awarded to all distributees and that the apportionment of the award among the distributees is for the Supreme or Surrogate’s Court after a hearing. In light of Carter, courts within the Second Department should consider modifying the charge and verdict sheet in wrongful death cases to require a single lump sum award to the distributees.

Caveat 3: With respect to the compensable injuries sustained by the decedent before he or she died—the plaintiff’s second claim in the charge—the decedent’s estate may recover damages for the decedent’s “pre-impact terror” as an element of the decedent’s conscious pain and suffering. Damages for pre-impact terror are designed to compensate the decedent’s estate for the fear the decedent experienced during the interval between the moment the decedent appreciated the danger resulting in the decedent’s death and the moment the decedent sustained a physical injury as a result of the danger, see *Cabrera v Lincoln Sq. Condominium*, 199 AD3d 507, 157 NYS3d 420 (1st Dept 2021) (motion to dismiss plaintiff’s claim for wrongful death and pain and suffering properly denied where testimony of decedent’s coworker concerning knowledge of impending accident coupled with expert testimony of time that elapsed during that period sufficiently supported claim of impending death and pre-accident suffering); *Vatalaro v Suffolk*, 163 AD3d 893, 81 NYS3d 441 (2d Dept 2018) (citing PJI); *Matter of 91st Street Crane Collapse Litigation*, 154 AD3d 139, 62 NYS3d 11

(1st Dept 2017) (citing PJI); *McKenna v Reale*, 137 AD3d 1533, 29 NYS3d 596 (3d Dept 2016). Such damages are appropriate where there is evidence that the decedent was aware of the danger that caused the decedent's death, that the decedent was aware of the likelihood of grave injury or impending death, and that the decedent suffered emotional distress as a result of that awareness, *Lang v Bouju*, 245 AD2d 1000, 667 NYS2d 440 (3d Dept 1997); see *Keenan v Molloy*, *supra*; *Phiri v Joseph*, 32 AD3d 922, 822 NYS2d 573 (2d Dept 2006); *Anderson v Rowe*, 73 AD2d 1030, 425 NYS2d 180 (4th Dept 1980); see also this Comment, *infra*. Care must be taken in preparing the charge to reflect the precise conscious pain and suffering damages that the evidence supports, as three possible scenarios exist: (1) the evidence supports an award only for pre-impact terror, (2) the evidence supports an award only for pain and suffering from the moment of physical injury to the moment of death, or (3) the evidence supports awards for both species of damages.

Caveat 4: The above pattern charge applies generally to all wrongful death actions. However, for actions based on medical, dental or podiatric malpractice commenced on or after July 26, 2003, the charge may be modified to instruct the jury to reduce to present value the award for future damages and to eliminate the instruction to specify the period of years for which an award of future damages is intended to provide compensation, see Comment to this charge, *infra*.

I. General Considerations

The wrongful death charge contains instructions for the jury relating to two substantive claims: (1) the wrongful death cause of action itself, and (2) the survival action. The wrongful death cause of action, which is a creature of statute, provides a means of compensation to the decedent's distributees for the pecuniary injuries they suffered as a result of the decedent's death. The common law survival cause of action is brought on behalf of the decedent's estate to recover for the decedent's pre-death losses, including conscious pain and suffering and past lost earnings. Both causes of action are brought by the decedent's personal representative for the benefit of the distributees on the wrongful death cause of action and the estate on the survival action, *Jordan v Metropolitan Jewish Hospice*, 122 AD3d 682, 995 NYS2d 610 (2d Dept 2014); see *Freeland v Erie*, 122 AD3d 1348, 997 NYS2d 860 (4th Dept 2014).

EPTL 5-4.3 governs the amount of recovery for wrongful death; EPTL 5-4.4 and EPTL 1-2.5 define the persons for whose benefit the action is brought. EPTL 11-3.3 defines what may be recovered in a survival action, including conscious pain and suffering. Pre-death loss of earnings, as well as medical, nursing and funeral expenses paid by decedent or by the estate, or which are a charge against the estate, are recoverable in the survival action, EPTL 11-3.3, but damages for future loss of earnings or loss of services are not, *Huthmacher v Dunlop Tire Corp.*, 309 AD2d 1175, 765 NYS2d 111 (4th Dept 2003). Medical, nursing and funeral expenses paid by the spouse or next of kin, or for which

such person is responsible are recoverable in the wrongful death action, EPTL 5-4.3, but funeral expenses paid by a spouse in his or her capacity as administrator of decedent's estate are recoverable as an item of damages in the survival action, *Montalvo v Chiaramonte*, 74 AD3d 455, 902 NYS2d 520 (1st Dept 2010). To avoid a double recovery, the pattern charge must be modified to reflect who made or is responsible for these payments. Itemized verdicts are required in wrongful death actions, CPLR 4111(e); this issue is discussed further in this Comment.

Age 21 is used in the pattern charge because the age for support has not been reduced. While the legislature in 1974 lowered the age of majority to 18, see Domestic Relations Law § 2; CPLR 105; see also PJI 2:317, statutory authority continues to make parents chargeable for the support of their children to age 21, Family Court Act § 13, but not beyond, *Hirsch v Hirsch*, 142 AD2d 138, 534 NYS2d 681 (2d Dept 1988). As to emancipation, see PJI 2:317.1. As to "loss of earnings" and "future impairment of earning ability" sustained by decedent prior to death, except in the most unusual circumstances, there is little, if any, distinction between the two items and, therefore, it is erroneous to identify both as separate items of damages, *Taylor v Henderson*, 175 AD2d 590, 573 NYS2d 793 (4th Dept 1991).

II. Effect of Legislation Applicable to Certain Actions Commenced on or After July 23, 2003

In 1985 the Legislature adopted CPLR article 50-A to require that certain money judgments in medical, dental and podiatric malpractice actions be paid over a period of time through "structured" plans. In 1986 the Legislature adopted CPLR article 50-B, which applied essentially the same requirements to most other tort actions. A significant overhaul of the structured judgments provisions occurred in 2003, when the Legislature revised CPLR article 50-A. Included among the changes was a provision that all damages in wrongful death actions based on medical, dental and podiatric malpractice be paid in a lump sum (as opposed to payment in structured form), CPLR 5031(b); *Toledo v Iglesia Ni Cristo*, 18 NY3d 363, 939 NYS2d 282, 962 NE2d 773 (2012). The revisions to CPLR article 50-A were made applicable to medical, dental and podiatric malpractice actions commenced on or after July 26, 2003. No similar revisions were made to CPLR article 50-B.

The 2003 revisions to CPLR article 50-A resulted in some seeming anomalies. First, although the revisions made the structured judgment requirements inapplicable to post-July 26, 2003 wrongful death actions for medical, dental and podiatric malpractice, it did not alter the provision in CPLR 4111(e) (former CPLR 4111(f)) requiring that the jury be instructed that it must not only itemize the damages but also set forth the period of years over which the amounts for future damages are intended to provide compensation. An instruction requiring the jury to set forth the period of years for which its award of future damages is intended to compensate has no practical utility where future damages are awarded in a lump sum and may be particularly problematic in cases tried in the Second Department since *Carter v New York City*

Health and Hospitals Corp., 47 AD3d 661, 851 NYS2d 588 (2d Dept 2008), states that courts should not ask the jury to itemize the amount of economic loss to be awarded to each distributee.

Second, the 2003 revisions to CPLR article 50-A altered the structured judgment scheme applicable to actions involving medical, dental and podiatric malpractice by exempting awards for future damages in wrongful death cases from the structuring requirements, CPLR 5031(d); *Toledo v Iglesia Ni Christo*, 18 NY3d 363, 939 NYS2d 282, 962 NE2d 773 (2012). Although CPLR 5031 as amended now requires future damages to be awarded in a lump sum, that statute is silent on the question whether the award should be reduced to its present value. If there were no other relevant statutory provisions, the common-law approach to that question would, presumably, be revived. Under the common law, the parties could submit expert evidence on the present-value question, including evidence of the effects of inflation, and the jury could return a verdict reflecting a reduction of its future-damages award to its present value. However, the final sentence of CPLR 4111(e) (former CPLR 4111(f)), which was not amended in 2003, still requires an instruction that the jury must “award the full amount of future damages, as calculated, without reduction to present value,” see *Toledo v Iglesia Ni Christo*, 18 NY3d 363, 939 NYS2d 282, 962 NE2d 773 (2012). If, as the language suggests, that sentence is applicable to wrongful death actions based on medical, dental and podiatric malpractice, then any consideration of reduction to present value is precluded.

An alternative reading of CPLR 4111(e), which is suggested by CPLR 4111’s respective subdivision headings as well as by the first sentence of subdivision (e), is that CPLR 4111(d) is the exclusive governing provision for medical, dental and podiatric malpractice actions. Since CPLR 4111(d) contains no language prohibiting consideration of present value, this alternative reading of the statute would permit consideration of—and reduction to—the present value of a future-damages award.

The pattern charge, which is applicable generally to all wrongful death actions, does not contain an instruction on reduction to present value, and therefore reflects the first view of the statute discussed above. In the absence of legislative clarification and in the absence of any appellate case law on the issue of reduction to present value in actions based on medical, dental or podiatric malpractice commenced on or after July 23, 2003, the question of which interpretative approach should be taken is one that trial courts will have to resolve as a matter of first impression or the parties will resolve by agreement. Where the parties have agreed or the court has determined that reduction to present value is appropriate and where relevant expert testimony has been offered the following charge may be utilized and inserted in place of the eighth paragraph of the pattern charge:

PJI 2:320.1

In determining the monetary loss sustained by

[*list the distributees by name*], you must also consider the fact that a lump sum of money received today is worth more than the same amount paid in installments over a period of time, because the lump sum can be invested to earn interest. Your award is being made now, even though the earnings from which AB would have contributed to the support of [*list the distributees by name*] would have been received in the future. For that reason, you must reduce the amount that you find that AB would have contributed each year from (his, her) earnings to the support of [*list the distributees by name*] to its present cash value in order to make allowance for the earning power of the money.

You have heard testimony that will assist you in deciding the present cash value of the money by determining a discount rate for each year and then using that discount rate to deduct from your award a reasonable allowance for the earning power of money. In determining what discount rate to use for each year, you must consider the rate of interest that is fairly to be expected from reasonably safe investments made by a person who does not have any special financial skill or experience. On the other hand, you must also consider that inflation may reduce the value of a dollar in the future. For example, if I invest \$1 today, I will earn interest on that dollar but I will not actually come out ahead unless the interest rate that I earn is greater than the inflation rate. Therefore the discount rate you use will be the interest rate you selected as affected by the inflation rate you find appropriate.

You must also decide the period of years for which that amount is intended to provide compensation.

III. Wrongful Death Action

A. Elements

The cause of action authorized by EPTL 5-4.1 through 5-4.5 did not exist at common law, *Gonzalez v New York City Housing Authority*, 77

NY2d 663, 569 NYS2d 915, 572 NE2d 598 (1991); *Liff v Schildkrout*, 49 NY2d 622, 427 NYS2d 746, 404 NE2d 1288 (1980); *Langan v St. Vincent's Hosp. of New York*, 25 AD3d 90, 802 NYS2d 476 (2d Dept 2005). The damages recoverable are limited to those allowed by statute, *Farrar v Brooklyn Union Gas Co.*, 73 NY2d 802, 537 NYS2d 26, 533 NE2d 1055 (1988); *Smith v Lehigh Valley R. Co.*, 177 NY 379, 69 NE 729 (1904); see *Parilis v Feinstein*, 49 NY2d 984, 429 NYS2d 165, 406 NE2d 1059 (1980). The essential elements to be pleaded and proved in a wrongful death action are: (1) a death; (2) caused by the wrongful act, neglect or default of defendant; (3) giving rise to a cause of action that could have been maintained, at the moment of death, by decedent if death had not ensued; (4) survival by distributees who have suffered pecuniary loss by reason of the death; and (5) appointment of a personal representative of decedent, EPTL 5-4.1; see *Chong v New York City Transit Authority*, 83 AD2d 546, 441 NYS2d 24 (2d Dept 1981); see also *Goldberg v Plaza Nursing Home Comp., Inc.*, 222 AD2d 1082, 635 NYS2d 841 (4th Dept 1995) (ovrld on other grounds, *Doe v Westfall Health Care Center, Inc.*, 303 AD2d 102, 755 NYS2d 769 (4th Dept 2002)).

B. Damages Recoverable

1. Pecuniary Injuries

In a wrongful death action, an award of damages is limited to fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought, EPTL 5-4.3; *Bynum v Camp Bisco, LLC*, 198 AD3d 1164, 155 NYS3d 617 (3d Dept 2021); *Vargas v Crown Container Co., Inc.*, 155 AD3d 989, 65 NYS3d 567 (2d Dept 2017); see *Johnson v Manhattan & Bronx Surface Transit Operating Authority*, 71 NY2d 198, 524 NYS2d 415, 519 NE2d 326 (1988); *De Long v Erie*, 60 NY2d 296, 469 NYS2d 611, 457 NE2d 717 (1983); *Motelson v Ford Motor Co.*, 101 AD3d 957, 957 NYS2d 341 (2d Dept 2012), *aff'd*, 24 NY3d 1025, 997 NYS2d 678, 22 NE3d 186 (2014); see also *Hernandez v New York City Health and Hospitals Corp.*, 78 NY2d 687, 578 NYS2d 510, 585 NE2d 822 (1991). Such damages include loss of support, voluntary assistance, and possible inheritance, as well as medical expenses incidental to death and funeral expenses, *Gonzalez v New York City Housing Authority*, 77 NY2d 663, 569 NYS2d 915, 572 NE2d 598 (1991); *Parilis v Feinstein*, 49 NY2d 984, 429 NYS2d 165, 406 NE2d 1059 (1980); *McKenna v Reale*, 137 AD3d 1533, 29 NYS3d 596 (3d Dept 2016); *Johnson v Richmond University Medical Center*, 101 AD3d 1087, 956 NYS2d 568 (2d Dept 2012); *Motelson v Ford Motor Company*, *supra*; *Sand v Chapin*, 238 AD2d 862, 656 NYS2d 700 (3d Dept 1997); see *Gardner v State*, 134 AD3d 1563, 24 NYS3d 805 (4th Dept 2015). To establish a right to a wrongful death recovery, the plaintiff need only show that one or more distributees had a reasonable expectation of support from the decedent and therefore a pecuniary loss, *Zelizo v Ullah*, 2 AD3d 273, 769 NYS2d 255 (1st Dept 2003). Once that showing is made, the determination of the amount of damages is a question for the jury, *id.*

Pecuniary injuries do not include sorrow or mental anguish, *Smith v Lehigh Valley R. Co.*, 177 NY 379, 69 NE 729 (1904), loss of companionship of a deceased child, *Devito v Opatich*, 215 AD2d 714, 627 NYS2d 441 (2d Dept 1995), or loss of companionship of a deceased spouse, *Liff v Schildkrout*, 49 NY2d 622, 427 NYS2d 746, 404 NE2d 1288 (1980); *Sand v Chapin*, 238 AD2d 862, 656 NYS2d 700 (3d Dept 1997); see *Motelson v Ford Motor Co.*, 101 AD3d 957, 957 NYS2d 341 (2d Dept 2012), *aff'd*, 24 NY3d 1025, 997 NYS2d 678, 22 NE3d 186 (2014) (damages for loss of society, affection, conjugal fellowship and consortium are not recoverable). Nor does recovery include the damages that the decedent might have obtained in a personal injury action had the decedent survived, *Parilis v Feinstein*, 49 NY2d 984, 429 NYS2d 165, 406 NE2d 1059 (1980). Therefore, the plaintiff in a wrongful death action cannot seek any recovery for decedent's loss of enjoyment of life, *Sand v Chapin*, *supra*.

However, pecuniary injuries do include loss of parental nurture and care and loss of physical, moral and intellectual training by a parent, *Kenavan v New York*, 120 AD2d 24, 507 NYS2d 193 (2d Dept 1986), *aff'd*, 70 NY2d 558, 523 NYS2d 60, 517 NE2d 872 (1987); *Zygmunt v Berkowitz*, 301 AD2d 593, 754 NYS2d 313 (2d Dept 2003). Accordingly, it is proper to instruct the jury: "You must also take into consideration the intellectual, moral and physical training, guidance and assistance [the decedent] would have given the children had he [or she] lived," *Kenavan v New York*, *supra*. Further, proof that the decedent performed household duties for his or her spouse and provided love, guidance and advice to their adult children is sufficient proof of pecuniary loss to sustain at least some damages, *Korman v Public Service Truck Renting Inc.*, 116 AD2d 631, 497 NYS2d 480 (2d Dept 1986). Likewise, evidence that a deceased grandparent provided services to her adult, financially independent grandchildren was sufficient to demonstrate pecuniary damages, *Gonzalez v New York City Housing Authority*, 77 NY2d 663, 569 NYS2d 915, 572 NE2d 598 (1991). Evidence that the deceased assisted in the care of a disabled brother who lived with the plaintiff mother is sufficient to demonstrate pecuniary damages, *Abruzzo v New York*, 233 AD2d 278, 649 NYS2d 172 (2d Dept 1996). Evidence that a decedent regularly gave her sister money, took care of the sister's house while she was on active military duty, and provided baby-sitting services for the children of another sibling, suggested that those siblings sustained pecuniary losses as a result of the decedent's death and precluded summary judgment in favor of the defendant dismissing the siblings' wrongful death cause of action, *Johnson v Richmond University Medical Center*, 101 AD3d 1087, 956 NYS2d 568 (2d Dept 2012); see *Bynum v Camp Bisco, LLC*, 198 AD3d 1164, 155 NYS3d 617 (3d Dept 2021) (summary judgment denied where decedent paid nominal rent, gave presents, and occasionally mowed the lawn). Recovery for pecuniary loss was required upon uncontroverted evidence that the decedent cooked, cleaned and ironed for her adult children and babysat for her grandchildren, *Pullman v Pullman*, 216 AD2d 886, 629 NYS2d 577 (4th Dept 1995).

The standard by which to measure the value of past and future loss

of household services is the cost of replacing the decedent's services, *Klos v New York City Transit Authority*, 240 AD2d 635, 659 NYS2d 97 (2d Dept 1997); see *De Long v Erie*, 60 NY2d 296, 469 NYS2d 611, 457 NE2d 717 (1983). The pecuniary loss of a child for the death of a parent is not limited to the minority of the child, if the jury is persuaded that the loss will continue beyond minority, *Tilley v Hudson River R. Co.*, 29 NY 252 (1864); *Zaninovich v American Airlines, Inc.*, 26 AD2d 155, 271 NYS2d 866 (1st Dept 1966). However, adult children have no claim for the loss of a deceased parent's companionship where the parent provided no services to them, *Bumpurs v New York City Housing Authority*, 139 AD2d 438, 527 NYS2d 217 (1st Dept 1988).

2. Jury Role in Calculating Damages

The damages recoverable are not capable of exact proof, *Countryman v Fonda, J. & G.R. Co.*, 166 NY 201, 59 NE 822 (1901). The fixing of damages in a death action is peculiarly within the province of the jury, *Parilis v Feinstein*, 49 NY2d 984, 429 NYS2d 165, 406 NE2d 1059 (1980); *Franchell v Sims*, 73 AD2d 1, 424 NYS2d 959 (4th Dept 1980); see *Motelson v Ford Motor Co.*, 101 AD3d 957, 957 NYS2d 341 (2d Dept 2012), *aff'd*, 24 NY3d 1025, 997 NYS2d 678, 22 NE3d 186 (2014). Because it is difficult to establish pecuniary loss, damages in a wrongful death case should typically be for a jury to calculate, *Bynum v Camp Bisco, LLC*, 198 AD3d 1164, 155 NYS3d 617 (3d Dept 2021); *McKenna v Reale*, 137 AD3d 1533, 29 NYS3d 596 (3d Dept 2016). The jury is permitted to consider in a reasonable way those prospective and indefinite damages arising from death, *Countryman v Fonda, J. & G.R. Co.*, *supra*. Each case stands on its own particular facts, *Liubowsky v State*, 260 App Div 416, 23 NYS2d 633 (3d Dept 1940), *aff'd*, 285 NY 701, 34 NE2d 385 (1941); *Franchell v Sims*, *supra*.

3. Factors and Considerations in Determining Award

a. Generally

In determining what is "fair and just compensation for the pecuniary injuries resulting from the decedent's death," EPTL 5-4.3, a number of factors have been identified as appropriate for consideration by the jury. These include: the age, health and life expectancy of the decedent at the time of the injury; the decedent's work habits and present position; the decedent's future earning capacity and potential for career advancement; and the number, age, and life expectancy of the decedent's distributees, *Johnson v Manhattan & Bronx Surface Transit Operating Authority*, 71 NY2d 198, 524 NYS2d 415, 519 NE2d 326 (1988); see *Vargas v Crown Container Co., Inc.*, 155 AD3d 989, 65 NYS3d 567 (2d Dept 2017); see also *Motelson v Ford Motor Co.*, 101 AD3d 957, 957 NYS2d 341 (2d Dept 2012), *aff'd*, 24 NY3d 1025, 997 NYS2d 678, 22 NE3d 186 (2014) (award may be based on the decedent's age, character, earning capacity, life expectancy, and the circumstances of the distributees); *Gardner v State*, 134 AD3d 1563, 24 NYS3d 805 (4th Dept 2015) (same); *Grevelding v State*, 132 AD3d 1332, 17 NYS3d 813 (4th Dept 2015) (same); *Gilleo v Elizabeth A. Horton Memorial Hosp.*, 196 AD2d

569, 601 NYS2d 332 (2d Dept 1993) (evidence concerning plaintiff's and decedent's alleged desire to terminate decedent's life-sustaining dialysis treatment was properly admitted since health and life expectancy of decedent are relevant in determining pecuniary loss in wrongful death action). Thus, there was no pecuniary loss in the death of a 64 year old retiree who was living on disability benefits and who was survived by two emancipated and self supporting children, see *Hartman v Dermont*, 89 AD2d 807, 453 NYS2d 464 (4th Dept 1982).

b. Decedent's Income

Generally, evidence of a decedent's gross income at the time of death is the standard by which to measure the value of income already lost and to measure the loss of future earnings, *Johnson v Manhattan & Bronx Surface Transit Operating Authority*, 71 NY2d 198, 524 NYS2d 415, 519 NE2d 326 (1988); *Klos v New York City Transit Authority*, 240 AD2d 635, 659 NYS2d 97 (2d Dept 1997); *Marigliano v New York*, 196 AD2d 533, 601 NYS2d 161 (2d Dept 1993) (abrogated on other grounds by, *Rodriguez v Triborough Bridge and Tunnel Authority*, 276 AD2d 769, 716 NYS2d 24 (2d Dept 2000)); see also *Konstantatos v Suffolk*, 174 AD2d 653, 571 NYS2d 514 (2d Dept 1991). The jury may take into account increased earnings that the decedent would have received, provided that the plaintiff establishes that such increases would probably have been forthcoming, *Wanamaker v Pietraszek*, 107 AD2d 1020, 486 NYS2d 523 (4th Dept 1985). Thus, where the decedent had a consistently high level of job performance that resulted in yearly profit-sharing bonuses, the jury could properly consider such bonuses in the decedent's future earning capacity, *Woodring v Board of Ed. of Manhasset Union Free School Dist.*, 79 AD2d 1022, 435 NYS2d 52 (2d Dept 1981). However, where the decedent's employment history was unimpressive, the trial court erred in permitting the jury to project a dramatic increase in the decedent's earnings based solely on the decedent's expression of a desire to obtain further schooling and to open a business, *Morales v New York*, 115 AD2d 439, 497 NYS2d 5 (1st Dept 1985). Likewise, it was error to receive evidence as to what profits were made by a car dealership operating in a location in which the decedent had planned to operate a dealership, *Stringile v Rothman*, 142 AD2d 637, 530 NYS2d 838 (2d Dept 1988).

In proving the decedent's prospective earnings, evidence of what others actually earned and could earn is admissible if there is a fair basis for comparison, *Wanamaker v Pietraszek*, 107 AD2d 1020, 486 NYS2d 523 (4th Dept 1985). The court has discretion to refuse to allow an economist to testify as to the prospective loss of earnings of the deceased where the testimony is too speculative, *Franchell v Sims*, 73 AD2d 1, 424 NYS2d 959 (4th Dept 1980); *Bartkowiak v St. Adalbert's Roman Catholic Church Soc.*, 40 AD2d 306, 340 NYS2d 137 (4th Dept 1973); see also PJI 1:90.

The decedent's earnings are to be considered by the jury not only as a source of his or her contribution to current support but also as a

means of augmenting his or her estate and thus increasing the distributees' inheritances, *Keenan v Brooklyn City R. Co.*, 145 NY 348, 40 NE 15 (1895); *Johnson v Long Island R. Co.*, 30 NYS 318 (Gen Term 1894), *aff'd*, 144 NY 719, 39 NE 857 (1895); *Zaninovich v American Airlines, Inc.*, 26 AD2d 155, 271 NYS2d 866 (1st Dept 1966); Annot: 76 ALR3d 125.

Because the decedent's income from investments is not considered in arriving at pecuniary loss, the rule stated in PJI 2:295 applies to death actions as well as personal injury actions, see *Spreen v Erie R. Co.*, 219 NY 533, 114 NE 1049 (1916); *Read v Brooklyn Heights R. Co.*, 32 App Div 503, 53 NYS 209 (2d Dept 1898); see also *Fell v Presbyterian Hosp. in City of New York at Columbia-Presbyterian Medical Center*, 98 AD2d 624, 469 NYS2d 375 (1st Dept 1983). What the distributee received as a pension, *Cady v New York*, 14 NY2d 660, 249 NYS2d 868, 198 NE2d 901 (1964); *Lehr v New York*, 16 AD2d 702, 227 NYS2d 705 (2d Dept 1962), or under the decedent's will, *Closson v Griffith*, 219 App Div 163, 218 NYS 517 (1st Dept 1926), *aff'd*, 245 NY 552, 157 NE 854 (1927), may not be considered by the jury; nor is the distributee's pecuniary loss any less because the distributee has independent income, *Franchell v Sims*, 73 AD2d 1, 424 NYS2d 959 (4th Dept 1980); *Application of Frank*, 286 App Div 986, 144 NYS2d 435 (4th Dept 1955). However, it has been held that evidence that the surviving spouse and children have no property of their own is admissible, *Lockwood v New York, L.E. & W.R. Co.*, 98 NY 523 (1885); *Van Leet v Kilmer*, 225 App Div 184, 232 NYS 330 (3d Dept 1929), *rev'd* on other grounds, 252 NY 454, 169 NE 644 (1930).

Future tax liability of the estate is not considered when determining pecuniary loss and, therefore, the loss of an inchoate tax credit, the right to which is dependent upon the amount of the estate, the decedent's future tax status, and the future tax law itself, is not compensable, *Farrar v Brooklyn Union Gas Co.*, 73 NY2d 802, 537 NYS2d 26, 533 NE2d 1055 (1988).

c. Pecuniary Loss of Distributees for Loss of Homemaker

If the decedent was a homemaker, recovery may include the monetary value of the services provided, *De Long v Erie*, 60 NY2d 296, 469 NYS2d 611, 457 NE2d 717 (1983). Expert testimony and other evidence on this issue is admissible, *De Long v Erie*, *supra*; see *Gonzalez v New York City Housing Authority*, 77 NY2d 663, 569 NYS2d 915, 572 NE2d 598 (1991); see also *Speiser, Recovery for Wrongful Death*, § 4.5; *Speiser, Recovery for Wrongful Death, Economic Handbook*, § 12:1-12:3; Comment: *The Unemployed Housewife-Mother: Fair Appraisal of Economic Loss in a Wrongful Death Action*, 21 Buffalo L Rev 205; Annot: 77 ALR3d 1175. When the question of this item of recovery is presented by expert testimony or otherwise, the following instruction should be given in place of, or in addition to, the sixth paragraph of the pattern charge:

PJI 2:320.2

In fixing the value of AB's services you must take into consideration the circumstances and condition of (his, her) spouse and children; the services (he, she) would have performed for (his, her) spouse and children in the care and management of the family home, finances and health; and the intellectual, moral and physical guidance and assistance (he, she) would have given the children had (he, she) lived. In fixing the monetary value of AB to (the survivor) and children you must consider what it would cost to pay for a substitute for (his, her) services, considering both AB's age and life expectancy and the age and life expectancy of (the survivor) and of each of the children.

d. Pecuniary Loss for Death of Spouse

Hostility between the deceased and the surviving spouse is relevant on the question of the latter's pecuniary loss, *Loetsch v New York City Omnibus Corporation*, 291 NY 308, 52 NE2d 448 (1943); *Freeman v Corbin Ave. Bus Co.*, 60 AD2d 824, 401 NYS2d 224 (1st Dept 1978); see also *Janecka v Casey*, 121 AD2d 28, 508 NYS2d 451 (1st Dept 1986) (allowing discovery of pleadings in matrimonial action between decedent and surviving spouse). However, the jury may not consider the remarriage of the surviving spouse, *Luddy v State*, 30 AD2d 993, 294 NYS2d 87 (3d Dept 1968), *aff'd*, 25 NY2d 773, 303 NYS2d 522, 250 NE2d 581 (1969); *Lees v New York Consol. R. Co.*, 109 Misc 608, 180 NYS 546 (Sup 1919), *aff'd* without opinion, 193 App Div 882, 182 NYS 933 (2d Dept 1920); *Duffy v New York*, 16 Misc2d 1015, 184 NYS2d 1006 (Sup 1958), *mod* on other grounds, 7 AD2d 988, 183 NYS2d 863 (1st Dept 1959); *Restatement, Second, Torts* § 925, Comment H, and, on request, the jury should be so charged. Nor may the jury consider the remarriage of: (a) the decedent's divorced parent with whom decedent lived, *Lawler v Newcastle Motors Leasing Inc.*, 35 AD2d 450, 317 NYS2d 99 (2d Dept 1970); *Annot*: 69 ALR3d 1038, or (b) the decedent's subsequently widowed mother, *Woodard v Pancio*, 65 AD2d 923, 410 NYS2d 454 (4th Dept 1978). Where the decedent's widow has remarried the court may not require that she be sworn as a witness in her present name, but counsel may in selecting jurors inquire whether they know or are related to a person having the name of her present husband, *Rodak v Fury*, 31 AD2d 816, 298 NYS2d 50 (2d Dept 1969). The fact that the decedent and his or her spouse were married after the accident which caused his death does not preclude the surviving spouse from recovering in the wrongful death action as a distributee, *Radley v Le Ray Paper Co.*, 214 NY 32, 108 NE 86 (1915); *Du Bois v Community Hosp. of Schoharie County, Inc.*, 150 AD2d 893, 540 NYS2d 917 (3d Dept 1989); *Annot*: 69 ALR3d 1046.

e. Pecuniary Loss of Child for Death of Parent

The jury may consider, should the health of the child fail, that the parent might care for the child indefinitely, *Countryman v Fonda, J. & G.R. Co.*, 166 NY 201, 59 NE 822 (1901), and also the fact that though the child was self supporting, the mother had been in the habit of sending articles of clothing to him, *McIntyre v New York Cent. R. Co.*, 37 NY 287, 35 How Pr 36 (1867). Though under other wrongful death acts, it has been held that there must be evidence that contributions after minority are reasonably to be anticipated, *Boller v Pennsylvania R. Co.*, 185 F Supp 505 (NDInd 1960); *First Nat Bank in Greenwich v National Airlines, Inc.*, 171 F Supp 528 (SDNY 1958), *aff'd*, 288 F2d 621 (2d Cir 1961), it appears that under the New York statute the evidence need not be specific, that the jury may allow such damages as from the evidence and the intrinsic probabilities they find will reasonably result, *Tilley v Hudson River R. Co.*, 24 NY 471, 23 How Pr 363 (1862); *Countryman v Fonda, J. & G.R. Co.*, *supra*; see *Kraus v Ford Motor Co.*, 43 AD2d 896, 351 NYS2d 229 (4th Dept 1974) (room and some meals); *Phalen v Rochester Ry. Co.*, 31 App Div 448, 52 NYS 836 (4th Dept 1898).

The loss by a child also includes damages from the deprivation of the intellectual, moral and physical training and education that the parent would have given, *Tilley v Hudson River R. Co.*, 24 NY 471, 23 How Pr 363 (1862); *Sternfels v Metropolitan St. Ry. Co.*, 73 App Div 494, 77 NYS 309 (1st Dept 1902), *aff'd*, 174 NY 512, 66 NE 1117 (1903); see *Juiditta v Bethlehem Steel Corp.*, 75 AD2d 126, 428 NYS2d 535 (4th Dept 1980) (citing PJI); *Richardson v Lutheran Hospital of Brooklyn*, 70 AD2d 933, 417 NYS2d 526 (2d Dept 1979); *Didocha v State*, 54 AD2d 786, 387 NYS2d 752 (3d Dept 1976). As in the case of other next of kin, the jury may take into consideration the probability that decedent's estate would have been augmented by earnings and the child's inheritance thus increased, *Tilley v Hudson River R. Co.*, *supra*; *Sternfels v Metropolitan St. Ry. Co.*, *supra*. Thus, it is not necessary that the child have been dependent on the decedent, see *De Clara v Barber S. S. Lines*, 309 NY 620, 132 NE2d 871 (1956); *Gross v Abraham*, 306 NY 525, 119 NE2d 370 (1954). An award of damages for loss of parental guidance is not limited to minor children, and an award may be made to financially independent adults, *Gardner v State*, 134 AD3d 1563, 24 NYS3d 805 (4th Dept 2015).

An out-of-wedlock child may not constitutionally be excluded from recovery for the wrongful death or for the conscious pain and suffering of his or her parent, *Levy v Louisiana*, 391 US 68, 88 SCt 1509 (1968); *Matter of Niles' Estate*, 53 AD2d 983, 385 NYS2d 876 (3d Dept 1976); see *Lalli v Lalli*, 439 US 259, 99 SCt 518 (1978). Under EPTL 5-4.5, the out-of-wedlock child is the distributee of the father, and vice versa, see *Eckel v Hassan*, 61 AD2d 13, 401 NYS2d 820 (2d Dept 1978).

f. Pecuniary Loss of Parent for Death of Child

Where the decedent is a child, the pecuniary loss of the parent is

measured by the services of the child during minority less the cost of the child's maintenance and education during that period, *Keenan v Brooklyn City R. Co.*, 145 NY 348, 40 NE 15 (1895); see Comment to PJI 2:317, and in addition all the probable, or even possible, pecuniary benefits that might result to the parent from the child's life, modified as the jury finds they should be by all the chances of failure and misfortune, *Birkett v Knickerbocker Ice Co.*, 110 NY 504, 18 NE 108 (1888); *Hanson v Erie*, 120 AD2d 135, 507 NYS2d 778 (4th Dept 1986); *Franchell v Sims*, 73 AD2d 1, 424 NYS2d 959 (4th Dept 1980); see *Parilis v Feinstein*, 49 NY2d 984, 429 NYS2d 165, 406 NE2d 1059 (1980); *Lopez v Gomez*, 305 AD2d 292, 761 NYS2d 601 (1st Dept 2003). The Court of Appeals has stated that, in cases involving a decedent of "tender years," the absence of dollars and cents proof of pecuniary loss does not relegate the distributees to recovery of nominal damages, *Parilis v Feinstein*, *supra*. Thus, even in the absence of direct evidence of pecuniary loss, the Court upheld a wrongful death award of \$50,000 to the parents-distributees of their 12-year-old child, since there was proof as to the age, character and condition of the decedent-child and the circumstances of his parents, *id*; see *Meredith v New York*, 220 AD2d 563, 632 NYS2d 812 (2d Dept 1995). Under *Parilis*, in cases in which the decedent was too young to have demonstrated any disposition or ability to support his or her surviving parents, an award for the wrongful death of the decedent may nevertheless be appropriate where the parents and decedent were part of an intact family unit, which furnishes a basis for the expectation that the parents would have become the objects of the decedent's bounty had he or she lived, *Public Adm'r, Kings County v U.S. Fleet Leasing of New York, Inc.*, 159 AD2d 331, 552 NYS2d 608 (1st Dept 1990). The pecuniary value of services of a child may be considered though the child is an adult, *Rowan v Nassau*, 91 AD2d 608, 456 NYS2d 418 (2d Dept 1982); *Brooks v Siegel*, 52 AD2d 1003, 383 NYS2d 439 (3d Dept 1976); *Cook v Erwin*, 30 AD2d 579, 289 NYS2d 730 (3d Dept 1968); *Palmer v New York Cent. & H.R.R. Co.*, 153 App Div 296, 138 NYS 10 (2d Dept 1912); see *Prosser & Keeton, Torts* (5th ed), § 127, pp 952-954.

A parent's loss also includes the probability that the parent would benefit from earnings that the child might have accumulated, *Connaughton v Sun Printing & Publishing Ass'n*, 73 App Div 316, 76 NYS 755 (1st Dept 1902). However, there must be an adequate basis for assessing the decedent's future earnings so that the matter is not left to speculation, *Wanamaker v Pietraszek*, 107 AD2d 1020, 486 NYS2d 523 (4th Dept 1985); see *Franchell v Sims*, 73 AD2d 1, 424 NYS2d 959 (4th Dept 1980). Aside from future earnings, damages may include the reasonable value of future services that the decedent would have performed. Recovery of the value of services is not affected by whether or not the child was unemancipated, a minor, or living within the parent's abode. The standard is the value of reasonable expectations of future services; therefore, evidence is admissible showing prior services, the parent's increasing or decreasing need for services, the decedent's ability to have rendered future services, character and habits of the deceased, and the life expectancy of the parent, *Quinn v Sullivan*, 48 AD2d 965, 369

NYS2d 551 (3d Dept 1975); *Palmer v New York Cent. & H.R.R. Co.*, 153 App Div 296, 138 NYS 10 (2d Dept 1912); see *Hanson v Erie*, 120 AD2d 135, 507 NYS2d 778 (4th Dept 1986). But recovery is precluded where an adult decedent had little contact with his surviving parent and there was no evidentiary basis for a reasonable expectation of pecuniary loss on the part of the parent, *Public Adm'r, Kings County v U.S. Fleet Leasing of New York, Inc.*, 159 AD2d 331, 552 NYS2d 608 (1st Dept 1990). The loss from the death of a child does not include the social security benefits the child would have received because of the death of the parent subsequent to the death of the child, *Woodard v Pancio*, 65 AD2d 923, 410 NYS2d 454 (4th Dept 1978). The pecuniary loss by the parents does not include grief or loss of companionship, see *Gilbert v Stanton Brewery*, 295 NY 270, 67 NE2d 155 (1946); *Devito v Opatich*, 215 AD2d 714, 627 NYS2d 441 (2d Dept 1995); *Bell v Cox*, 54 AD2d 920, 388 NYS2d 118 (2d Dept 1976); *Amerman v Lizza & Sons, Inc.*, 45 AD2d 996, 358 NYS2d 220 (2d Dept 1974).

The mother of an out-of-wedlock child may not constitutionally be barred from a recovery for the child's wrongful death, *Glonn v American Guarantee & Liability Ins. Co.*, 391 US 73, 88 S Ct 1515 (1968). Under EPTL 5-4.5, the father of an out-of-wedlock child is a distributee of the child, see *Eckel v Hassan*, 61 AD2d 13, 401 NYS2d 820 (2d Dept 1978).

The fact that the parents were divorced, and custody of the deceased child was awarded to one parent, does not preclude the non-custodial parent from sharing in a recovery for wrongful death. However, there is no presumption that the parents are entitled to equal shares of the recovery, *Hanson v Erie*, 120 AD2d 135, 507 NYS2d 778 (4th Dept 1986).

No cause of action to recover damages for wrongful death or personal injury exists on behalf of a stillborn child, *Broadnax v Gonzalez*, 2 NY3d 148, 777 NYS2d 416, 809 NE2d 645 (2004); *Endresz v Friedberg*, 24 NY2d 478, 301 NYS2d 65, 248 NE2d 901 (1969); *Matter of Broadnax*, 240 AD2d 663, 659 NYS2d 502 (2d Dept 1997); see *Becker v Schwartz*, 46 NY2d 401, 413 NYS2d 895, 386 NE2d 807 (1978); *Maher v Yoon*, 297 AD2d 361, 746 NYS2d 493 (2d Dept 2002); see also PJI 2:284; 2:318. However, the funeral expenses are recoverable as an incident of injuries sustained by the mother, see PJI 2:316. Where there is a live birth but the infant survives only briefly, a wrongful death action may be brought on behalf of the infant's estate, *Levin v New York City Health and Hospitals Corp.*, 119 AD3d 480, 990 NYS2d 490 (1st Dept 2014); see *Ward v Safajou*, 145 AD3d 836, 43 NYS3d 447 (2d Dept 2016).

g. Criminal Conduct/Institutionalization of the Decedent

The criminal conduct of the decedent during his or her lifetime may not be considered by the jury unless it bears on either (1) his or her earning capacity, or (2) his or her disposition to support those dependent on him or her, *Dobro v Sloan*, 48 AD2d 243, 368 NYS2d 621 (4th

Dept 1975); see *Freeman v Corbin Ave. Bus Co.*, 60 AD2d 824, 401 NYS2d 224 (1st Dept 1978); see *Sanchez v New York*, 97 AD3d 501, 949 NYS2d 368 (1st Dept 2012) (citing PJI 2:320.2) (criminal history admissible on issue of loss of moral guidance of child). In addition, evidence of the decedent's future lost wages may be admitted even if the decedent was an undocumented alien working in the United States on an apparently illegal basis, see *Balbuena v IDR Realty LLC*, 6 NY3d 338, 356, 812 NYS2d 416, 845 NE2d 1246 (2006); *Public Adm'r of Bronx County v Equitable Life Assur. Soc. of U.S.*, 192 AD2d 325, 595 NYS2d 478 (1st Dept 1993). However, the fact that an injured worker was undocumented is a factor that may be considered in determining the amount of the award for lost future wages, *Balbuena v IDR Realty LLC*, *supra*; *Public Adm'r of Bronx County v Equitable Life Assur. Soc. of U.S.*, *supra*.

Where the decedent was confined in an institution, damages depend upon the chance he or she had at the time of the accident of being returned to normal society, *Hassler v State*, 29 AD2d 1026, 289 NYS2d 483 (3d Dept 1968); *Herold v State*, 15 AD2d 835, 224 NYS2d 369 (3d Dept 1962); see *Cohen v State*, 51 AD2d 494, 382 NYS2d 128 (3d Dept 1976), *aff'd*, 41 NY2d 1086, 396 NYS2d 363, 364 NE2d 1134 (1977).

C. Distributees

The beneficiaries of the action are determined at the moment of the decedent's death, *Alberino v Long Island Jewish-Hillside Medical Center*, 87 AD2d 217, 450 NYS2d 857 (2d Dept 1982) (fact that distributee was adopted by another after decedent's death irrelevant in wrongful death action); *Woodard v Pancio*, 65 AD2d 923, 410 NYS2d 454 (4th Dept 1978) (citing PJI). Under EPTL 5-4.1 and 5-4.4, an action for wrongful death is maintained for the benefit of the decedent's distributees and the damages recovered are distributable to all distributees under EPTL 4-1.1, except those disqualified under EPTL 4-1.4 (parent who abandons child during infancy or fails or refuses to provide for a child) or 5-1.2 (with certain exceptions, a spouse separated or divorced, or whose marriage was void, or who abandoned decedent, or who failed to support decedent). Under the EPTL, "grandchildren or parents, if distributees under 4-1.1, will be entitled to recover in wrongful death if they can show pecuniary injury," *Revisers' Notes to 5-4.4*. Surviving spouses, who are included in the class of distributees set forth in EPTL 4-1.1, do not include surviving same sex life partners, *Langan v St. Vincent's Hosp. of New York*, 25 AD3d 90, 802 NYS2d 476 (2d Dept 2005); but see *Marriage Equality Act*, L 2011, ch 95; *U.S. v Windsor*, 133 SCt 2675 (2013) (holding § 3 of the federal Defense of Marriage Act unconstitutional; that section had defined, for the purposes of federal law, a "marriage" as a "legal union between one man and one woman," and a "spouse" as "a person of the opposite sex who is a husband or a wife"). A corporation is not a "person" under the EPTL for whom a death action can be brought, *Konstantatos v Suffolk*, 174 AD2d 653, 571 NYS2d 514 (2d Dept 1991). If there is a dispute as to who are the legal distributees, that issue must be determined prior to

trial, *Reed v Schoharie*, 51 AD2d 499, 382 NYS2d 371 (3d Dept 1976); see *Kingsley v Bast-Hatfield, Inc.*, 188 AD2d 957, 592 NYS2d 103 (3d Dept 1992).

It is error to charge the decedent's life expectancy without also charging the life expectancy of the distributees, *Bishin v New York Cent. R. Co.*, 20 AD2d 921, 249 NYS2d 778 (2d Dept 1964). With respect to life expectancy tables, see PJI 2:281 and Appendix A. With respect to work expectancy tables, see PJI 2:290 and Appendix B. Where, however, the distributee has died prior to trial, life expectancy tables should not be charged since damages are confined to the pecuniary loss sustained between the time of the decedent's death and the time of the distributee's death, *Dibble v Whipple*, 281 NY 247, 22 NE2d 358 (1939); *Woodard v Pancio*, 65 AD2d 923, 410 NYS2d 454 (4th Dept 1978).

D. Income Taxes on Lost Earnings

Absent an express statute to the contrary, the earnings considered in a wrongful death action are ascertained by reference to the decedent's gross earnings and no deduction is to be made, or consideration given, on account of income taxes, *Johnson v Manhattan & Bronx Surface Transit Operating Authority*, 71 NY2d 198, 524 NYS2d 415, 519 NE2d 326 (1988). Evidence as to after-tax income is inadmissible, *id.* However, in wrongful death actions which are predicated upon medical or dental malpractice, evidence is admissible to establish the federal, state and local income taxes that the decedent would have been required by law to pay, EPTL 5-4.3(c)(i). The jury must be instructed to find, "with reasonable certainty," the amount of taxes that the decedent would have been required by law to pay and to consider that amount in determining the sum that would otherwise be available for the support of the decedent's distributees, EPTL 5-4.3(c)(ii). A similar requirement is imposed upon the court in a non-jury trial, EPTL 5-4.3(c)(iii). Although the statute does not expressly mandate a reduction in the award, it does invite the factfinder to exclude the amount that otherwise would have been paid in taxes by the decedent from the sums available for the support of the distributees. For further elaboration on the intricate problems posed by differing rules applying to different aspects of the case, see PJI 2:151B.2, *supra*.

Where EPTL 5-4.3(c) applies, the instruction that follows should be given after the sixth paragraph of the pattern charge above. The instruction should not be given unless evidence has been adduced on the question of the decedent's income taxes.

PJI 2:320.3

In determining what portion of AB's earnings would have been available to the support of (*list the distributees by name*), the law requires you to consider the effect of income taxation on AB's

earnings. This is why during the trial evidence was received as to the amount of federal, state (and local) income taxes AB would have been legally required to pay on the income AB would have received had (he, she) not died. If you find that it is reasonably certain that AB would have been required to pay a given amount of income taxes on the income that (he, she) would have earned if (he, she) had survived, then you must consider that amount of income taxes in determining how much money would have been available to AB for the support of (his, her) family. If you conclude that you cannot make any finding with reasonable certainty as to the amount of decedent's tax liability, then do not consider the issue of income taxation any further.

The provisions of EPTL 5-4.3 and CPLR 4546 apply where the conduct complained of is medical or dental malpractice. CPLR 4546 also applies to podiatric malpractice, but EPTL 5-4.3 has not been made expressly applicable to podiatric malpractice. Neither EPTL 5-4.3 nor CPLR 4546 applies where the wrongful conduct constitutes negligence other than malpractice. As to the distinction between malpractice and negligence, see Comment to PJI 2:150. The jury should be charged as to income tax principles applicable to different claims.

A complication is presented by cases in which the decedent, as the result of an act of medical or dental malpractice, incurred a loss of earnings as a result of incapacitation prior to death. In such situations, the decedent's personal representative may pursue, in a single litigation, causes of action for wrongful death and for medical or dental malpractice to recover earnings lost by the decedent prior to death. Where both survival and wrongful death claims are asserted, the jury should be carefully instructed as to which claims on which the jury must and must not consider taxes. In such cases, the following charge should be inserted after the tenth paragraph of the main charge:

PJI 2:320.4

The plaintiff also seeks recovery for the loss of earnings that AB incurred prior to (his, her) death. In deciding the amount, if any, the plaintiff may recover for earnings that AB lost before (his, her) death, you must not deduct from the award any sums on account of federal, state (and local) income taxes. The law requires me to decide whether any such reduction is warranted.

The above charge should not be used as to a cause of action pursuant to the Federal Employer's Liability Act for lost wages, *BNSF Railway Company v Loos*, 139 SCt 893 (2019).

E. Income Taxes on Award

Damages for personal injury and loss of earnings are not income taxable, 26 USC § 104(a)(2); see *Lanzano v New York*, 71 NY2d 208, 524 NYS2d 420, 519 NE2d 331 (1988); but see *BNSF Railway Company v Loos*, 139 SCt 893 (2019) (recovery pursuant to the Federal Employers' Liability Act for lost wages due to an on-the-job injury is taxable income). The court must instruct the jury that the award is not subject to income taxes and that the jury should not add to or subtract from the award on account of income taxes, *Lanzano v New York*, supra; *Cramer v Kuhns*, 213 AD2d 131, 630 NYS2d 128 (3d Dept 1995).

Based upon *Lanzano v New York*, 71 NY2d 208, 524 NYS2d 420, 519 NE2d 331 (1988), the court should add the following instruction to the charge in actions not subject to express statute on the issue of income taxes:

PJI 2:320.5

If your verdict is in favor of plaintiff, plaintiff will not be required to pay income taxes on the award and you must not add to the award, nor subtract from the award, on account of income taxes.

F. Special Verdicts and Collateral Source Reductions

CPLR 4545 was added to mandate certain collateral source payment reductions in all personal injury, property damage and wrongful death actions. To apply the statutory collateral source rule, itemized verdicts are essential. For a detailed discussion regarding collateral source reductions under CPLR 4545, including the collateral sources to which the statute applies and the procedure for determining a defendant's entitlement to collateral source reductions, see Comment to PJI 2:301.

The jury must specify the applicable elements of special and general damages upon which the award is based and the amount assigned to each element, including, but not limited to medical expenses, dental expenses, loss of earnings, impairment of earning ability and pain and suffering. Each element must be further itemized into amounts intended to compensate the plaintiff for damages incurred prior to verdict and amounts intended to compensate the plaintiff for damages to be incurred in the future. The jury must set forth the period of years over which the amounts awarded for future damages are intended to provide compensation. In making this computation, the jury must be instructed

to award the full amount of future damages without reduction to present value, CPLR 4111(e). In a non-jury trial, CPLR 4213(b) imposes a similar requirement upon the court. As to the issue of reduction to present value in actions based on medical, dental or podiatric malpractice commenced on or after July 23, 2003, see this Comment, *supra*.

The pattern charge covers the items of past damages listed in CPLR 4111(e) and others as well. Care should be taken to omit those items not supported by evidence. It is apparent that the Legislature used the term “pain and suffering” to encompass all items of general damages. Although custodial care and rehabilitation services are not mentioned specifically in CPLR 4111(e), they constitute special damages and should be listed in the special verdict form. CPLR 4545(c) specifically requires reduction for collateral source payments for “custodial care and rehabilitation services.” Within the context of a wrongful death action, payments for funeral expenses constitute special damages and should be itemized.

The jury should be required to state the period of years over which the award of pecuniary loss is intended to provide compensation. Moreover, except in the Second Department, the jury should be required to state the amount of pecuniary loss of each distributee, see Caveat 2 of the pattern charge. The amount of pecuniary loss constitutes an “element” of damage, and the period of years is required in order for the court to enter an appropriately structured judgment under CPLR article 50-B. Prior to CPLR article 50-B, the award made by the jury in a wrongful death action was regarded as being for the benefit of all distributees, with the allocation of that award as between the distributees being a matter for subsequent judicial determination, see EPTL 5-4.4; *Hanson v Erie*, 120 AD2d 135, 507 NYS2d 778 (4th Dept 1986). It now appears that itemization in the verdict as to each distributee is required to meet the mandates of CPLR article 50-B, see *Huthmacher v Dunlop Tire Corp.*, 309 AD2d 1175, 765 NYS2d 111 (4th Dept 2003); but see *Carter v New York City Health and Hospitals Corp.*, 47 AD3d 661, 851 NYS2d 588 (2d Dept 2008); Caveat 2 of the pattern charge. In making the computation for purposes of article 50-B, while the statute is not explicit, the trial court should make a pro rata allocation of the first \$250,000 in future damages which is paid in a lump sum based on the amounts allocated to each distributee, see *Huthmacher v Dunlop Tire Corp.*, *supra*; see also CPLR 5041(b). Where the jury has allocated different percentages of pecuniary loss to each distributee, a structured judgment cannot be calculated based on the testimony of an economist who simply divided the future loss of earnings equally among the survivors, *Huthmacher v Dunlop Tire Corp.*, *supra*.

A special verdict form for use in conjunction with the pattern charge follows. When the special verdict form is prepared for use, signature lines should be included after each question, see Comment to PJI 1:95, PJI 1:26. The completed special verdict form should be marked as a court exhibit.

Special Verdict Form PJI 2:320 SV. Wrongful Death Verdict Sheet

If your verdict is in favor of plaintiff, answer the following:

1. Set forth the amount to which the estate of the decedent is entitled for the following items of damage, if any:

- (a) Medical expenses; \$_____
- (b) Dental expenses; \$_____
- (c) Custodial care; \$_____
- (d) Rehabilitation services; \$_____
- (e) Nursing care; \$_____
- (f) Loss of earnings. \$_____
- (g) Pain and suffering AB endured between the moment AB realized that (he, she) was going to be gravely injured or die and the moment AB sustained a physical injury; \$_____
- (h) Pain and suffering of AB from the moment of physical injury to the moment of death. \$_____

At least five jurors must agree on the answer to this question.

2. Set forth the amount of monetary loss from the time of death to the date of your verdict sustained by the following persons as a result of the death of the decedent.

Name	Total Amount
_____	\$_____
_____	\$_____

At least five jurors must agree on the answer to this question.

3. Set forth the amount of future monetary loss sustained by the following persons as a result of the death of the decedent.

Name	Total Amount
_____	\$_____
_____	\$_____

At least five jurors must agree on the answer to this question.

4. Set forth the number of years each of the above named persons will sustain that future monetary loss.

Name	Number of Years
_____	_____
_____	_____

At least five jurors must agree on the answer to this question.

5. Set forth the funeral expenses incurred in connection with the decedent's burial.

\$_____

At least five jurors must agree on the answer to this question.

G. Interest on Award

Interest on the principal sum recovered from the date of the decedent's death is to be added to and be part of the total sum awarded, EPTL 5-4.3; *Toledo v Iglesia Ni Christo*, 18 NY3d 363, 939 NYS2d 282, 962 NE2d 773 (2012). The proper method for calculating preverdict interest on future damages in a wrongful death action is to discount that verdict to the date of liability, i.e. the date of death, and award interest on that amount from the date of death to the date of judgment, *Toledo v Ni Christo*, supra. If, however, the award for future damages has not been discounted to the date of death, but rather to the date of the verdict, preverdict interest may not be added, *Milbrandt v A.P. Green Refractories Co.*, 79 NY2d 26, 580 NYS2d 147, 588 NE2d 45 (1992); *Shue v Red Creek Cent. School Dist.*, 266 AD2d 899, 697 NYS2d 437 (4th Dept 1999); *Perez v Columbia Operating Co., Inc.*, 203 AD2d 347, 609 NYS2d 924 (2d Dept 1994). Nor is it permissible to calculate interest on the total amount of preverdict damages from the date of the decedent's death, since that would assume that all losses occurred simultaneously at the time of death, *Milbrandt v A.P. Green Refractories Co.*, supra. The proper approach is to either calculate interest on each separate damage item from the date it was incurred or to calculate interest on all preverdict damages from a single, reasonable intermediate date, *Milbrandt v A.P. Green Refractories Co.*, supra; see CPLR 5001(b). As to interest generally, see Comment to PJI 2:277.

H. Conditions Precedent and Statute of Limitations

A wrongful death action may be maintained only when, at the moment of death, the decedent could have maintained an action "if death had not ensued," EPTL 5-4.1. A wrongful death action is precluded if, during the lifetime of the decedent, the decedent obtained a judgment against the tortfeasor or settled the claim against the tortfeasor, *Kwiatkowski v John Lowry, Inc.*, 276 NY 126, 11 NE2d 563 (1937); *Doe v State*, 189 AD2d 199, 595 NYS2d 592 (4th Dept 1993); *Fontheim v Third Ave. Ry. Co.*, 257 App Div 147, 12 NYS2d 90 (1st Dept 1939). Similarly, if the statute of limitations barred the decedent's personal injury claim before the decedent died, the wrongful death action is also barred, *Kelliher v New York Cent. & H.R.R. Co.*, 212 NY 207, 105 NE 824 (1914); see *Lanni v Sekar*, 249 AD2d 515, 672 NYS2d 113 (2d Dept 1998). Where a personal injury claim is pending and plaintiff dies, a personal representative must be substituted as plaintiff, CPLR 1015, and the complaint may be amended to add the wrongful death claim, CPLR 3025(b); see *Caffaro v Trayna*, 35 NY2d 245, 360 NYS2d 847, 319 NE2d 174 (1974).

The statute of limitations on a wrongful death claim is two years, measured from the date of death, EPTL 5-4.1, but care should be taken to check other applicable statutes in a wrongful death action where the defendant is a municipality or other governmental authority or public corporation, see General Municipal Law § 50-i; *Baez v New York City Health and Hospitals Corp.*, 80 NY2d 571, 592 NYS2d 640, 607 NE2d

787 (1992); *Andersen v Long Island R.R.*, 59 NY2d 657, 463 NYS2d 407, 450 NE2d 213 (1983) (one year if Metropolitan Transportation Authority or one of its subsidiaries, other than the New York City Transit Authority, is defendant); *Collins v New York*, 55 NY2d 646, 446 NYS2d 258, 430 NE2d 1311 (1981) (two years under GML); Public Authorities Law § 1276; *D'Andrea v Long Island R. Co.*, 117 AD2d 10, 501 NYS2d 891 (2d Dept 1986), *aff'd*, 70 NY2d 683, 518 NYS2d 964, 512 NE2d 547 (1987) (the one year period runs from date of decedent's death); Public Authorities Law §§ 1212(2), 2981; Town Law § 67 (in action against town, claim shall be commenced pursuant to GML 50-i); Unconsolidated Laws § 7401(2) (as to New York City Health and Hospitals Corporation, two years from date of death); see also *Hernandez v New York City Health and Hospitals Corp.*, 78 NY2d 687, 578 NYS2d 510, 585 NE2d 822 (1991). The time within which an action must be commenced under Public Authorities Law § 1276(2), governing suits against the MTA and its subsidiaries, constitutes a period of limitation that may be tolled or extended pursuant to CPLR 210(a) when the claimant dies before the expiration of the statute, *Trepel v Metropolitan Suburban Bus Authority*, 262 AD2d 552, 693 NYS2d 159 (2d Dept 1999).

Where the decedent's only distributee is a minor, the limitations period is tolled until a guardian is appointed or the distributee reaches majority, whichever first occurs, *Hernandez v New York City Health and Hospitals Corp.*, 78 NY2d 687, 578 NYS2d 510, 585 NE2d 822 (1991); *Nguyen v 230 Park Investors, LLC*, 19 AD3d 295, 797 NYS2d 488 (1st Dept 2005); *Boles v Sheehan Memorial Hosp.*, 265 AD2d 910, 695 NYS2d 818 (4th Dept 1999). However, this toll is not available with respect to the estate's claim for the decedent's personal injury, since the personal injury claim accrues on behalf of decedent, as opposed to the distributees, *Heslin v Greene*, 14 NY3d 67, 896 NYS2d 723, 923 NE2d 1111 (2010). It is the court's appointment of a legal guardian that is dispositive, not blood ties or natural guardianship, *Boles v Sheehan Memorial Hosp.*, *supra*. However, the statute of limitations for a wrongful death action commenced on behalf of the decedent's infant beneficiaries will not be tolled where the decedent's will named her mother as executrix of the estate and as guardian for her infant children, *Baez v New York City Health and Hospitals Corp.*, 80 NY2d 571, 592 NYS2d 640, 607 NE2d 787 (1992), or where there is a competent adult who can commence the action such as an executor or guardian, see *Ratka v St. Francis Hospital*, 44 NY2d 604, 407 NYS2d 458, 378 NE2d 1027 (1978); *Merced v Wyckoff Heights Medical Center*, 225 AD2d 532, 639 NYS2d 81 (2d Dept 1996).

EPTL 5-4.1(2) provides an alternative statute of limitations in cases where criminal proceedings are brought against the wrongful death defendant. Under the statute, where a criminal action is brought against the same defendant with respect to the event from which the wrongful death claim arises, the decedent's personal representative "shall have at least one year from the termination of the criminal action" to commence a death action, even if "the time in which to commence such action has already expired or has less than a year remaining." EPTL 5-4.1(2) is an

alternative period to the general two year period imposed by EPTL 5-4.1(1), and a wrongful death action is timely if brought within either period. Thus, an action was held timely where it was brought within one year of the defendant's plea of guilty to the criminal charges, even though the criminal proceedings were not commenced until nearly three years after the decedent's death, *Jordan v Britton*, 128 AD2d 315, 515 NYS2d 678 (4th Dept 1987). However, the alternative period allowed by EPTL 5-4.1(2) is available only as against the criminal defendant and does not apply to persons sought to be held vicariously liable, such as the criminal defendant's employer, *Villanueva v Comparetto*, 180 AD2d 627, 580 NYS2d 30 (2d Dept 1992); *Jordan v Britton*, supra (4th Dept); but see *Alford v St. Nicholas Holding Corp.*, 218 AD2d 622, 631 NYS2d 30 (1st Dept 1995). It should be noted that, where the criminal proceedings terminate in a conviction, the criminal defendant may not relitigate the issue of guilt unless he or she proves that a full and fair opportunity to contest the charges was not provided in the criminal court, *Jordan v Britton*, supra; see *Gilberg v Barbieri*, 53 NY2d 285, 441 NYS2d 49, 423 NE2d 807 (1981); *S. T. Grand, Inc. v New York*, 32 NY2d 300, 344 NYS2d 938, 298 NE2d 105 (1973); as to the effect of a plea of guilty, see *Merchants Mut. Ins. Co. v Arzillo*, 98 AD2d 495, 472 NYS2d 97 (2d Dept 1984); see also PJI 1:55.

I. Survival Action

No recovery for post-accident pain and suffering will be allowed where there is no evidence that the decedent was conscious at any time after the occurrence, *Blunt v Zinni*, 32 AD2d 882, 302 NYS2d 504 (4th Dept 1969), aff'd, 27 NY2d 521, 312 NYS2d 996, 261 NE2d 107 (1970); *Alfieri v Cabot Corp.*, 17 AD2d 455, 235 NYS2d 753 (1st Dept 1962), aff'd, 13 NY2d 1027, 245 NYS2d 600, 195 NE2d 310 (1963); *McKenna v Reale*, 137 AD3d 1533, 29 NYS3d 596 (3d Dept 2016); *Phiri v Joseph*, 32 AD3d 922, 822 NYS2d 573 (2d Dept 2006); see *Cummins v Onondaga*, 84 NY2d 322, 618 NYS2d 615, 642 NE2d 1071 (1994); *Oates v New York City Transit Authority*, 138 AD3d 470, 30 NYS3d 606 (1st Dept 2016), aff'd, 28 NY3d 1046, 43 NYS3d 245, 65 NE3d 1280 (2016); *Cleary v LJR Associates*, 198 AD2d 394, 604 NYS2d 140 (2d Dept 1993). But testimony that tends to prove pain is usually sufficient to support a verdict, *Roche v Brooklyn City & N.R. Co.*, 105 NY 294, 11 NE 630 (1887) (red and swollen appearance of arm); *Vatalaro v Suffolk*, 163 AD3d 893, 81 NYS3d 441 (2d Dept 2018) (decedent minimally conscious for 11 to 20 minutes and able to feel pain); *Coffey v Callichio*, 136 AD2d 673, 523 NYS2d 1011 (2d Dept 1988) (decedent conscious for 15 to 20 minutes with crushed skull); *Jones v Simeone*, 112 AD2d 772, 492 NYS2d 270 (4th Dept 1985) (decedent had eyes open and thrashed about); *Juiditta v Bethlehem Steel Corp.*, 75 AD2d 126, 428 NYS2d 535 (4th Dept 1980) (decedent screamed, made noises and breathing sounds); *Cook v Erwin*, 30 AD2d 579, 289 NYS2d 730 (3d Dept 1968) (decedent aware of treatment and groaning); *Kinner v Kuroczka*, 12 AD2d 383, 212 NYS2d 479 (3d Dept 1961) (decedent "moaning and groaning like he was in pain"). Conscious pain and suffering may be inferred from the fact that the decedent manifested the ability to talk

coherently, *Kallenberg v Beth Israel Hospital*, 45 AD2d 177, 357 NYS2d 508 (1st Dept 1974), *aff'd*, 37 NY2d 719, 374 NYS2d 615, 337 NE2d 128 (1975); see *Teller v Fairchild*, 67 AD2d 1105, 415 NYS2d 138 (4th Dept 1979), from the fact that the decedent consciously struggled for his life, *Cassar v Central Hudson Gas & Elec. Corp.*, 134 AD2d 672, 521 NYS2d 337 (3d Dept 1987), or from the fact that the decedent, a murder victim, had been elaborately bound and gagged, *Gonzalez v New York City Housing Authority*, 77 NY2d 663, 569 NYS2d 915, 572 NE2d 598 (1991). An award for conscious pain and suffering may be made where the decedent screamed after the occurrence and was conscious during painful treatment attempts, *Regan v Long Island R.R. Co.*, 128 AD2d 511, 512 NYS2d 443 (2d Dept 1987); see *Matter of 91st Street Crane Collapse Litigation*, 154 AD3d 139, 62 NYS3d 11 (1st Dept 2017). However, evidence that the decedent was dehydrated or thirsty, by itself, has been held insufficient, *Richardson v Lutheran Hospital of Brooklyn*, 70 AD2d 933, 417 NYS2d 526 (2d Dept 1979). Similarly, that defendant placed a blanket over the decedent does not, standing alone, raise an issue of fact as to whether decedent was conscious, *McKenna v Reale*, *supra*. The elements to be considered in determining the conscious pain award when the interval between injury and death is short are the degree of consciousness, severity of pain, apprehension of impending death and the duration, *Jones v Simeone*, 112 AD2d 772, 492 NYS2d 270 (4th Dept 1985); *Anderson v Rowe*, 73 AD2d 1030, 425 NYS2d 180 (4th Dept 1980); see *Regan v Long Island R.R. Co.*, 128 AD2d 511, 512 NYS2d 443 (2d Dept 1987).

Interest on the conscious pain and suffering award runs from the date of the verdict to the entry of final judgment, *Tucker v New York*, 45 AD2d 1051, 358 NYS2d 23 (2d Dept 1974).

1. Pre-impact terror

The courts have recognized the injured person's "pre-impact terror" as an element of conscious pain and suffering, *Lubecki v New York*, 304 AD2d 224, 758 NYS2d 610 (1st Dept 2003); *Smiley-Walsh v New York City Housing Authority*, 243 AD2d 261, 664 NYS2d 511 (1st Dept 1997); see *McKenna v Reale*, 137 AD3d 1533, 29 NYS3d 596 (3d Dept 2016) (citing PJI). There must be some evidence from which one might imply an awareness of the danger and therefore infer pre-impact terror, *Matter of 91st Street Crane Collapse Litigation*, 154 AD3d 139, 62 NYS3d 11 (1st Dept 2017); *Anderson v Rowe*, 73 AD2d 1030, 425 NYS2d 180 (4th Dept 1980); see *Santaiti v Ramapo*, 197 AD3d 1191, 153 NYS3d 554 (2d Dept 2021) (evidence that decedent was shot in the front of her body raised issue of fact whether decedent experienced preimpact terror); *Keenan v Molloy*, 137 AD3d 868, 27 NYS3d 73 (2d Dept 2016). Thus, no award for pre-impact terror was warranted where, in light of his pre-accident statement and the relatively low rate of speed of the decedent's vehicle, there was no basis for inferring that the decedent was aware of his own impending death, *Martin v Reedy*, 194 AD2d 255, 606 NYS2d 455 (3d Dept 1994); see *Keenan v Molloy*, *supra* (no award for pre-impact terror warranted; although bus driver heard scream few seconds

before bus struck decedent, no evidence established that scream came from decedent). Similarly, evidence that the bus driver whose vehicle struck the decedent's car sounded his horn continuously when he realized the car was entering the intersection was insufficient to support recovery for pre-impact terror, *Phiri v Joseph*, 32 AD3d 922, 822 NYS2d 573 (2d Dept 2006). In contrast, recovery for pre-impact terror was allowed where the driver of a motorcycle applied his brakes, indicating that he had seen defendant's truck and was aware of the likelihood of a serious collision, *Lang v Bouju*, 245 AD2d 1000, 667 NYS2d 440 (3d Dept 1997). Likewise, evidence that the deceased had a "surprised look" on his face was sufficient to support recovery for pre-impact terror, *Boston v Dunham*, 274 AD2d 708, 711 NYS2d 54 (3d Dept 2000). Recovery for pre-impact terror was allowed where witnesses described look of "sheer panic" on decedent's face as construction crane toppled, *Matter of 91st Street Crane Collapse Litigation*, 154 AD3d 139, 62 NYS3d 11 (1st Dept 2017). Evidence was sufficient to support an award for pre-impact terror where the decedent made eye contact with bus driver one second prior to impact, *Vatalaro v Suffolk*, 163 AD3d 893, 81 NYS3d 441 (2d Dept 2018). Plaintiffs asserting pre-impact terror claims on behalf of deceased accident victims may not take advantage of the lesser burden of proof permitted by *Noseworthy v New York*, 298 NY 76, 80 NE2d 744 (1948), *LaMendola v New York State Thruway Authority*, 35 AD3d 1249, 828 NYS2d 734 (4th Dept 2006).

2. Funeral expenses

The damages recoverable for injury that causes death are limited to those accruing before death, but may include the reasonable funeral expenses paid by the estate or for which the estate may be liable, *EPTL 11-3.3*; *Montalvo v Chiamonte*, 74 AD3d 455, 902 NYS2d 520 (1st Dept 2010). The cost of a burial lot is included in "funeral expenses," *Malvaso v State*, 15 Misc2d 585, 182 NYS2d 62 (Ct Cl 1959), *aff'd*, 10 AD2d 663, 197 NYS2d 452 (4th Dept 1960).

IV. Derivative Action

The surviving spouse's individual claim for loss of services may be joined with the wrongful death and survival actions, *CPLR 1002(a)*; see *Huthmacher v Dunlop Tire Corp.*, 309 AD2d 1175, 765 NYS2d 111 (4th Dept 2003). The surviving spouse individually may properly seek damages only for the loss suffered between the dates of the deceased's injury and death, and not for future losses, *Liff v Schildkrout*, 49 NY2d 622, 427 NYS2d 746, 404 NE2d 1288 (1980); *Sand v Chapin*, 238 AD2d 862, 656 NYS2d 700 (3d Dept 1997); *Yuet Ngor Chang v New York City Health and Hospitals Corp.*, 82 AD2d 764, 440 NYS2d 211 (1st Dept 1981).

The statute of limitations applicable to the derivative action is the same as applies to the underlying cause of action in favor of the decedent, *Rothfarb v Brookdale Hosp.*, 139 AD2d 720, 527 NYS2d 473 (2d Dept 1988). However, statutory tolls are personal to the decedent

and do not apply to derivative actions, *Myrick v Suffolk*, 139 AD2d 633, 527 NYS2d 273 (2d Dept 1988) (infancy toll not applicable to mother's derivative claim).

7. MITIGATION

**PJI 2:325. Damages—Mitigation—General Principles
(Failure to Have an Operation)**

A person who has been injured is not permitted to recover for damages that could have been avoided by using means which a reasonably prudent person would have used to (cure the injury, alleviate the pain). The defendant claims that if the plaintiff submitted to an operation (his, her) (injury, pain) would be (completely cured, greatly alleviated) and that such an operation is not dangerous.

The plaintiff claims that (he, she) declined to have the operation because it was (dangerous, too expensive). The burden of proving that the plaintiff failed to avail (himself, herself) of a reasonably safe procedure which would have (completely cured, greatly alleviated) (his, her) injury is on the defendant. If you find that the plaintiff is entitled to recover in this action, then in deciding the nature and permanence of (his, her) injury and what damages (he, she) may recover for the injury, you must decide whether in refusing to have an operation the plaintiff acted as a reasonably prudent person would have acted under the circumstances. In deciding that question you will take into consideration the evidence concerning the nature of the operation, the expense of such an operation and whether the plaintiff had sufficient funds or had insurance to meet that expense, the extent to which such an operation involves danger to the plaintiff, and the results to be expected from it. If you find that in deciding not to have an operation the plaintiff acted as a reasonably prudent person would have acted then the plaintiff is entitled to recover for (his, her) injuries, as you find them to be, without regard to the possibility of an operation. If, however, you find that the operation is one that a reasonably prudent person would submit to and that the operation would (cure the injury, relieve the pain), you will take

that fact into consideration in arriving at the amount of damages that you award.

Comment

Based on *Alberti v New York, L.E. & W.R. Co.*, 118 NY 77, 23 NE 35 (1889); *Lyons v Erie Ry. Co.*, 57 NY 489 (1874); *Hawkins v New York*, 99 AD2d 481, 470 NYS2d 420 (2d Dept 1984); *Beyer v Murray*, 33 AD2d 246, 306 NYS2d 619 (4th Dept 1970) (citing PJI); *Blate v Third Ave. R. Co.*, 44 App Div 163, 60 NYS 732 (1st Dept 1899); 7-A Part 1, *Warren, Negligence* 228 § 4.01 (4th Ed.); 36 NYJur2d 51-54, *Damages* §§ 28-31; Annot: 62 ALR3d 9.

The pattern charge is but one illustration of the general rule that the plaintiff is required by law to keep out-of-pocket expenses and loss to a minimum, *Wilmot v State*, 32 NY2d 164, 344 NYS2d 350, 297 NE2d 90 (1973); see *Assouline Ritz LLC v Edward I. Mills & Associates, Architects, PC*, 91 AD3d 473, 937 NYS2d 11 (1st Dept 2012). An injured party is under a duty to make a reasonable effort to minimize the consequential damages, and if such reasonable effort is not made, he or she will be barred from recovering those damages which result from such failure, *Mayes Co. v State*, 18 NY2d 549, 277 NYS2d 393, 223 NE2d 881 (1966); *Baldwin v U.S. Tel. Co.*, 45 NY 744 (1871); *Bell v Shopwell, Inc.*, 119 AD2d 715, 501 NYS2d 129 (2d Dept 1986); *Watson v Archer*, 46 AD2d 997, 362 NYS2d 302 (4th Dept 1974); see *Assouline Ritz LLC v Edward I. Mills & Associates, Architects, P.C.*, *supra*. Defendant has the burden of proving that plaintiff failed to mitigate damages, *Cornell v T. V. Development Corp.*, 17 NY2d 69, 268 NYS2d 29, 215 NE2d 349 (1966); see *Assouline Ritz LLC v Edward I. Mills & Associates, Architects, P.C.*, *supra*; *New York Telephone Co. v Harrison & Burrowes Bridge Contractors, Inc.*, 3 AD3d 606, 771 NYS2d 187 (3d Dept 2004); *Rebh v Lake George Ventures Inc.*, 241 AD2d 801, 660 NYS2d 901 (3d Dept 1997). Where appropriate upon the evidence, a defendant is entitled to a charge that plaintiff was under a duty to mitigate damages with respect to loss of earnings by endeavoring to obtain alternative employment, *McLaurin v Ryder Truck Rental*, 123 AD2d 671, 507 NYS2d 41 (2d Dept 1986); see *Gerbino v Tinseltown USA*, 13 AD3d 1068, 788 NYS2d 538 (4th Dept 2004). In other words, the failure to minimize damages merely prevents the plaintiff from recovering the damages that could have been avoided by a reasonable effort; all other damages may be recovered, *Colonna v State*, 232 App Div 385, 249 NYS 578 (4th Dept 1931). The jury may reduce the damages so as to prevent plaintiff from recovering for additional injuries occasioned by plaintiff's actions taken in disregard of medical advice, *Perla v New York Daily News, Inc.*, 123 AD2d 349, 506 NYS2d 361 (2d Dept 1986), or where a plaintiff has unreasonably failed to take steps to relieve emotional distress arising from exposure to the risk of HIV infection, *Ornstein v New York City Health and Hospitals Corp.*, 10 NY3d 1, 852 NYS2d 1, 881 NE2d 1187 (2008). Plaintiff has a duty to mitigate loss of earnings by reasonably seeking vocational rehabilitation, *Bell v Shopwell, Inc.*, 119 AD2d 715, 501 NYS2d 129 (2d Dept 1986); see *Aman v Federal*

Exp. Corp., 267 AD2d 1077, 701 NYS2d 571 (4th Dept 1999). Evidence that plaintiff, after seeking and failing to obtain employment, organized a corporate business does not bar recovery for lost income; although by so doing plaintiff took himself out of the employment field, his doing so was consistent with his obligation to mitigate damages, *Cornell v T. V. Development Corp.*, 17 NY2d 69, 268 NYS2d 29, 215 NE2d 349 (1966).

Plaintiff is only bound to make a reasonable effort to mitigate the damages, *People's Gas & Electric Co. of Oswego v State*, 189 App Div 421, 179 NYS 520 (4th Dept 1919), *aff'd*, 231 NY 520, 132 NE 871 (1921); *Reed v Harter Chair Corp.*, 185 AD2d 547, 586 NYS2d 401 (3d Dept 1992); *Close v State*, 90 AD2d 599, 456 NYS2d 437 (3d Dept 1982); *Carrols Equities Corp. v Villnave*, 57 AD2d 1044, 395 NYS2d 800 (4th Dept 1977); *State v Samfred Beltline Corp.*, 31 AD2d 865, 297 NYS2d 466 (3d Dept 1969); see *New York Telephone Co. v Harrison & Burrowes Bridge Contractors, Inc.*, 3 AD3d 606, 771 NYS2d 187 (3d Dept 2004). Plaintiff is not bound to follow medical advice blindly; it is for the jury to say whether in failing to do so plaintiff acted reasonably, *Fafard v Ajamian*, 60 AD2d 853, 400 NYS2d 856 (2d Dept 1978); *Watson v Archer*, 46 AD2d 997, 362 NYS2d 302 (4th Dept 1974). Plaintiff is, however, entitled to rely on the advice of a physician, *Lyons v Erie Ry. Co.*, 57 NY 489 (1874); see *Goldman v State*, 28 AD2d 782, 280 NYS2d 879 (3d Dept 1967). If the doctor's advice is erroneous, plaintiff may recover from the original tortfeasor for all damage, including that arising from the malpractice in treating the original injury, *Milks v McIver*, 264 NY 267, 190 NE 487 (1934); see PJI 2:305, but the original tortfeasor may have a third-party claim against the physician for that part of the damages caused by the malpractice, see PJI 2:75.

If it is claimed that plaintiff did not have an operation because he or she relied on the advice of a physician, the charge should be amended by deleting the period at its end and inserting the following:

PJI 2:325.1

For future loss of earnings or future pain and suffering. As to earnings lost or pain suffered prior to trial, however, plaintiff was entitled to rely on the advice of (his, her) doctor unless you find it was unreasonable for (him, her) to do so in the light of the facts then known to (him, her).

Plaintiff is only required to use such methods as are reasonably within his or her means, *Lyons v Erie Ry. Co.*, 57 NY 489 (1874), and when an issue is raised concerning whether he or she should have had an operation, plaintiff may introduce evidence of financial ability, *Alberti v New York, L.E. & W.R. Co.*, 118 NY 77, 23 NE 35 (1889). If the issue is not raised, the reference to financial ability in the pattern charge should be deleted.

The failure of an infant's parent or custodian to provide or consent

to an operation is not imputable to the infant, General Obligations Law § 3-111; *Favier by Favier v Winick*, 151 Misc2d 910, 583 NYS2d 907 (Sup 1992) (citing PJI).

The injured party who makes a successful effort to avoid or reduce damages will be allowed to recover the expenses necessarily incurred in so doing. He or she will also be allowed to recover the expenses of a proper effort even though it proves unsuccessful, provided the effort is made in good faith and with reasonable skill and prudence, *Den Norske Ameriekalinje Actiesselskabet v Sun Printing & Publishing Ass'n*, 226 NY 1, 122 NE 463 (1919). The mitigation, however, must be reasonably warranted by and proportioned to the injury and consequences to be averted, *Den Norske Ameriekalinje Actiesselskabet v Sun Printing & Publishing Ass'n*, *supra*.

A plaintiff's religious beliefs are a factor for the jury to consider in deciding whether plaintiff acted reasonably. In *Williams v Bright*, 230 AD2d 548, 658 NYS2d 910 (1st Dept 1997), the Appellate Division held that it was error to instruct the jury to decide whether plaintiff "acted reasonably as a Jehovah's Witness" in refusing surgery requiring blood transfusions and directed that the pattern charge be supplemented as follows:

In considering whether the plaintiff acted as a reasonably prudent person, you may consider the plaintiff's testimony that she is a believer in the Jehovah's Witness faith, and that as an adherent of that faith, she cannot accept any medical treatment which requires a blood transfusion. I charge you that such belief is a factor for you to consider, together with all the other evidence you have heard, in determining whether the plaintiff acted reasonably in caring for her injuries, keeping in mind, however, that the overriding test is whether the plaintiff acted as a reasonably prudent person, under all the circumstances confronting her.

In *Sorkin v Lee*, 78 AD2d 180, 434 NYS2d 300 (4th Dept 1980), the Court stated that the failure of the plaintiff to seek an abortion in a case involving an unwanted pregnancy should not be considered by the jury for policy reasons.

Payment by a joint tortfeasor will mitigate plaintiff's damages, but evidence of such payment does not give rise to a jury question. CPLR 4533-b reads:

In an action for personal injury, injury to property or for wrongful death, any proof as to payment by or settlement with another joint tortfeasor, or one claimed to be a joint tortfeasor, offered by a defendant in mitigation of damages, shall be taken out of the hearing of the jury. The court shall deduct the proper amount, as determined pursuant to section 15-108 of the general obligations law from the award made by the jury.

It is not reversible error for a court to refuse to include a question on a verdict sheet asking whether the plaintiff has failed to mitigate past and future damages. *Rohring v Niagara Falls*, 192 AD2d 228, 601 NYS2d 740 (4th Dept 1993), *aff'd*, 84 NY2d 60, 614 NYS2d 714, 638 NE2d 62 (1994). In *Rohring*, the court's charge fully covered the issue of mitigation and the verdict sheet did not in any way preclude the jury from considering all of the relevant issues, including mitigation, *id.*

As to the failure to use a seat belt, see PJI 2:87.1.

APPENDICES

- A. LIFE EXPECTANCY TABLES
- B. TABLES OF WORKING LIFE FOR MEN AND WOMEN
- C. PRESENT VALUE TABLE

A LIFE EXPECTANCY TABLES

The source of this information is the National Center for Health Statistics, Vital Statistics of the United States, Volume II, Mortality, Part A, Section 6, as published in the National Vital Statistics Reports, Vol. 47, No. 28 (December 13, 1999). While a more recent set of tables exists, see National Vital Statistics Reports, Vol. 56, No. 9, December 28, 2007, those tables are less complete than the tables in Appendix A in that they only report life expectancy for individuals in five-year age cohorts. Since the differences between the 1999 and 2004 tables are minimal, the 1999 tables have been retained.

The life expectancy tables of the Centers for Disease Control, which are updated monthly, are available at www.cdc.gov/nchs/fastats/life-expectancy.htm.

EXPLANATION OF THE COLUMNS OF THE LIFE TABLE

Column 1—Age ($\times$ to $\times + 1$) This column shows the age interval between the two exact ages indicated. For instance, “20–21” means the 1-year interval between the 20th and 21st birthdays.

Column 2—Average remaining lifetime (e_x) The average remaining lifetime (also called life expectancy) at any given age is the average number of years remaining to be lived by those surviving to that age on the basis of a given set of age-specific rates of dying. To arrive at this value, it is first necessary to observe that the figures in column 5 of the life table can also be interpreted in terms of a single life table cohort without introducing the concept of the stationary population. From this point of view, each figure in column 5 represents the total time (in years) lived between two indicated birthdays by all those reaching the earlier birthday. Thus, the figure 98,226 for males in the age interval 20–21 is the total number of years lived between the 20th and 21st birthdays by the 98,293 (column 3) males who reached their 20th birthday out of 100,000 males born alive. The corresponding figure 5,377,806 in column 6 is the total number of years lived after attaining age 20 by the 98,293 reaching that age. This number of years divided by the number of person (5,377,806 divided by 98,293) gives 54.7 years as the average remaining lifetime of males at age 20.

APPENDIX A

Table 1. Life table for males: United States, 1997

	Life expectancy at beginning of age interval
Age	e_x
0-1	73.6
1-2	73.1
2-3	72.2
3-4	71.2
4-5	70.2
5-6	69.3
6-7	68.3
7-8	67.3
8-9	66.3
9-10	65.3
10-11	64.3
11-12	63.3
12-13	62.3
13-14	61.4
14-15	60.4
15-16	59.4
16-17	58.5
17-18	57.5
18-19	56.6
19-20	55.6
20-21	54.7
21-22	53.8
22-23	52.9
23-24	51.9
24-25	51.0
25-26	50.1
26-27	49.2
27-28	48.2
28-29	47.3
29-30	46.4
30-31	45.4
31-32	44.5
32-33	43.6
33-34	42.7
34-35	41.7
35-36	40.8
36-37	39.9
37-38	39.0
38-39	38.1
39-40	37.1
40-41	36.2
41-42	35.3
42-43	34.4
43-44	33.5
44-45	32.7

PATTERN JURY INSTRUCTIONS

	Life expectancy at beginning of age interval
Age	e_x
45-46	31.8
46-47	30.9
47-48	30.0
48-49	29.2
49-50	28.3
50-51	27.4
51-52	26.6
52-53	25.8
53-54	24.9
54-55	24.1
55-56	23.3
56-57	22.5
57-58	21.7
58-59	20.9
59-60	20.2
60-61	19.4
61-62	18.7
62-63	18.0
63-64	17.3
64-65	16.6
65-66	15.9
66-67	15.2
67-68	14.6
68-69	13.9
69-70	13.3
70-71	12.7
71-72	12.1
72-73	11.5
73-74	11.0
74-75	10.4
75-76	9.9
76-77	9.4
77-78	8.9
78-79	8.4
79-80	7.9
80-81	7.5
81-82	7.0
82-83	6.6
83-84	6.2
84-85	5.8
85-86	5.5
86-87	5.2
87-88	4.8
88-89	4.6
89-90	4.3
90-91	4.0

APPENDIX A

	Life expectancy at beginning of age interval
Age	e_x
91-92	3.8
92-93	3.6
93-94	3.4
94-95	3.2
95-96	3.0
96-97	2.9
97-98	2.7
98-99	2.6
99-100	2.5
100+	2.4

PATTERN JURY INSTRUCTIONS

Table 2. Life table for females: United States, 1997

	Life expectancy at beginning of age interval
Age	e_x
0-1	79.4
1-2	78.9
2-3	77.9
3-4	76.9
4-5	75.9
5-6	75.0
6-7	74.0
7-8	73.0
8-9	72.0
9-10	71.0
10-11	70.0
11-12	69.0
12-13	68.0
13-14	67.0
14-15	66.1
15-16	65.1
16-17	64.1
17-18	63.1
18-19	62.2
19-20	61.2
20-21	60.2
21-22	59.2
22-23	58.3
23-24	57.3
24-25	56.3
25-26	55.4
26-27	54.4
27-28	53.4
28-29	52.4
29-30	51.5
30-31	50.5
31-32	49.5
32-33	48.6
33-34	47.6
34-35	46.7
35-36	45.7
36-37	44.7
37-38	43.8
38-39	42.8
39-40	41.9
40-41	40.9
41-42	40.0
42-43	39.1
43-44	38.1
44-45	37.2

APPENDIX A

	Life expectancy at beginning of age interval
Age	e_x
45-46	36.3
46-47	35.4
47-48	34.4
48-49	33.5
49-50	32.6
50-51	31.7
51-52	30.8
52-53	29.9
53-54	29.0
54-55	28.2
55-56	27.3
56-57	26.4
57-58	25.6
58-59	24.7
59-60	23.9
60-61	23.1
61-62	22.3
62-63	21.5
63-64	20.7
64-65	19.9
65-66	19.2
66-67	18.4
67-68	17.7
68-69	16.9
69-70	16.2
70-71	15.5
71-72	14.8
72-73	14.1
73-74	13.4
74-75	12.8
75-76	12.1
76-77	11.5
77-78	10.9
78-79	10.3
79-80	9.7
80-81	9.1
81-82	8.6
82-83	8.0
83-84	7.5
84-85	7.1
85-86	6.6
86-87	6.2
87-88	5.8
88-89	5.4
89-90	5.0
90-91	4.7

PATTERN JURY INSTRUCTIONS

	Life expectancy at beginning of age interval
Age	e_x
91-92	4.4
92-93	4.1
93-94	3.8
94-95	3.6
95-96	3.4
96-97	3.1
97-98	3.0
98-99	2.8
99-100	2.6
100+	2.5

APPENDIX B

B TABLES OF WORKING LIFE FOR MEN AND WOMEN

Tables 1 through 8 in Appendix B are extracted from a report published by the United States Bureau of Labor Statistics, United States Department of Labor, entitled "Report: Worklife Estimates: Effects of Race and Education" (February 1986). This report, which has not been updated as of April 2010, is the most recent authoritative source of working life statistics in the United States.

PATTERN JURY INSTRUCTIONS

Table 1. Table of working life for men, 1979–80. Current labor status

Expectation of life		Total population		Not in the labor force		In the labor force	
Age	Total years	Active years	Inactive years	Active years ²	Inactive years ²	Active years	Inactive years
16	55.5	39.1	16.5	38.3	17.2	39.8	15.7
17	54.6	38.6	16.0	37.7	16.9	39.3	15.3
18	53.7	38.0	15.6	37.1	16.6	38.7	15.0
19	52.8	37.5	15.3	36.4	16.3	38.1	14.7
20	51.8	36.8	15.0	35.7	16.1	37.4	14.5
21	50.9	36.2	14.8	35.0	16.0	36.7	14.3
22	50.0	35.4	14.6	34.2	15.8	35.9	14.1
23	49.1	34.7	14.4	33.4	15.7	35.1	14.0
24	48.2	33.9	14.3	32.6	15.6	34.3	13.9
25	47.3	33.1	14.2	31.8	15.6	33.5	13.8
26	46.4	32.3	14.1	30.9	15.5	32.7	13.8
27	45.5	31.5	14.1	30.0	15.5	31.8	13.7
28	44.6	30.6	14.0	29.1	15.5	30.9	13.7
29	43.7	29.8	13.9	28.1	15.6	30.1	13.6
30	42.8	28.9	13.9	27.1	15.6	29.2	13.6
31	41.9	28.0	13.9	26.2	15.7	28.3	13.5
32	40.9	27.1	13.8	25.1	15.8	27.5	13.5
33	40.0	26.2	13.8	24.1	15.9	26.6	13.4
34	39.1	25.3	13.7	23.1	15.9	25.7	13.4
35	38.2	24.5	13.7	22.1	16.0	24.8	13.4
36	37.3	23.6	13.7	21.1	16.2	23.9	13.3
37	36.3	22.7	13.7	20.0	16.3	23.1	13.3
38	35.4	21.8	13.6	19.0	16.5	22.2	13.2
39	34.5	20.9	13.6	17.9	16.6	21.3	13.2
40	33.6	20.0	13.6	16.9	16.7	20.4	13.2
41	32.7	19.2	13.6	15.9	16.8	19.6	13.1
42	31.8	18.3	13.5	14.9	17.0	18.7	13.1
43	30.9	17.4	13.5	13.8	17.1	17.9	13.0
44	30.1	16.6	13.5	12.8	17.3	17.1	13.0
45	29.2	15.7	13.5	11.8	17.3	16.3	12.9
46	28.3	14.9	13.4	10.9	17.4	15.5	12.9
47	27.5	14.0	13.4	10.0	17.4	14.7	12.8
48	26.6	13.2	13.4	9.2	17.4	13.9	12.8
49	25.8	12.4	13.4	8.3	17.4	13.1	12.7
50	25.0	11.6	13.4	7.5	17.4	12.3	12.6
51	24.2	10.8	13.4	6.8	17.4	11.6	12.6
52	23.4	10.0	13.3	6.1	17.3	10.8	12.5
53	22.6	9.3	13.3	5.4	17.2	10.1	12.5
54	21.8	8.5	13.3	4.7	17.1	9.4	12.4
55	21.1	7.8	13.3	4.2	16.9	8.7	12.4
56	20.3	7.0	13.3	3.7	16.7	8.0	12.3
57	19.6	6.3	13.3	3.2	16.4	7.4	12.2
58	18.9	5.6	13.2	2.8	16.1	6.8	12.1
59	18.2	5.0	13.2	2.5	15.7	6.2	11.9

APPENDIX B

Expectation of life		Total population		Not in the labor force		In the labor force	
Age	Total years	Active years	Inactive years	Active years ²	Inactive years ²	Active years	Inactive years
60	17.5	4.4	13.1	2.2	15.3	5.7	11.7
61	16.8	3.9	12.9	1.9	14.9	5.3	11.5
62	16.1	3.4	12.7	1.7	14.4	4.9	11.2
63	15.5	3.0	12.5	1.5	14.0	4.6	10.9
64	14.9	2.6	12.3	1.3	13.5	4.3	10.5
65	14.2	2.3	12.0	1.2	13.1	4.1	10.1
66	13.6	2.0	11.6	1.0	12.6	3.9	9.7
67	13.0	1.8	11.3	0.8	12.2	3.8	9.3
68	12.5	1.6	10.9	0.7	11.8	3.6	8.9
69	11.9	1.4	10.5	0.5	11.4	3.4	8.5
70	11.4	1.2	10.2	0.4	11.0	3.2	8.1
71	10.9	1.1	9.8	0.3	10.5	3.1	7.8
72	10.4	0.9	9.4	0.2	10.1	2.8	7.5
73	9.9	0.8	9.1	0.1	9.7	2.6	7.3
74	9.4	0.7	8.7	0.1	9.3	2.2	7.2
75	9.0	0.6	8.4	0.0	8.9	1.7	7.2

² Estimates revised January 1986.

PATTERN JURY INSTRUCTIONS

Table 2. Table of working life for men who have not completed high school, 1979-80					Table 3. Table of working life for men who have completed high school to 14 years of schooling, 1979-80				
Expected duration of active life for					Expected duration of active life for				
Life ex-pec-tancy ²	Total	Inac-tives ³	Ac-tives		Life ex-pec-tancy ²	Total	Inac-tives ³	Ac-tives	
16	55.5	34.8	34.0	35.6					
17	54.6	34.3	33.4	35.0					
18	53.7	33.8	32.8	34.5	18	53.7	38.9	37.9	39.5
19	52.8	33.2	32.1	33.9	19	52.8	38.3	37.2	38.8
20	51.8	32.6	31.5	33.3	20	51.8	37.6	36.5	38.1
21	50.9	32.0	30.8	32.6	21	50.9	36.9	35.7	37.3
22	50.0	31.4	30.0	32.0	22	50.0	36.1	34.9	36.6
23	49.1	30.7	29.3	31.2	23	49.1	35.4	34.1	35.8
24	48.2	30.0	28.4	30.5	24	48.2	34.6	33.3	34.9
25	47.3	29.2	27.6	29.8	25	47.3	33.8	32.4	34.1
26	46.4	28.5	26.8	29.0	26	46.4	32.9	31.5	33.2
27	45.5	27.7	26.0	28.2	27	45.5	32.1	30.6	32.4
28	44.6	26.9	25.1	27.5	28	44.6	31.2	29.6	31.5
29	43.7	26.2	24.1	26.7	29	43.7	30.3	28.7	30.6
30	42.8	25.4	23.0	25.9	30	42.8	29.4	27.7	29.7
31	41.9	24.6	22.1	25.2	31	41.9	28.5	26.7	28.9
32	40.9	23.8	21.1	24.4	32	40.9	27.7	25.7	28.0
33	40.0	23.0	20.3	23.6	33	40.0	26.8	24.7	27.1
34	39.1	22.2	19.4	22.8	34	39.1	25.9	23.6	26.2
35	38.2	21.3	18.5	22.0	35	38.2	25.0	22.6	25.4
36	37.3	20.5	17.5	21.2	36	37.3	24.1	21.6	24.5
37	36.3	19.7	16.6	20.4	37	36.3	23.2	20.5	23.6
38	35.4	18.9	15.8	19.6	38	35.4	22.3	19.4	22.8
39	34.5	18.1	14.9	18.9	39	34.5	21.5	18.4	21.9
40	33.6	17.3	14.0	18.1	40	33.6	20.6	17.3	21.0
41	32.7	16.5	13.1	17.3	41	32.7	19.7	16.3	20.2
42	31.8	15.7	12.2	16.6	42	31.8	18.8	15.4	19.3
43	30.9	15.0	11.3	15.8	43	30.9	18.0	14.5	18.5
44	30.1	14.2	10.3	15.1	44	30.1	17.1	13.5	17.6
45	29.2	13.4	9.5	14.3	45	29.2	16.3	12.6	16.8
46	28.3	12.6	8.7	13.6	46	28.3	15.4	11.7	16.0
47	27.5	11.9	7.9	12.9	47	27.5	14.6	10.9	15.1
48	26.6	11.1	7.1	12.1	48	26.6	13.7	10.1	14.3
49	25.8	10.4	6.4	11.4	49	25.8	12.9	9.3	13.5
50	25.0	9.6	5.7	10.7	50	25.0	12.1	8.5	12.8
51	24.2	8.9	5.1	10.1	51	24.2	11.3	7.7	12.0
52	23.4	8.2	4.5	9.4	52	23.4	10.5	6.9	11.2
53	22.6	7.5	4.0	8.7	53	22.6	9.7	6.1	10.5
54	21.8	6.8	3.6	8.1	54	21.8	9.0	5.3	9.7
55	21.1	6.2	3.2	7.5	55	21.1	8.2	4.7	9.0
56	20.3	5.5	2.8	6.8	56	20.3	7.5	4.0	8.3
57	19.6	4.9	2.5	6.3	57	19.6	6.7	3.5	7.6

APPENDIX B

Table 2. Table of working life for men who have not completed high school, 1979-80					Table 3. Table of working life for men who have completed high school to 14 years of schooling, 1979-80				
Expected duration of active life for					Expected duration of active life for				
	Life ex-pec-tancy ²	Total	Inac-tives ³	Ac-tives		Life ex-pec-tancy ²	Total	Inac-tives ³	Ac-tives
58	18.9	4.4	2.2	5.8	58	18.9	6.0	3.0	7.0
59	18.2	3.8	2.0	5.3	59	18.2	5.3	2.6	6.4
60	17.5	3.3	1.8	4.9	60	17.5	4.7	2.3	5.9
61	16.8	2.9	1.6	4.5	61	16.8	4.1	2.0	5.5
62	16.1	2.6	1.4	4.2	62	16.1	3.6	1.8	5.1
63	15.5	2.2	1.3	3.9	63	15.5	3.2	1.6	4.8
64	14.9	2.0	1.1	3.7	64	14.9	2.8	1.4	4.5
65	14.2	1.8	1.0	3.6	65	14.2	2.4	1.2	4.3
66	13.6	1.6	0.8	3.4	66	13.6	2.2	1.0	4.1
67	13.0	1.4	0.7	3.3	67	13.0	1.9	0.9	3.9
68	12.5	1.2	0.6	3.2	68	12.5	1.7	0.7	3.7
69	11.9	1.1	0.5	3.1	69	11.9	1.5	0.6	3.6
70	11.4	1.0	0.4	2.9	70	11.4	1.3	0.4	3.4
71	10.9	0.9	0.3	2.8	71	10.9	1.1	0.3	3.2
72	10.4	0.8	0.2	2.6	72	10.4	1.0	0.2	3.0
73	9.9	0.7	0.1	2.3	73	9.9	0.8	0.1	2.7
74	9.6	0.5	0.0	1.8	74	9.4	0.7	0.1	2.3
75	9.0	0.5	0.0	1.6	75	9.0	0.6	0.0	1.8

² Given mortality rates of the general male population.

³ Estimates revised January 1986.

PATTERN JURY INSTRUCTIONS

Table 4. Table of working life for men who have completed 15 years or more of schooling, 1979-80

	Expected duration of active life for			
	Life expect- tancy ²	Total	Inactives ³	
20	51.8	39.5	38.5	40.2
21	50.9	38.9	37.8	39.6
22	50.0	38.3	37.1	38.9
23	49.1	37.6	36.4	38.2
24	48.2	36.9	35.6	37.4
25	47.3	36.1	34.8	36.6
26	46.4	35.3	34.0	35.8
27	45.5	34.5	33.1	34.9
28	44.6	33.6	32.2	34.0
29	43.7	32.8	31.3	33.2
30	42.8	31.9	30.4	32.3
31	41.9	31.0	29.5	31.4
32	40.9	30.1	28.6	30.5
33	40.0	29.2	27.7	29.6
34	39.1	28.3	26.8	28.7
35	38.2	27.4	25.9	27.7
36	37.3	26.5	24.9	26.9
37	36.3	25.6	23.9	25.9
38	35.4	24.6	22.9	25.0
39	34.5	23.7	21.9	24.1
40	33.6	22.8	20.9	23.2
41	32.7	21.9	19.8	22.3
42	31.8	21.0	18.8	21.4
43	30.9	20.1	17.6	20.5
44	30.1	19.2	16.5	19.7
45	29.2	18.4	15.5	18.8
46	28.3	17.5	14.5	17.9
47	27.5	16.6	13.5	17.1
48	26.6	15.8	12.5	16.3
49	25.8	14.9	11.5	15.4
50	25.0	14.1	10.5	14.6
51	24.2	13.3	9.6	13.8
52	23.4	12.4	8.7	13.0
53	22.6	11.6	.9	12.2
54	21.8	10.8	.0	11.5
55	21.1	10.0	.2	10.7
56	20.3	9.2	.4	10.0
57	19.6	8.5	.7	9.3
58	18.9	7.7	.0	8.6
59	18.2	7.0	.5	8.0
60	17.5	6.3	.1	7.4
61	16.8	5.6	.7	7.0
62	16.1	5.0	.4	6.5
63	15.5	4.5	.2	6.1

APPENDIX B

Expected duration of active life for				
	Life expectancy ²	Total	Inactives ³	
64	14.9	4.0	.9	5.7
65	14.2	3.6	.7	5.4
66	13.6	3.2	.4	5.1
67	13.0	2.8	.2	4.9
68	12.5	2.5	.9	4.6
69	11.9	2.2	.7	4.4
70	11.4	1.9	.5	4.1
71	10.9	1.7	.3	3.9
72	10.4	1.4	.2	3.6
73	9.9	1.2	.1	3.2
74	9.4	1.0	.0	2.7
75	9.0	0.9	.0	2.2

² Given mortality rates of the general male population.

³ Estimates revised January 1986.

PATTERN JURY INSTRUCTIONS

Table 5. Table of working life for women, 1979-80

Expectation of life		Total population		Not in the labor force		In the labor force	
Age	Total years	Active years	Inactive years	Active years ²	Inactive years ²	Active years	Inactive years
16	62.9	29.3	33.6	28.7	34.3	30.1	32.9
17	61.9	28.8	33.1	28.0	33.9	29.6	32.4
18	61.0	28.3	32.7	27.4	33.5	29.0	31.9
19	60.0	27.7	32.3	26.8	33.2	28.5	31.5
20	59.1	27.2	31.9	26.1	32.9	27.9	31.2
21	58.1	26.6	31.5	25.4	32.7	27.3	30.8
22	57.1	25.9	31.2	24.7	32.4	26.6	30.5
23	56.2	25.3	30.9	24.0	32.2	26.0	30.1
24	55.2	24.6	30.6	23.3	31.9	25.4	29.8
25	54.2	24.0	30.2	22.6	31.7	24.8	29.4
26	53.3	23.3	29.9	21.9	31.4	24.2	29.1
27	52.3	22.7	29.6	21.2	31.1	23.6	28.7
28	51.3	22.0	29.3	20.5	30.8	22.9	28.4
29	50.4	21.4	29.0	19.8	30.5	22.3	28.0
30	49.4	20.8	28.6	19.1	30.3	21.7	27.7
31	48.4	20.1	28.3	18.5	30.0	21.1	27.3
32	47.5	19.5	28.0	17.8	29.7	20.5	27.0
33	46.5	18.9	27.7	17.1	29.4	19.9	26.6
34	45.6	18.2	27.3	16.4	29.1	19.3	26.3
35	44.6	17.6	27.0	15.7	28.9	18.6	26.0
36	43.6	17.0	26.7	15.0	28.6	18.0	25.6
37	42.7	16.3	26.4	14.3	28.4	17.4	25.3
38	41.7	15.7	26.1	13.6	28.2	16.8	25.0
39	40.8	15.0	25.8	12.8	28.0	16.1	24.7
40	39.9	14.3	25.5	12.1	27.8	15.5	24.4
41	38.9	13.7	25.2	11.3	27.6	14.9	24.0
42	38.0	13.0	25.0	10.6	27.4	14.3	23.7
43	37.1	12.4	24.7	9.8	27.2	13.7	23.4
44	36.2	11.7	24.4	9.1	27.0	13.1	23.1
45	35.2	11.1	24.2	8.4	26.8	12.5	22.7
46	34.3	10.4	23.9	7.7	26.6	11.9	22.4
47	33.4	9.8	23.6	7.1	26.3	11.4	22.1
48	32.5	9.2	23.3	6.5	26.0	10.8	21.7
49	31.6	8.6	23.0	5.9	25.8	10.3	21.4
50	30.8	8.0	22.8	5.3	25.5	9.8	21.0
51	29.9	7.4	22.5	4.8	25.1	9.2	20.6
52	29.0	6.9	22.2	4.2	24.8	8.7	20.3
53	28.2	6.3	21.9	3.7	24.4	8.2	19.9
54	27.3	5.8	21.6	3.3	24.0	7.7	19.6
55	26.5	5.2	21.2	2.9	23.6	7.2	19.3
56	25.6	4.7	20.9	2.5	23.1	6.7	18.9
57	24.8	4.3	20.6	2.2	22.6	6.3	18.5
58	24.0	3.8	20.2	1.9	22.1	5.8	18.2
59	23.2	3.4	19.8	1.7	21.5	5.4	17.8

APPENDIX B

Expectation of life		Total population		Not in the labor force		In the labor force	
Age	Total years	Active years	Inactive years	Active years ²	Inactive years ²	Active years	Inactive years
60	22.4	3.0	19.4	1.5	20.9	5.0	17.4
61	21.6	2.6	19.0	1.3	20.3	4.7	16.9
62	20.8	2.3	18.5	1.1	19.7	4.4	16.4
63	20.1	2.0	18.0	1.0	19.1	4.2	15.9
64	19.3	1.8	17.5	0.9	18.4	4.0	15.3
65	18.5	1.5	17.0	0.7	17.8	3.8	14.8
66	17.8	1.3	16.5	0.6	17.2	3.6	14.2
67	17.1	1.2	15.9	0.5	16.5	3.4	13.7
68	16.4	1.0	15.3	0.4	15.9	3.3	13.1
69	15.6	0.9	14.7	0.4	15.3	3.1	12.5
70	14.9	0.8	14.2	0.3	14.7	3.0	12.0
71	14.3	0.7	13.6	0.2	14.1	2.8	11.5
72	13.6	0.6	13.0	0.1	13.5	2.5	11.1
73	13.0	0.5	12.5	0.1	12.9	2.3	10.7
74	12.3	0.4	11.9	0.0	12.3	1.9	10.4
75	11.7	0.3	11.4	0.0	11.7	1.3	10.4

² Estimates revised January 1986.

PATTERN JURY INSTRUCTIONS

Table 6. Table of working life for women who have not completed high school, 1979-80					Table 7. Table of working life for women who have completed high school to 14 years of schooling, 1979-80				
Expected duration of active life for					Expected duration of active life for				
Life ex-pec-tancy ²	Total	Inac-tives ³	Ac-tives		Life ex-pec-tancy ²	Total	Inac-tives ³	Ac-tives	
16	62.9	22.1	21.5	22.8					
17	61.9	21.6	20.9	22.3					
18	61.0	21.1	20.4	21.9	18	61.0	28.9	27.9	29.6
19	60.0	20.7	19.9	21.5	19	60.0	28.3	27.3	29.0
20	59.1	20.2	19.4	21.1	20	59.1	27.7	26.5	28.4
21	58.1	19.7	18.9	20.6	21	58.1	27.0	25.8	27.8
22	57.1	19.3	18.4	20.2	22	57.1	26.4	25.1	27.2
23	56.2	18.8	17.9	19.8	23	56.2	25.7	24.4	26.5
24	55.2	18.4	17.4	19.4	24	55.2	25.1	23.7	25.9
25	54.2	17.9	17.0	18.9	25	54.2	24.4	23.0	25.3
26	53.3	17.4	16.5	18.5	26	53.3	23.8	22.3	24.7
27	52.3	17.0	16.0	18.1	27	52.3	23.2	21.6	24.1
28	51.3	16.5	15.5	17.7	28	51.3	22.5	21.0	23.5
29	50.4	16.1	15.0	17.2	29	50.4	21.9	20.3	22.9
30	49.4	15.6	14.5	16.8	30	49.4	21.3	19.6	22.3
31	48.4	15.1	14.0	16.6	31	48.4	20.6	19.0	21.7
32	47.5	14.7	13.4	16.0	32	47.5	20.0	18.3	21.1
33	46.5	14.2	12.9	15.6	33	46.5	19.4	17.6	20.4
34	45.6	13.7	12.4	15.2	34	45.6	18.8	17.0	19.8
35	44.6	13.3	11.9	14.8	35	44.6	18.1	16.3	19.2
36	43.6	12.8	11.3	14.4	36	43.6	17.5	15.6	18.6
37	42.7	12.3	10.7	14.0	37	42.7	16.8	14.9	17.9
38	41.7	11.8	10.2	13.5	38	41.7	16.2	14.1	17.3
39	40.8	11.4	9.7	13.1	39	40.8	15.5	13.4	16.7
40	39.9	10.9	9.1	12.7	40	39.9	14.9	12.6	16.0
41	38.9	10.4	8.6	12.3	41	38.9	14.2	11.8	15.4
42	38.0	9.9	8.1	11.8	42	38.0	13.5	11.1	14.8
43	37.1	9.5	7.6	11.4	43	37.1	12.9	10.3	14.2
44	36.2	9.0	7.1	11.0	44	36.2	12.2	9.6	13.6
45	35.2	8.5	6.6	10.5	45	35.2	11.6	8.9	13.0
46	34.3	8.1	6.1	10.0	46	34.3	10.9	8.2	12.4
47	33.4	7.6	5.6	9.6	47	33.4	10.3	7.5	11.9
48	32.5	7.1	5.2	9.1	48	32.5	9.7	6.9	11.4
49	31.6	6.7	4.7	8.7	49	31.6	9.1	6.3	10.8
50	30.8	6.2	4.2	8.3	50	30.8	8.5	5.7	10.3
51	29.9	5.7	3.8	7.9	51	29.9	7.9	5.1	9.8
52	29.0	5.3	3.4	7.5	52	29.0	7.3	4.6	9.3
53	28.2	4.9	3.0	7.1	53	28.2	6.8	4.1	8.8
54	27.3	4.	2.7	6.7	54	27.3	6.2	3.6	8.3
55	26.5	4.0	2.4	6.3	55	26.5	5.7	3.2	7.7
56	25.6	3.6	2.1	5.9	56	25.6	5.2	2.8	7.2
57	24.8	3.3	1.8	5.5	57	24.8	4.7	2.5	6.7

APPENDIX B

Table 6. Table of working life for women who have not completed high school, 1979-80					Table 7. Table of working life for women who have completed high school to 14 years of schooling, 1979-80				
Expected duration of active life for					Expected duration of active life for				
Life ex-pec-tancy ²	Total	Inac-tives ³	Ac-tives		Life ex-pec-tancy ²	Total	Inac-tives ³	Ac-tives	
58	24.0	2.9	1.6	5.2	58	24.0	4.2	2.2	6.3
59	23.2	2.6	1.4	4.9	59	23.2	3.8	1.9	5.8
60	22.4	2.3	1.3	4.6	60	22.4	3.3	1.7	5.4
61	21.6	2.1	1.1	4.3	61	21.6	2.9	1.5	5.0
62	20.8	1.8	1.0	4.1	62	20.8	2.6	1.3	4.7
63	20.1	1.6	0.9	3.9	63	20.1	2.3	1.1	4.4
64	19.3	1.4	0.8	3.7	64	19.3	2.0	1.0	4.2
65	18.5	1.2	0.6	3.5	65	18.5	1.8	0.9	4.0
66	17.8	1.1	0.6	3.3	66	17.8	1.6	0.7	3.8
67	17.1	1.0	0.5	3.1	67	17.1	1.4	0.6	3.7
68	16.4	0.8	0.4	3.0	68	16.4	1.2	0.5	3.5
69	15.6	0.7	0.3	2.9	69	15.6	1.1	0.4	3.4
70	14.9	0.6	0.2	2.7	70	14.9	1.0	0.3	3.2
71	14.3	0.5	0.2	2.5	71	14.3	0.9	0.3	3.0
72	13.6	0.5	0.1	2.3	72	13.6	0.7	0.2	2.8
73	13.0	0.4	0.1	2.0	73	13.0	0.7	0.1	2.5
74	12.3	0.3	0.0	1.7	74	12.3	0.6	0.1	2.1
75	11.7	0.2	0.0	1.2	75	11.7	0.5	0.0	1.5

² Given morality rates of the general female population.

³ Estimates revised January 1986.

PATTERN JURY INSTRUCTIONS

Table 8. Table of working life for women who have completed 15 years or more of schooling, 1979-80

Expected duration of active life for				
	Life expectancy ²	Total	Inactives ³	Actives
20	59.1	31.6	30.3	32.2
21	58.1	30.9	29.6	31.4
22	57.1	30.1	28.9	30.7
23	56.2	29.4	28.1	30.0
24	55.2	28.7	27.3	29.3
25	54.2	27.9	26.4	28.6
26	53.3	27.2	25.6	27.9
27	52.3	26.5	24.8	27.2
28	51.3	25.7	24.0	26.5
29	50.4	25.0	23.2	25.9
30	49.4	24.3	22.4	25.2
31	48.4	23.6	21.7	24.5
32	47.5	22.9	20.9	23.8
33	46.5	22.2	20.2	23.1
34	45.6	21.5	19.5	22.4
35	44.6	20.8	18.8	21.7
36	43.6	20.1	18.0	21.0
37	42.7	19.3	17.2	20.2
38	41.7	18.6	16.4	19.5
39	40.8	17.9	15.5	18.7
40	39.9	17.1	14.7	18.0
41	38.9	16.4	13.8	17.3
42	38.0	15.6	12.9	16.5
43	37.1	14.8	12.0	15.8
44	36.2	14.1	11.1	15.1
45	35.2	13.3	10.1	14.4
46	34.3	12.6	9.3	13.7
47	33.4	11.8	8.5	13.0
48	32.5	11.1	7.8	12.3
49	31.6	10.4	7.1	11.6
50	30.8	9.7	6.4	10.9
51	29.9	8.9	5.7	10.2
52	29.0	8.2	5.0	9.6
53	28.2	7.6	4.4	9.0
54	27.3	6.9	3.9	8.3
55	26.5	6.2	3.4	7.8
56	25.6	5.6	2.9	7.2
57	24.8	5.0	2.4	6.7
58	24.0	4.5	2.1	6.3
59	23.2	3.9	1.8	5.8
60	22.4	3.5	1.6	5.4
61	21.6	3.0	1.4	5.1
62	20.8	2.6	1.2	4.8
63	20.1	2.3	1.0	4.6

APPENDIX B

Expected duration of active life for				
	Life expect- tancy ²	Total	Inactives ³	Actives
64	19.3	2.0	0.9	4.3
65	18.5	1.8	0.8	4.1
66	17.8	1.6	0.7	4.0
67	17.1	1.4	0.6	3.8
68	16.4	1.2	0.5	3.7
69	15.6	1.1	0.4	3.6
70	14.9	1.0	0.3	3.5
71	14.3	0.9	0.3	3.3
72	13.6	0.8	0.2	3.0
73	13.0	0.7	0.1	2.7
74	12.3	0.6	0.1	2.3
75	11.7	0.5	0.0	1.6

² Given mortality rates of the general female population.

³ Estimates revised January 1986.

PATTERN JURY INSTRUCTIONS

C PRESENT VALUE TABLE

This table sets forth the Present Value of \$1.00 Per year (Payable at the end of each year) for a specified number of years at rates from 2.00% to 11.5%.

Years	2.00%	3.00%	4.00%	5.00%	6.00%	7.00%	8.00%	9.00%	10.00%	11.00%	11.50%
1	.98039	.97087	.96126	.95166	.94206	.93246	.92286	.91326	.90366	.89406	.88850
2	.96078	.94146	.92214	.90282	.88350	.86418	.84486	.82554	.80622	.78690	.77650
3	.94118	.91214	.88310	.85406	.82502	.79598	.76694	.73790	.70886	.67982	.66650
4	.92158	.88282	.84406	.80530	.76654	.72778	.68902	.65026	.61150	.57274	.55650
5	.90198	.85350	.80502	.75654	.70806	.65958	.61110	.56262	.51414	.46566	.44650
6	.88238	.82422	.76606	.70790	.64982	.59174	.53366	.47558	.41750	.35942	.33650
7	.86278	.79490	.73702	.67914	.62126	.56338	.50550	.44762	.38974	.33186	.30550
8	.84318	.76562	.70814	.65066	.59318	.53570	.47822	.42074	.36326	.30538	.27550
9	.82358	.73642	.67914	.62166	.56418	.50670	.44922	.39174	.33426	.27638	.24350
10	.80398	.70722	.65014	.59266	.53518	.47770	.42022	.36274	.30526	.24738	.21150
11	.78438	.67802	.62114	.56366	.50618	.44870	.39122	.33374	.27626	.21838	.17850
12	.76478	.64882	.59214	.53466	.47718	.41970	.36222	.30474	.24726	.18938	.14650
13	.74518	.61962	.56314	.50566	.44818	.39070	.33322	.27574	.21826	.16038	.11450
14	.72558	.59042	.53414	.47666	.41918	.36170	.30422	.24674	.18926	.13138	.08150
15	.70598	.56122	.50514	.44766	.39018	.33270	.27522	.21774	.16026	.10238	.04850
16	.68638	.53202	.47614	.41866	.36118	.30370	.24622	.18874	.13126	.07338	.01550
17	.66678	.50282	.44714	.38966	.33218	.27470	.21722	.15974	.10226	.04438	0.00000
18	.64718	.47362	.41814	.36066	.30318	.24570	.18822	.13074	.07326	.01538	0.00000
19	.62758	.44442	.38914	.33166	.27418	.21670	.15922	.10174	.04426	.00638	0.00000
20	.60798	.41522	.36014	.30266	.24518	.18770	.13022	.07274	.01526	.00000	0.00000

APPENDIX C

PRESENT VALUE OF \$1.00 PAYABLE AT THE END OF A SPECIFIED YEAR

To reduce to present value the total loss claimed should be multiplied by the percentage set forth in the table under the appropriate discount rate, for the number of years specified.

PAY- ABLE AT END OF YEAR	NO	2.00%	2.50%	3.00%	3.50%	4.00%	4.50%	5.00%	5.50%	6.00%	6.50%
1	1	0.980392	0.975610	0.970874	0.966184	0.961538	0.956938	0.952381	0.947867	0.943396	0.938967
2	2	0.961169	0.951814	0.942596	0.933511	0.924556	0.915730	0.907029	0.898452	0.889996	0.881659
3	3	0.942322	0.928599	0.915142	0.901943	0.888996	0.876297	0.863838	0.851614	0.839619	0.827849
4	4	0.923845	0.905951	0.888487	0.871442	0.854804	0.838561	0.822702	0.807217	0.792094	0.777323
5	5	0.905731	0.883854	0.862609	0.841973	0.821927	0.802451	0.783526	0.765134	0.747258	0.729881
6	6	0.887971	0.862297	0.837484	0.813501	0.790315	0.767896	0.746215	0.725246	0.704961	0.685334
7	7	0.870560	0.841265	0.813092	0.785991	0.759918	0.734828	0.710681	0.687437	0.665057	0.643506
8	8	0.853490	0.820747	0.789409	0.759412	0.730690	0.703185	0.676839	0.651599	0.627412	0.604231
9	9	0.836755	0.800728	0.766417	0.733731	0.702587	0.672904	0.644609	0.617629	0.591898	0.567353
10	10	0.820348	0.781198	0.744094	0.708919	0.675564	0.643928	0.613913	0.585431	0.558395	0.532726
11	11	0.804263	0.762145	0.722421	0.684946	0.649581	0.616199	0.584679	0.554911	0.526788	0.500212
12	12	0.788493	0.743556	0.701380	0.661783	0.624597	0.589664	0.556837	0.525982	0.496969	0.469683
13	13	0.773033	0.725420	0.680951	0.639404	0.600574	0.564272	0.530321	0.498561	0.468839	0.441017
14	14	0.757875	0.707727	0.661118	0.617782	0.577475	0.539973	0.505068	0.472569	0.442301	0.414100
15	15	0.743015	0.690466	0.641862	0.596891	0.555265	0.516720	0.481017	0.447933	0.417265	0.388827
16	16	0.728446	0.673625	0.623167	0.576706	0.533908	0.494469	0.458112	0.424581	0.393646	0.365095
17	17	0.714163	0.657195	0.605016	0.557204	0.513373	0.473176	0.436297	0.402447	0.371364	0.342813
18	18	0.700159	0.641166	0.587395	0.538361	0.493628	0.452800	0.415521	0.381466	0.350344	0.321890
19	19	0.686431	0.625528	0.570286	0.520156	0.474642	0.433302	0.395734	0.361579	0.330513	0.302244

PATTERN JURY INSTRUCTIONS

20	0.672971	0.610271	0.553676	0.502566	0.456387	0.414643	0.376889	0.342729	0.311805	0.283797
21	0.659776	0.595386	0.537549	0.485571	0.438834	0.396787	0.358942	0.324862	0.294155	0.266476
22	0.646839	0.580865	0.521893	0.469151	0.421955	0.379701	0.341850	0.307926	0.277505	0.250212
23	0.634156	0.566697	0.506692	0.453286	0.405726	0.363350	0.325571	0.291873	0.261797	0.234941
24	0.621721	0.552875	0.491934	0.437957	0.390121	0.347703	0.310068	0.276657	0.246979	0.220602
25	0.609531	0.539391	0.477606	0.423147	0.375117	0.332731	0.295303	0.262234	0.232999	0.207138
26	0.597579	0.526235	0.463695	0.408838	0.360689	0.318402	0.281241	0.248563	0.219810	0.194496
27	0.585862	0.513400	0.450189	0.395012	0.346817	0.304691	0.267848	0.235605	0.207368	0.182625
28	0.574375	0.500878	0.437077	0.381654	0.333477	0.291571	0.255094	0.223322	0.195630	0.171479
29	0.563112	0.488661	0.424346	0.368748	0.320651	0.279015	0.242946	0.211679	0.184557	0.161013
30	0.552071	0.476743	0.411987	0.356278	0.308319	0.267000	0.231377	0.200644	0.174110	0.151186
31	0.541246	0.465115	0.399987	0.344230	0.296460	0.255502	0.220359	0.190184	0.164255	0.141959
32	0.530633	0.453771	0.388337	0.332590	0.285058	0.244500	0.209866	0.180269	0.154957	0.133295
33	0.520229	0.442703	0.377026	0.321343	0.274094	0.233971	0.199873	0.170871	0.146186	0.125159
34	0.510028	0.431905	0.366045	0.310476	0.263552	0.223896	0.190355	0.161963	0.137912	0.117520
35	0.500028	0.421371	0.355383	0.299977	0.253415	0.214254	0.181290	0.153520	0.130105	0.110348
36	0.490223	0.411094	0.345032	0.289833	0.243669	0.205028	0.172657	0.145516	0.122741	0.103613
37	0.480611	0.401067	0.334983	0.280032	0.234297	0.196199	0.164436	0.137930	0.115793	0.097289
38	0.471187	0.391285	0.325226	0.270562	0.225285	0.187750	0.156605	0.130739	0.109239	0.091351
39	0.461948	0.381741	0.315754	0.261413	0.216621	0.179665	0.149148	0.123924	0.103056	0.085776
40	0.452890	0.372431	0.306557	0.252572	0.208289	0.171929	0.142046	0.117463	0.097222	0.080541
41	0.444010	0.363347	0.297628	0.244031	0.200278	0.164525	0.135282	0.111339	0.091719	0.075625
42	0.435304	0.354485	0.288959	0.235779	0.192575	0.157440	0.128840	0.105535	0.086527	0.071010
43	0.426769	0.345839	0.280543	0.227806	0.185168	0.150661	0.122704	0.100033	0.081630	0.066676
44	0.418401	0.337404	0.272372	0.220102	0.178046	0.144173	0.116861	0.094818	0.077009	0.062606
45	0.410197	0.329174	0.264439	0.212659	0.171198	0.137964	0.111297	0.089875	0.072650	0.058785
46	0.402154	0.321146	0.256737	0.205468	0.164614	0.132023	0.105997	0.085190	0.068538	0.055197
47	0.394268	0.313313	0.249259	0.198520	0.158283	0.126338	0.100949	0.080748	0.064658	0.051828
48	0.386538	0.305671	0.241999	0.191806	0.152195	0.120898	0.096142	0.076539	0.060998	0.048665

APPENDIX C

NO	PAY- ABLE AT END OF YEAR	7.00%	7.50%	8.00%	8.50%	9.00%	9.50%	10.00%	10.50%	11.00%	11.50%
		0.934579	0.930233	0.925926	0.921659	0.917431	0.913242	0.909091	0.904977	0.900901	0.896861
49	0.378958	0.298216	0.294950	0.285320	0.185320	0.146341	0.115692	0.091564	0.072549	0.057546	0.045699
50	0.371528	0.290942	0.228107	0.179053	0.140713	0.110710	0.087204	0.068767	0.054288	0.042906	0.032406
PAY-ABLE AT END OF YEAR											
1	0.934579	0.930233	0.925926	0.921659	0.917431	0.913242	0.909091	0.904977	0.900901	0.896861	0.892822
2	0.873439	0.865333	0.857339	0.849455	0.841680	0.834011	0.826446	0.818984	0.811622	0.804360	0.797103
3	0.816298	0.804961	0.793832	0.782908	0.772183	0.761654	0.751315	0.741162	0.731191	0.721399	0.711694
4	0.762895	0.748801	0.735030	0.721574	0.708425	0.695574	0.683013	0.670735	0.658731	0.646994	0.635411
5	0.712986	0.696559	0.680583	0.665045	0.649931	0.635228	0.620921	0.607000	0.593451	0.580264	0.567411
6	0.666342	0.647962	0.630170	0.612945	0.598267	0.580117	0.564474	0.549321	0.534641	0.520416	0.506641
7	0.622750	0.602755	0.583490	0.564926	0.547034	0.529787	0.513158	0.497123	0.481658	0.466741	0.452461
8	0.582009	0.560702	0.540269	0.520669	0.501866	0.483824	0.466507	0.449885	0.433926	0.418602	0.403911
9	0.543934	0.521583	0.500249	0.479880	0.460428	0.441848	0.424098	0.407136	0.390925	0.375428	0.360606
10	0.508349	0.485194	0.463193	0.442285	0.422411	0.403514	0.385543	0.368449	0.352184	0.336706	0.321995
11	0.475093	0.451343	0.428883	0.407636	0.387533	0.368506	0.350494	0.333438	0.317283	0.301979	0.287494
12	0.444012	0.419854	0.397114	0.375702	0.355535	0.336535	0.318631	0.301754	0.285841	0.270833	0.256822
13	0.414964	0.390562	0.367698	0.346269	0.326179	0.307338	0.289664	0.273080	0.257514	0.242900	0.229331
14	0.387817	0.363313	0.340461	0.319142	0.299246	0.280674	0.263331	0.247132	0.231995	0.217847	0.204694
15	0.362446	0.337966	0.315242	0.294140	0.274538	0.256323	0.239392	0.223648	0.209004	0.195379	0.182794
16	0.338735	0.314387	0.291890	0.271097	0.251870	0.234085	0.217629	0.202397	0.188292	0.175227	0.163206
17	0.316574	0.292453	0.270269	0.249859	0.231073	0.213777	0.197845	0.183164	0.169633	0.157155	0.145794
18	0.295864	0.272049	0.250249	0.230285	0.211994	0.195230	0.179859	0.165760	0.152822	0.140946	0.130099
19	0.276508	0.253069	0.231712	0.212244	0.194490	0.178292	0.163508	0.150009	0.137678	0.126409	0.116206

PATTERN JURY INSTRUCTIONS

20	0.258419	0.235413	0.214548	0.195616	0.178431	0.162824	0.148644	0.135755	0.124034	0.113371
21	0.241513	0.218989	0.198656	0.180292	0.163698	0.148697	0.135131	0.122855	0.111742	0.101678
22	0.225713	0.203711	0.183941	0.166167	0.150182	0.135797	0.122846	0.111181	0.100669	0.091191
23	0.210947	0.189498	0.170315	0.153150	0.137781	0.124015	0.111678	0.100616	0.090693	0.081786
24	0.197147	0.176277	0.157699	0.141152	0.126405	0.113256	0.101526	0.091055	0.081705	0.073351
25	0.184249	0.163979	0.146018	0.130094	0.115968	0.103430	0.092296	0.082403	0.073608	0.065785
26	0.172195	0.152539	0.135202	0.119902	0.106393	0.094457	0.083905	0.074573	0.066314	0.059000
27	0.160930	0.141896	0.125187	0.110509	0.097608	0.086262	0.076278	0.067487	0.059742	0.052915
28	0.150402	0.131997	0.115914	0.101851	0.089548	0.078778	0.069343	0.061074	0.053822	0.047457
29	0.140563	0.122788	0.107328	0.093872	0.082155	0.071943	0.063039	0.055271	0.048488	0.042563
30	0.131367	0.114221	0.099377	0.086518	0.069148	0.060002	0.052099	0.045266	0.039354	0.034236
31	0.122773	0.106252	0.092016	0.079740	0.069148	0.060002	0.052099	0.045266	0.039354	0.034236
32	0.114741	0.098839	0.085200	0.073493	0.063438	0.054796	0.047362	0.040964	0.035454	0.030705
33	0.107235	0.091943	0.078889	0.067736	0.058200	0.050042	0.043057	0.037072	0.031940	0.027538
34	0.100219	0.085529	0.073045	0.062429	0.053395	0.045700	0.039143	0.033549	0.028775	0.024698
35	0.093663	0.079562	0.067635	0.057539	0.048986	0.041736	0.035584	0.030361	0.025924	0.022150
36	0.087535	0.074011	0.062625	0.053031	0.044941	0.038115	0.032349	0.027476	0.023355	0.019866
37	0.081809	0.068847	0.057986	0.048876	0.041231	0.034808	0.029408	0.024865	0.021040	0.017817
38	0.076457	0.064044	0.053690	0.045047	0.037826	0.031788	0.026735	0.022503	0.018955	0.015979
39	0.071455	0.059576	0.049713	0.041518	0.034703	0.029030	0.024304	0.020364	0.017077	0.014331
40	0.066780	0.055419	0.046031	0.038266	0.031838	0.026512	0.022095	0.018429	0.015384	0.012853
41	0.062412	0.051553	0.042621	0.035268	0.029209	0.024211	0.020086	0.016678	0.013860	0.011527
42	0.058329	0.047956	0.039464	0.032505	0.026797	0.022111	0.018260	0.015093	0.012486	0.010338
43	0.054513	0.044610	0.036541	0.029959	0.024584	0.020193	0.016600	0.013659	0.011249	0.009272
44	0.050946	0.041498	0.033834	0.027612	0.022555	0.018441	0.015091	0.012361	0.010134	0.008316
45	0.047613	0.038603	0.031328	0.025448	0.020692	0.016841	0.013719	0.011187	0.009130	0.007458
46	0.044499	0.035910	0.029007	0.023455	0.018984	0.015380	0.012472	0.010124	0.008225	0.006689
47	0.041587	0.033404	0.026859	0.021617	0.017416	0.014045	0.011338	0.009162	0.007410	0.005999
48	0.038867	0.031074	0.024869	0.019924	0.015978	0.012827	0.010307	0.008291	0.006676	0.005380

49	0.036324	0.028906	0.023027	0.018363	0.014659	0.011714	0.009370	0.007503	0.006014	0.004825
50	0.033948	0.026889	0.021321	0.016924	0.013449	0.010698	0.008519	0.006790	0.005418	0.004328

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